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CASES AFFECTING RAILROADS OF EVERY KIND,
DECIDED BY THE COURTS OF
LAST RESORT

IN THE

UNITED STATES.

EDITED BY

THOMAS J. MICHIE.

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RAILROAD REPORTS

ST. LOUIS S. W. RY. CO. *v.* SMITH.

(Supreme Court of Arkansas, March 14, 1903.)

[73 S. W. Rep. 101.]

Compensation for Services—Parties Liable—Company Incorporated in Two States.

A servant employed by a corporation created under the laws of one state, and operating a railroad commencing at the terminus of a railway company of the same name, organized under the laws of another state, could not hold the latter company liable for the services so rendered; the two companies being distinct, and there being no evidence that they were jointly liable.

Appeal from Circuit Court, Miller County; Joel D. Conway, Judge.

Action by W. M. Smith against the St. Louis Southwestern Railway Company. From a judgment of the circuit court in favor of plaintiff on appeal by defendant from a default judgment for plaintiff rendered in justice court, defendant appeals. Reversed.

Gaughan & Tifford and Saml. H. West, for appellant.

HUGHES, J. On April 30, 1901, the appellee recovered a judgment by default against the appellant, the St. Louis Southwestern Railway Company, in the sum of $35.29, before W. J. Smithers, a justice of the peace of Miller county, on a claim for labor alleged to have been rendered for the appellant. From this judgment an appeal was taken to the circuit court, where, upon a new trial, judgment was rendered for the appellee for said sum of $35.29. From this judgment an appeal was taken to this court.

The evidence in the case shows that the labor, the value of which now sued for, was performed in the state of Texas for the St. Louis Southwestern Railway Company of Texas, which was incorporated in the state of Texas, and whose line extends from Texarkana, on the line between Arkansas and Texas, into the state of Texas, and that it is a distinct and separate corporation and entity from the St. Louis Southwestern Railway Company, which was incorporated under the laws of Missouri, and extends to Texarkana only. Smith was employed and worked for the St. Louis Southwestern Railway Company of Texas, and it alone was liable to him, and the St. Louis Southwestern Railway Company is not shown to have owed him anything. There was no evidence that the two companies were jointly liable. St. Louis Southwestern Ry. Co. v. Gate City Co-op. Grocery Co. (Ark.) 65 S. W. 706.

The judgment of the circuit court is reversed, and judgment will be rendered here for the appellant.

PULLMAN COMPANY, Plff. in Err., v. WIRT ADAMS, State Revenue Agent.

(*Argued and submitted December 19, 1902. Decided March 2, 1903.*)

[23 Sup. Ct. Rep. 494.]

Commerce—Privilege Tax—On Sleeping Car Companies.

The privilege tax imposed by Miss. Code 1892, §§ 3317, 3387, on sleeping and palace car companies carrying passengers from one point to another within the state, cannot be deemed an unconstitutional regulation of commerce because of the declaration in Miss. Const. § 195, that sleeping car companies are common carriers and subject to liability as such, where such provision is regarded by the state courts as imposing no obligation on the company to transport local passengers.

In Error to the Supreme Court of the State of Mississippi to review a judgment affirming a judgment of the trial court in favor of plaintiff in an action to recover privilege taxes from a sleeping car company. Affirmed.

See same case below, 78 Miss. 814, 30 So. 757.

The facts are stated in the opinion.

Messrs. William Burry and J. S. Runnells for plaintiff in error.

Messrs. Marcellus Green, W. R. Harper, and W. H. Potter for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court:

This is an action for taxes, brought by the revenue agent of the state of Mississippi against the Pullman Company. The defendant in due form raised the objection that the tax law was void as an interference with commerce between the states. Judgment was given for the plaintiff in the local state court, and the judgment was affirmed by the supreme court of the state. 78 Miss. 814, 30 So. 757. The case then was brought here by writ of error.

The tax in question was imposed by the following sections of the Mississippi Code of 1892: "§ 3317. A tax on privileges is levied as follows, to wit: . . . § 3387. Sleeping car companies: On each sleeping and palace car company carrying passengers from one point to another within the state, $100, and 25 cents per mile for each mile of railroad track over which the company runs its cars." We assume that the last words mean what afterwards was expressed by an amendment, "over which the company runs its cars in this state."

The Pullman Company is an Illinois corporation. Its sleeping cars were carried by various railroad companies, and all of them were carried into the state from another state, or out of the state to another state, or both. But such cars in their passage also carried passengers from point to point within the state, and a specific fare was collected by the servants of the Pullman Company. The company attempted by pleas and by an offer of evidence to bring before the court the fact that its

receipts from this class of passengers did not equal the expenses chargeable against such receipts. It contended that these facts would show that the business within the state was merely a burden on its commerce between the states, while at the same time, it argued, it was compelled to assume that burden by § 195 of the state Constitution, which declares sleeping car companies to be common carriers and subject to liability as such. The pleas were held bad on demurrer, the evidence was rejected, and the jury was instructed to find for the plaintiff on the facts admitted. These rulings and the refusal of the court to declare the above-mentioned § 3387 unconstitutional are the errors assigned.

If the clause of the state Constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true that the state Constitution and the statute combined would impose a burden on commerce between the states analogous to that which was held bad in Crutcher v. Kentucky, 141 U. S. 47, 35 L. Ed. 649, 11 Sup. Ct. Rep. 851. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the state, the case is governed by Osborne v. Florida, 164 U. S. 650, 41 L. Ed. 586, 17 Sup. Ct. Rep. 214. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax.

As the validity of the tax is thus bound up with the effect of the section of the state Constitution, we think that the Pullman Company was entitled to know how it stood under the latter, and that a judgment against it could not be justified by reasoning which leaves that point obscure. We are somewhat embarrassed in dealing with the case, because we are not quite certain whether we rightly interpret the intimations upon the subject in the judgment under review. If the Constitution of Mississippi should be read as imposing an obligation to take local passengers, the question for us might be which, if not both, the clause of the Constitution or the tax act, is invalid. But we assume that the opinion of the supreme court of Mississippi intends to meet the difficulty frankly, and when it says that the argument against the tax drawn from the above interpretation of the Constitution is fallacious, we take it as meaning that no such interpretation will be attempted in the future, and we take it so the more readily that we can see no ground for a different view. If we are right in our understanding the judgment of the supreme court was correct for the reason sufficiently stated above.

Judgment affirmed.

HALE v. KANSAS CITY SOUTHERN RY. CO.

(Circuit Court of Appeals, Fifth Circuit, February 3, 1903.)

[120 Fed. Rep. 735.]

Master and Servant—Injury of Servant—Fellow Servants.

Where, as in Louisiana, the liability of a master for an injury of an employee by the negligence of a fellow servant is a matter of general law, not affected by statute, a railroad company is not liable for the injury of one member of a train crew, which occurred through the negligence of another member of the same crew, and without fault or negligence on the part of the company.

In Error to the Circuit Court of the United States for the Western District of Louisiana.

W. P. Hall, for plaintiff in error.

J. D. Wilkinson, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In the Supreme Court of the state of Louisiana the liability of an employer to an employee for damages resulting from the negligence of a co-employee or fellow servant is considered a question of general law and not controlled by any express statute. See Hubgh v. New Orleans & Carrollton R. R. Co., 6 La. Ann. 495, 54 Am. Dec. 565; Satterly v. Morgan, 35 La. Ann. 1166; Towns v. Railroad Co., 37 La. Ann. 630, 55 Am. Rep. 508; Wallis v. Railroad & Steamship Co., 38 La. Ann. 160; Dandie v. Railroad Co., 42 La. Ann. 689, 7 South. 792; Bell v. Lumber Co., 107 La. 725, 31 South. 994. In Mexican Central R. R. Co. v. Sprague, 52 C. C. A. 318, 114 Fed. 544, this court found from the record and evidence that under the specific laws of Mexico, as construed by the Mexican courts, the common-law doctrine as to the nonliability of an employer for the negligence of a fellow servant did not exist in Mexico. In Railroad Co. v. McDuffey, 25 C. C. A 247, 79 Fed. 934, the Circuit Court of Appeals for the Second Circuit held upon proof that under articles 1053 and 1054 of the Civil Code of Canada, as construed by the Canadian courts, "where an accident causing injury to a servant was the result of the negligence of a fellow servant, the employer would nevertheless be liable in damages to the injured person," etc. These last two mentioned cases, and others to the same purport, cited by counsel for plaintiff in error, turned upon local laws and their proper construction, and are not applicable in the instant case. Under the late decisions of the Supreme Court of the United States the employees of a railroad company specifically engaged in operating a train of the company are fellow servants, and, under the general law, for the damages to one through the negligence of the other the employer, without fault himself, is not liable. See Railroad Company v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; New England

Railroad Co. v. Conroy, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181. As the petition and amended petition in this case show that the damages sued for were caused through the negligence of fellow servants of the deceased, and in no wise show any negligence attributable to the railway company, the Circuit Court properly sustain the demurrer to the said petitions, and dismissed the suit.

The decision of the Circuit Court is affirmed.

BOYLE v. UNION PAC. R. CO.

(*Supreme Court of Utah, March 27, 1903.*)

[71 Pac. Rep. 988.]

Appeal.

Cases appealed to the Supreme Court must be heard and decided on the record made in the trial court.

Same—Bill of Exceptions—Amendment.

Const. art. 8, § 9, provides that ar appeal shall be on the record made in the court below, under such regulations as may be provided by law. Rev. St. 1898, § 3286, requires the judge before whom a case has been tried to settle, sign, and certify to the bill of exceptions; section 3290 provides that where, for certain reasons, the bill of exceptions is not settled by the trial judge, it shall be settled and certified in such manner as the Supreme Court may direct; and Sup. Ct. Rule 25 provides that, where a trial judge is absent from the state, or refuses to settle a bill of exceptions, it may be settled by a justice of that court: *held*, that the Supreme Court cannot allow amendments to be made to a bill of exceptions after it has been signed, certified, and allowed by the trial judge.

Nonsuit.

Where the question of plaintiff's contributory negligence was not made a basis for the motion for a nonsuit in the trial court, it cannot be considered on appeal.

Master's Duty to Furnish Safe Appliances.*

A master owes his servant the duty of providing his machinery with the same kind of appliances, or appliances equally as safe, as those in general use by men of ordinary prudence who are engaged in the same kind of business.

Same—Inspection—Repairs.

It is not only a master's duty to his servant to provide his machinery with reasonably safe appliances, but it is also his duty to use ordinary care in looking after, inspecting, and keeping them in repair.

Same.

Where a railroad company transferred a car used for the shipment of supplies to hotels along the route from the passenger to the freight service, it was its duty to provide it with necessary appliances ordinarily used on cars in the freight service to enable the employees whose duties required them to pass from one car to another while the train was in motion to do so without unnecessary risk or danger.

Injury to Conductor—Contributory Negligence—Stepping on Defective Brake.

While in the performance of his duty, a conductor of a freight train stepped on a brake in attempting to pass over a car, the brake being the only means of assistance to him, and was injured by reason of its being

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*See foot-note appended to Gustafson v. Seattle Traction Co. (Wash.), 3 R. R. R. 176, 26 Am. & Eng. R. Cas., N. S., 176.

defective: *held*, that he was not guilty of contributory negligence as a matter of law.

Same—Same—Same.

Whether a conductor of a freight train, who was injured in passing along his train while in motion, was exercising due care and caution, *held*, under the facts, to be a question for the jury.

Master's Duty as to Rules.†

Where a master has a large number of persons employed, and the safety of the employment mainly depends on that all of the employees perform their duties at stated times and in a given manner, it is the duty of the master to promulgate and furnish the employees with suitable rules for their guidance and safety.

Violation of Rule as Defense—Abrogation.

A conductor was injured while running his train in violation of a rule governing the movements of the company's trains, but was doing so under a time order, which, in effect, authorized him to ignore the rules. The rule had never been observed when trains were run under time orders: *held*, that the company could not interpose the violation of the rule as a defense to an action by the conductor.

Bartch, J., dissenting.

Appeal from District Court, Summit County; S. W. Stewart, Judge.

Action by Daniel L. Boyle against the Union Pacific Railroad Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

On the 26th day of May, 1900, plaintiff was, and for 13 years prior thereto had been, employed by defendant corporation as a freight conductor. On the day in question (May 26, 1900) he was in charge of a freight train consisting of 44 cars and a caboose. The train was en route from Ogden, Utah, to Omaha, Neb. Attached to the train, and immediately in front of the caboose, was what is known as a "hotel supply" car, which was used to ship and supply vegetables and meats to hotels along the railroad between Omaha and Ogden. This car would not couple automatically with the coupler on the caboose, which made it necessary to couple it with link and pin, thereby making the distance between it and the caboose so great that plaintiff and other employees of the defendant company who were operating the train could not step from the top of one car to the other. It was without doors in the ends, and had no platform, end ladders, grab or hand irons. In fact, it was without any of the equipments and conveniences necessary to enable plaintiff and the other members of the train crew to pass through or over it from the caboose to the other cars. The car in question was equipped for and belonged to the passenger service, but was sometimes placed in and hauled with the freight cars.

Plaintiff left Ogden at about 4:10 in the morning, and arrived at Echo at 10 o'clock a. m. Having stopped at several stations between the two points to load and unload freight, he was behind time. At Echo he received an order

†See note appended to Wright's Adm'r v. Southern Ry. Co. (Va.), 5 R. R. R. 438, 28 Am. & Eng. R. Cas., N. S., 438.

to meet a certain freight train at Emery, the next station, which is about nine miles east of Echo. Being behind time, he also got what is known as a "time" order, which informed him that two passenger trains coming west, and traveling at the rate of 50 or 60 miles an hour, would pass Castle Rock without stopping; one at 11:30 a. m., and the other 10 minutes later. Castle Rock is the next station, and about 6½ miles east of Emery. Plaintiff had the right, under this time order, to either side-track his train and wait at Emery until the passenger trains passed, or to go on to Castle Rock, provided he had sufficient time to make the run and side-track before the arrival there of the passenger trains. Plaintiff left Echo at 10:28, and it was agreed between him and the engineer that if they found the freight train they were to meet side-tracked at Emery they would go on to Castle Rock without stopping, as they would be compelled to stop over at Emery for 12 hours if they side-tracked there for the passenger trains, whereas by going on this delay would be avoided. They arrived at Emery at 11:04 or 11:05, and found the freight train side-tracked, and went on without stopping, expecting to reach Castle Rock before the arrival of the passenger trains which were to pass there at 11:30. The schedule time between Emery and Castle Rock for plaintiff's train was 40 minutes, but, as will be observed, on this occasion he had but 25 or 26 minutes in which to make the run. According to his own testimony, this was "short time," even if his train met with no delays. A single stop, however short, would have made it impossible for him to get his train to Castle Rock before the arrival there of the passenger trains. The record shows that, while it was not compulsory for him to do so, yet under the time order he was expected to go on to Castle Rock, provided he could get his train there in time to clear the main track for the passenger trains. The record also shows that it was not only necessary, but the duty of plaintiff, the time being short, for him to be at the head of his train after it left Emery. Soon after passing Emery he started to go to the head of the train, and in order to get on top of and over the hotel supply car, he set a hand brake that was at the end and attached to the car. The brake when set was held in place by a small piece of iron known as a "dog," which, as the brake was tightened caught in the teeth of a ratchet wheel. Plaintiff, having no other means of passing over the car, stepped on top of the brake thus fastened, and placed his hands on the roof of the car, and was in the act of pulling himself onto the top thereof, when the brake on which he was standing came loose and turned, and, there being no grab or hand irons on the car for him to hold to, he was thrown from the train, and run over, which resulted in the loss of one foot and permanent injury to the other. On former occasions he had with safety and in the same manner climbed onto other cars constructed and equipped similarly

to the one in question. One witness testified that soon after the accident he examined the brake, and found it to be so loose that the "dog" played back and forth over the ratchet wheel, and that the "dog" contained a small nick, that appeared to be an old defect, which defect added to the inefficiency of the brake.

The foregoing are, in substance, the facts relied upon by plaintiff for a recovery.

When plaintiff rested, defendant moved for a nonsuit in the following terms: "Comes now the defendant, and moves the court for a nonsuit in this case, for the reason that plaintiff has failed to sustain the allegations of the complaint in this: (1) That plaintiff has failed to show that he exercised due care, or was without fault, in attempting to cross from said caboose onto said supply car. (2) Plaintiff has failed to show that the failure to equip said car in the manner alleged in said complaint made the duties of said plaintiff extraordinarily hazardous or dangerous, and that said plaintiff was ignorant of said condition; and for the further reason that plaintiff has not established the fact that such danger was not so obvious that a reasonably prudent man, in the exercise of such urgent duties as plaintiff was called upon to perform, would have undertaken to perform. (3) The plaintiff has failed to show any pressing or urgent necessity for plaintiff to go to the front of the train, and cross from said hotel car. (4) Plaintiff has failed to show that he had no other or safer means of crossing from one car to another. (5) Plaintiff has failed to show that said supply car was negligently or carelessly in a condition of disrepair, in this: That the dog which should have prevented the brake wheel upon which plaintiff stepped from turning and holding it fast was out of order, or so worn that it did not hold said wheel firmly, and permitted the same to turn when plaintiff stepped thereon, which was unknown to plaintiff, or could not have been discovered by him, and which was known or might have been known to defendant. (6) That the evidence shows that the brake wheel, dog, and ratchet were in reasonably good repair and order, and they would hold the brake when used for any use for which intended to be used. That the extraordinary use made by plaintiff of this brake was uncalled for and unexpected, and one that the brake was not calculated to sustain." The motion was overruled, to which ruling defendant duly excepted.

Defendant introduced testimony which tended to show that the brake on the car was in good order and repair at the time of the accident. It also introduced in evidence certain rules regulating the running and management of its trains, at the time of the accident. So far as material to this case, they are as follows: "Conductors and engineers will be held equally responsible for the violation of any rule governing the safety of their trains, and they must take every precaution for the pro-

tection of their trains, even if not provided by the rules." "Rule 90. No train must leave a station expecting to meet or to be passed at the next station by a train having the right of track, unless it has full schedule time to make the meeting or passing point and clear the track by the time required by Rule 86;" which provides that, "When a train of inferior class meets a train of superior class on a single track, the train of inferior class must take the siding, and clear the train of superior class ten minutes."

Mr. Knoder, who was the engineer on plaintiff's train at the time of the accident, and in defendant's employ at the time of the trial, was called as a witness for defendant, and on cross-examination testified as follows: "Q. Your attention has been called to Rule No. 90. I will ask you whether that rule is observed by trains running on schedule time? A. No, sir. Q. How long has that condition of affairs existed, so far as you know? A. Always. Q. You said to Mr. Young that you had until 11:30 to make Castle Rock. Was that the instruction that you received in your time order? A. Yes, sir; as long as we had time to make Castle Rock by 11:30, it was our duty to do so. I have been an engineer about fourteen years."

The issues were tried by a jury, who returned a verdict for plaintiff, and assessed his damages at $10,000. Defendant appeals.

After the appeal in this case had been perfected, appellant made a motion, supported by affidavit of its counsel, to amend the record by including therein certain copies of requests for instructions to the jury made by defendant at the trial of the case and refused by the court, which requests were lost, and therefore were not made a part of the bill of exceptions; also to include in the bill of exceptions certain exceptions taken by defendant to instructions given by the court to the jury. It appears from the affidavit of the stenographer who reported the case that the exceptions appear in his stenographic notes, and were transcribed by him. The exceptions referred to were omitted from the bill of exceptions through the inadvertence and oversight of defendant's counsel, and the mistake was not discovered until after the appeal was taken and appellant served with a copy of respondent's brief in the case.

Le Grand Young, for appellant.

W. L. Maginnis and A. J. Weber, for respondent.

McCARTY, J., after stating the facts, delivered the opinion of the court.

It will be observed that appellant not only asked permission to amend the bill of exceptions by incorporating therein matters which appear in the reporter's transcript of the proceedings, and omitted from the bill of exceptions, but to substitute copies of papers that were lost before the bill of exceptions was prepared, and make such copies a part of the

record on appeal. A judge before whom a case has been tried may, on a proper showing, allow copies of lost papers to be substituted and incorporated into the bill of exceptions, as the record shows was done in this case, together with other material matters that have been omitted; but this court possesses no such authority. Cases appealed must be heard and decided upon the record made in the court from which the appeal is taken. 3 Ency. Pl. & Pr. p. 502; Hayne, New Trial & Appeal, § 271; Elliott, App. Proc. § 206.

Section 9, art. 8, of the Constitution of this state, so far as material here, provides: "From all final judgments of the district courts there shall be a right of appeal to the Supreme Court. The appeal shall be upon the record made in the court below, and under such regulations as may be provided by law." The "regulations" are found in sections 3286–3290, Rev. St. 1898. Section 3286 provides that the judge before whom a case has been tried must settle the bill of exceptions, and must sign and certify to the same. Section 3290 in part provides as follows: "If such judge, referee, or judicial officer before the bill of exceptions is settled, dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle the bill of exceptions, or if no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the supreme court may, by its orders or rules, direct." Rule 25 of this court, so far as material in this case, provides as follows: "If any judge before whom a cause has been tried or heard is absent from the state or refuses to settle a bill of exceptions, or if no mode is provided by law for the settlement of the bill of exceptions in any case, then the bill of exceptions may be settled, allowed and certified by the chief justice, or any one of the judges of this court." It will readily be observed that under the foregoing provisions of the Constitution and statute and the above rule of this court the amendment asked for by appellant cannot be allowed. Aside from any constitutional or statutory restriction or court rules, it would not only be unfair to the trial court for this court to permit amendments to be made to bills of exception after they have been signed, certified, and allowed by the judge who tried the case, but such a practice, if followed, would open the way for vexatious delays, and in course of time lead to infinite confusion.

We will now consider the alleged errors as assigned by appellant in the order in which they are discussed in its brief.

Appellant's first contention is that the trial court erred in overruling its motion for a nonsuit on the ground that the evidence showed that plaintiff was guilty of contributory negligence, and that such negligence consisted in running his train between Emery and Castle Rock at the time of the accident in question in violation of the schedule and printed rules of the company, thereby creating the necessity, if any existed, for him to go from the caboose to the head end of the

train. Counsel for the appellant has devoted much time and space in his brief to the discussion of this phase of the case. The motion for a nonsuit is not based on this ground. By referring to the motion, which is set out in full in the statement of facts, it will be seen that contributory negligence is not made a basis for a nonsuit. This court has repeatedly held that a party moving for a nonsuit is required to state in his motion the specific grounds relied on. Therefore we cannot consider these alleged elements of contributory negligence, as they are raised for the first time in this court. Frank v. Min. Co., 19 Utah, 35, 56 Pac. 419; McIntyre v. Ajax Min. Co., 20 Utah, 323, 60 Pac. 552; Lewis v. Min. Co., 22 Utah, 51, 61 Pac. 860; Wild v. Union Pacific Ry. Co., 23 Utah 265, 63 Pac. 886; Palmer v. Marysville Dem. Pub. Co., 90 Cal. 168, 27 Pac. 21.

It may be contended that, notwithstanding the motion for a nonsuit does not directly charge contributory negligence, it is inferred from the phraseology, as the last paragraph of the motion contains the following allegation: "That the extraordinary use made by plaintiff of this brake was uncalled for and unexpected, and one that the brake was not calculated to sustain." The trial court undoubtedly held this to be a sufficient allegation to raise the question of contributory negligence on the part of the plaintiff in using the brake as a substitute for a ladder to enable him to climb onto the car, as the order overruling the motion contains the following paragraph:

"The motion for a nonsuit in this case appears to be based upon two principal grounds. The one is that plaintiff in doing what he did assumed the risk. The other ground is that plaintiff was guilty of contributory negligence."

The trial court having treated the foregoing paragraph as an allegation of contributory negligence on the part of plaintiff in stepping on the brake referred to, we will, for the purposes of this case, adopt the same view.

The rule has become elementary that it is a duty the master owes to his servant to use reasonable care and prudence for his safety by providing the machinery in use with such appliances as will enable the servant with ordinary and reasonable care on his part to perform the duties required of him without danger except as may be reasonably incident to the business or employment engaged in. That is, the master is required to provide the same kind of appliances, or appliances equally as safe, as those in general use by men of ordinary prudence who are engaged in the same kind of business. Bailey's Mast. Liab. pp. 15, 16, and cases cited; Sherman & Redfield, Neg. § 194; Pool v. So. Pac. Co., 20 Utah, 210, 58 Pac. 326. It is not only the master's duty to provide his servants with reasonably safe appliances, but it is also his duty to use ordinary care in looking after, inspecting, and keeping them in repair. Sherman & Redf. Neg. § 195; Bailey's Mast. Liab. p. 101. Testing the facts in this case by the foregoing

rules, we do not think that such a case of contributory negligence was made out as would justify a court in taking the case from the jury and granting a nonsuit.

When the defendant company transferred the car referred to from the passenger service to that of the freight, it was its duty to provide it with the necessary appliances that are ordinarily used on and attached to cars used in the freight department, and to use ordinary care in inspecting such appliances and keeping them in repair, so as to enable plaintiff and other employees of the company, whose duties required them to pass from one car to another while the train was in motion, to do so without incurring unnecessary risks, or exposing themselves to unnecessary dangers. The defendant having failed to provide such appliances, it cannot, therefore, be held as a legal proposition that because plaintiff, while in the performance of his duties, attempted to pass over this car, and in so doing stepped on the brake—the only means at his command to assist him—he was guilty of contributory negligence. In view of all the circumstances leading up to the injury of plaintiff, as shown by the record, the question as to whether he used that degree of care and caution that a man of ordinary prudence, understanding the hazard and dangers of the situation, would have used under the same or similar circumstances, was a question for the determination of the jury, in connection with the question of the alleged defect in the brake; and, if it was of such a character, that the company knew, or by the exercise of reasonable care would have known, of its existence.

It is urged that, independent of the question of the alleged contributory negligence of plaintiff in using the brake to climb onto the car, he is precluded from recovering in this case because in making the run from Emery to Castle Rock on the day of the accident he not only violated the schedule, but also the printed rules, of the company. The rule is well settled that when the master has a large number of persons employed, and the safety of the employment mainly depends upon all of the employees performing their duties at stated times and in a given manner, it is the duty of the master to promulgate and furnish such employees with suitable rules and regulations for their guidance and safety. Pool v. So. Pac. Co., supra, and cases cited; Bailey's Mast. Liab. p. 72. And the law holds the servant to a rigid observance of such rules, and especially so where the employment consists of operating and running numerous railroad trains, and the safety of the traveling public is also involved. There are, however, exceptions to this rule. When the master has habitually, either expressly or tacitly, sanctioned the violation of the rules, or for any reason suspended them, he cannot interpose such violation to defeat a recovery. Wright v. So. Pac. Co., 14 Utah, 383, 46 Pac. 374; Konold v. R. G. W. Ry., 21 Utah, 381, 60 Pac. 1021, 17 Am. & Eng. R. Cas., N. S., 450, 81 Am. St.

Rep. 693; Fluhrer v. Ry. Co. (Mich.) 80 N. W. 23, 17 Am. & Eng. R. Cas., N. S., 463; Nichols v. Chicago Ry. Co. (Mich.) 84 N. W. 470. The undisputed evidence in this case shows that when trains were run in pursuance of time orders that paragraph No. 90 of the printed rules of the company—and the one mainly relied upon by defendant to defeat a recovery —was not observed, and that this condition of affairs had always existed. And the record also shows that when a time order was issued to a conductor, and he had sufficient time to reach the stations covered by the order, it was his duty to do so regardless of the regular schedule. The plaintiff on a former occasion made the run from Echo to Castle Rock in 25 minutes. On the day in question, under the time order issued to him, he had 26 minutes in which to make the same run. The defendant, having by its own orders in effect authorized the plaintiff to ignore its rules, cannot now be heard to complain of such violation.

Appellant assigns as error the giving of certain instructions to the jury by the court, and the court's refusal to give certain instructions asked for by defendant. We cannot consider these alleged errors, as the record fails to show that any exceptions were taken to them.

We find no reversible error in the record. The judgment is affirmed. Costs to be taxed against the appellant.

BASKIN, C. J., concurs. BARTCH, J., dissents.

LARABEE v. NEW YORK, N. H. & H. R. Co.

(*Supreme Judicial Court of Massachusetts, Hampden, Dec. 2, 1902.*)

[66 N. E. Rep. 1032.]

Servant—Injuries—Railroad Cars—Automatic Couplers—Locomotive Tender.

St. 1895, p. 412, c. 362, § 2 (R. L. c. 111, § 203), provides: "No railroad corporation shall haul or permit to be hauled or used on its lines * * * any car which is not equipped with couplers, coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." Act March 2, 1893, c. 196, § 8, 27 Stat. 532 [U. S. Comp. St. 1901, p. 3176], provides that "any employee of such corporation who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk," etc.: *held*, that the tender of a locomotive is not a car within the statute.

Exceptions from Superior Court, Hampden County; Maynard, Judge.

Action by George Larabee against the New York, New Haven & Hartford Railroad Company. Verdict for plaintiff, and defendant brings exceptions. Exception sustained.

Argued before HOLMES, C. J., and KNOWLTON, MOR-

TON, LATHROP, BARKER, HAMMOND, and LORING, JJ.

J. B. Carroll and W. H. McClintock, for plaintiff.
W. S. Robinson, for defendant.

HOLMES, C. J. This is an action for personal injuries caused by the catching of the plaintiff's hand between a car and the tender of an engine when he was trying to couple the two. The plaintiff had a verdict, and his case is here on the defendant's exceptions. The car was equipped with an automatic coupler, as required by St. 1895, p. 412, c. 362, § 2 (R. L. c. 111, § 203), but the tender was not, so that the coupling had to be done in the old way with a link and pin. The plaintiff's case was that the tender should have been equipped in the same manner as the car.

The section cited copies, for traffic within the state, the provisions of United States statutes, Act March 2, 1893, c. 196, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], as to interstate commerce. The material words are "No railroad corporation shall haul or permit to be hauled or used on its lines * * * any car which is not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." By a later section it is enacted that "any employee of such corporation who may be injured by any locomotive, car or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such corporation after the unlawful use of such locomotive, car or train has been brought to his knowledge." Act March 2, 1893, c. 196, § 8, 27 Stat. 532 [U. S. Comp. St. 1901, p. 3176]. The defendant asked a ruling that a tender of a locomotive is not a car within the meaning of the act. The refusal of this raises the only question with which it is necessary to deal.

The court is of opinion that the ruling requested should have been given. It may be, as some of us think, that the rear end of the tender is within the policy and object of the act, but the word "car" in its ordinary use and acceptance does not include it. On the contrary it excludes the tender as obviously as it does the engine. It always is dangerous to give unusual meanings to the words of a document on the strength of an imagination of what the writer had in mind. Moreover, the other language of the section indicates that, whatever the evil which the Legislature sought to prevent, it had in mind only cars properly so called. The prohibition "no railroad corporation shall haul" hardly would be so expressed if it had in conscious view not merely the cars which are regarded as the inert objects of traction by a separate engine from which they are detached daily, but also the tenders which are so much more closely associated with the

source of power as almost to be regarded as one with it, and which only exceptionally and with more or less difficulty are taken apart from it.

It is said that the word has been interpreted in the same way by the United States Circuit Court. 15 Interst. Comm. R. 67.

Exceptions sustained.

PHILLIPS v. CENTRAL R. CO. OF NEW JERSEY.

(Supreme Court of New Jersey, Nov. 10, 1902.)

[53 Atl. Rep. 221.]

Injuries to Servants—Place of Duty—Contributory Negligence.

In an action by a brakeman against a railroad for injuries, the evidence showed that plaintiff was injured by being rolled between a car of the train on which he belonged and a car on an adjoining track. Plaintiff testified that he was on the side of the car for the purpose of cutting out some of the cars from the train, but the testimony of all the other trainmen was to the effect that no cars were to be taken out at that point: *held*, that plaintiff was injured at a place where his duties did not call him, and through his own negligence.

Action by Edward D. Phillips against the Central Railroad Company of New Jersey. On defendant's rule to show cause why new trial should not be granted. Rule made absolute.

Argued June term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and GARRETSON, JJ.

William C. Gebhardt, for plaintiff.
George M. Shipman, for defendant.

GARRETSON, J. The plaintiff was a brakeman in the employ of the defendant company, and was injured in the yard at Hampton Junction by being squeezed and rolled between a car of a moving mixed coal and freight train and a freight car on an adjoining track. His place of duty was upon the cars of the moving train. He claims that his duty at the time he was injured required him to get down from the side of the moving train for the purpose of getting off to throw a switch, so as to take out of the train three loaded cars and place them on a siding. He alone testifies as to the intention to take these three cars out of the train and place them on the siding. To the contrary of this is the testimony of the train conductor, of the head brakeman, of the engineer, of a brakeman who was put in the plaintiff's place after he was injured, of a brakeman on the drill engine that made up the train, and of the yard master, all of whom testify that no cars were, or were to be, taken out of the train to be put upon a siding. The clear weight of the evidence is that, if the plaintiff was injured as he testified, he was at the time of the injury in a place where his duties did not call him, and was injured through his own negligence.

The rule to show cause should be made absolute.

LOUISVILLE & N. R. CO. *v.* COLLINSWORTH.

(*Supreme Court of Florida, Division A., Jan. 20, 1903.*)

[33 So. Rep. 513.]

Appeal—Review.

The refusal of the trial court to instruct the jury to find a verdict for the defendant cannot be considered by this court in the absence of a full and complete statement of all the evidence in the bill of exceptions.

Injury to Employee—Damages—Size of Plaintiff's Family.*

In an action by an employee to recover damages for personal injuries, it is not competent for him to testify what family he has, since the damages allowed are for the injuries inflicted upon him, and not upon his family.

Same—Same—Same—Admissibility in Evidence.

In such an action, evidence of the size of the family of an employee, and its dependent condition, is calculated to unduly enhance the damages, and to influence the jury to give damages beyond what is a compensation for the injury received.

Evidence—Exclusion.

Where improper evidence has been admitted, the court should exclude it in express terms, and it is not enough to do so by implication.

(Syllabus by the Court.)

Error to circuit court, Jackson county; Evelyn C. Maxwell, Judge.

Action by Eli Collinsworth against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

W. A. Blount and Daniel Campbell, for plaintiff in error.
D. L. McKinnon & Son, for defendant in error.

SHACKLEFORD, J. An action was instituted by defendant in error in the circuit court against plaintiff in error, a railroad company, to recover damages for injuries received by defendant in error on account of the alleged negligence of an employee of the company. The declaration, as amended, alleges that on or about the 27th day of June, 1896, plaintiff was engaged in loading one of the cars of said company, which had been placed upon a side track at Westville for the purpose of being loaded with lumber for shipment, and that while plaintiff was in said car, so engaged in loading, the defendant carelessly and negligently ran its train, made up with an engine and cars, with great force, in, upon, and against said car in which plaintiff was at the time, and struck said car with such great force and violence as to cause the

*See foot-note appended to Louisville & N. R. Co. *v.* Banks (Ala.), 2 R. R. R. 359, 25 Am. & Eng. R. Cas., N. S., 359; Youngblood *v.* South Carolina & G. R. Co. (S. Car.), 20 Am. & Eng. R. Cas., N. S., 622; Alabama Mineral R. Co. *v.* Jones (Ala.), 8 Am. & Eng. R. Cas., N. S., 383; Illinois C. R. Co. *v.* Davis (Tenn.), 18 Am. & Eng. R. Cas., N. S., 708; English *v.* Southern Pac. Co. (Utah), 4 Am. & Eng. R. Cas., N. S., 63; Louisville & N. R. Co. *v.* Taafe (Ky.), 15 Am. & Eng. R. Cas., N. S., 693; Felton *v.* Spiro (C. C. A.), 10 Am. & Eng. R. Cas., N. S., 865.

staves with which plaintiff was engaged in loading said car to be moved from their place and to strike plaintiff, and to throw or knock him to a great distance and to the other end of said car, by and from which plaintiff sustained great injuries, which are of a lasting and permanent nature; the damages being laid at $10,000. The pleas were, "Not guilty," and that the negligence of the plaintiff contributed to the injury complained of, by remaining in the car in which the staves were being loaded after being warned that a switch was to be made, and that he had better get out of the car. Trial was had, which resulted in plaintiff recovering judgment for $2,500, from which the company sued out a writ of error.

There is no evidentiary bill of exceptions in the transcript, and counsel for plaintiff in error have expressly abandoned all of the errors except two. The first error assigned, which is argued, is as to the refusal of the trial court to instruct the jury to find a verdict for the defendant. In disposing of this, it is sufficient to say that this assignment cannot be considered in the absence of an evidentiary bill of exceptions, giving the entire testimony in the case.

The second and only other error assigned which is argued is that the court erred in permitting the plaintiff to be asked, over the objection of defendant company, the following question: "What size family have you?" The answer of witness to this question was: "I have two grown daughters, married and off from home, and seven children at home now. I provide for them myself. These seven are under thirteen years of age, the youngest being one and a half years, and there is a difference of about a year and a half between each of them." In admitting this testimony the trial judge stated, in the presence of the jury, that it was admitted only for the purpose of supporting plaintiff's testimony as to the amount of farm products raised by him, as tending to show the value of his services; the plaintiff's testimony being that, as a result of his injuries, he was almost incapacitated for work. In passing upon this point, we may remark that the plaintiff was suing for injuries to himself, and that the damage to himself was the same, whether he had no family or a large family. The effect upon his power to labor and produce was in question, and not the application of the results of his labor. We are of the opinion that, in an action by an employee to recover damages for personal injuries, it is not competent for him to testify what family he has, since the damages allowed are for the injuries inflicted upon him, and not on his family, and that in allowing this question and answer the court erred. Louisville & Nashville R. R. Co. v. Binion, 107 Ala. 645, 18 South. 75; Louisville & Nashville R. R. Co. v. Gower, 85 Tenn. 465, 3 S. W. 824, 31 Am. & Eng. R. Cas. 168; Driess v. Friedrich, 57 Tex. 70; Texas Mex. Ry. Co. v. Douglass, 69 Tex. 694, 7 S. W. 77; Dayharsh v. Hannibal & St. J. R. Co., 103 Mo. 570, 15 S. W. 554, 23 Am. St. Rep. 900; Penn-

sylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141; Pittsburg, Ft. Wayne & Chicago Ry. Co. v. Powers, 74 Ill. 341. As was aptly said in the case last cited: "Such evidence is well calculated to unduly enhance the damages, and to influence the jury to give damages beyond what is a compensation for the injury received. Appellants can in no case be required to support the family of one of their employees who may be injured even by the negligence of the servants of the company. Such a rule would be carrying the liability of such bodies beyond the liability of other persons, and would not accord with the analogies or principles of the law. And to permit such evidence would be virtually to impose that duty upon the defendant. It is impossible for us to know what portion of the verdict in this case was allowed because appellee had a family." And as said in Texas Mex. Ry. Co. v. Douglass, supra, "Nothing is better calculated to excite the sympathy of a jury than the idea of a poor and dependent family, caused by the wrongful act or omission of another." It is contended, however, by counsel for defendant in error, that there was no error in admitting this testimony, for the reason that the court stated in the presence of the jury that it was admitted for a limited and specified purpose. We cannot assent to this. In our opinion, it was not the proper manner in which to prove the value of plaintiff's services. Where improper evidence has been admitted, the court should exclude it in express terms, and it is not enough to do so by implication. Pavey v. Burch, 3 Mo. 447, 26 Am. Dec. 682; Arthur v. Griswold, Executrix, 55 N. Y. 400; Scripps v. Reilly, 35 Mich. 371, 24 Am. Rep. 575; Remington v. Bailey, 13 Wis. 332; Henkle v. McClure, 32 Ohio St. 202; 3 Jones on Evidence, section 898.

The judgment is reversed, and a new trial awarded, and it is so ordered, at the cost of the defendant in error.

SEABOARD AIR LINE RY. v. WALTHOUR.

(Supreme Court of Georgia, March 17, 1903.)

[43 S. E. Rep. 720.]

Railroads—Killing Stock—Evidence—Weight and Sufficiency.*

Where the law raises against a railway company a presumption of negligence whenever the fact is made to appear that live stock was killed by the running of its cars, yet this presumption cannot withstand positive evidence that the company's employees exercised ordinary diligence, both as regards maintaining a lookout for stock, and endeavoring to avoid injury to the same when discovered. South Carolina R. Co. v. Powell, 33 S. E. 994, 108 Ga. 437; Georgia Southern Ry. Co. v. Sanders, 36 S. E. 458, 111 Ga. 128. Relevant testimony in behalf of the company on the part of its servants cannot, if they be unimpeached, arbitrarily be disregarded by court or jury, upon the assumption that it is not, in point of fact, in accord with the truth. Georgia Southern Ry. Co. v.

*As to the credibility of railroad employees as witnesses, see Brunswick & W. R. Co. v. Wiggins (Ga.), 22 Am. & Eng. R. Cas., N. S., 588.

Thompson, 36 S. E. 945, 111 Ga. 731; Georgia & Alabama Ry. Co. v. Cook, 40 S. E. 718, 114 Ga. 760, 762. So it necessarily follows that where, as in the present case, a plaintiff relies for a recovery wholly upon the presumption of law arising in such cases, and this presumption is rebutted by uncontradicted evidence introduced by the defendant company, to the effect that its servants were without fault, a verdict in favor of the plaintiff cannot properly be allowed to stand. Central of Georgia Ry. Co. v. Wood, 30 S E. 933, 105 Ga. 499.

Candler, J., dissenting.

(Syllabus by the Court.)

Error from Superior Court, Liberty County; P. E. Seabrook, Judge.

Action by George Walthour against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Reversed.

Walter T. Johnson and Mackall & Anderson, for plaintiff in error.

A. S. Way, for defendant in error.

SIMMONS, C. J. Judgment reversed.

CANDLER, J. (dissenting). In an action for damages against a railroad company for the killing of live stock, a presumption of negligence arises against the defendant upon proof that the stock was killed by the running of its "locomotives, or cars, or other machinery." Civ. Code 1895, § 2321. The killing may be established by circumstantial evidence, the weight of such evidence being exclusively for the jury. Evidence offered in behalf of the railroad company that one of its trains ran over the plaintiff's horse after it had been killed does not prove that the horse was not killed by some one of its trains; nor does it rebut the presumption of negligence arising from the introduction of evidence, satisfactory to the jury, that the horse was so killed.

LUMPKIN, P. J., absent on account of sickness.

ANDERSON v. ERIE R CO.

(*Court of Errors and Appeals of New Jersey, March 2, 1903.*)

[54 Atl. Rep. 830.]

Railroads—Injury to Brakeman Negligence.*

The plaintiff, while acting as a brakeman in the employment of the defendant, fell from the roof of a freight car, and was injured. The cause of his fall was that the grab iron on the roof pulled out the screw which held it, as he threw his weight upon it in descending, the defects being the insufficiency of the screw and the deterioration of the wood. The car belonged to the Chicago & Erie Railroad Company, and first appears in the evidence as arriving loaded at Point Jervis in a freight train which came fr m the west over the Delaware Division of

*As to the duty of railroad companies, as employers, to furnish safe foreign cars, see monograph appended to Douglass v. Ohio River R. Co. (W. Va.), 4 R. R. R. 430, 27 Am. & Eng. R. Cas., N. S., 430.

the defendant's railroad. Afterwards it was hauled by the defendant to Weehawken, where the accident happened: *held*: (1) It must be inferred against the plaintiff that the car was received by the defendant loaded for transportation by it as a common carrier. (2) The defects complained of were not such as, under the circumstances, the defendant was bound to guard against.
(Syllabus by the Court.)

Error to Supreme Court.

Action by Milton Anderson against the Erie Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

Warren Dixon, for plaintiff in error.
Corbin & Corbin, for defendant in error.

DIXON, J. The plaintiff, a brakeman in the employ of the defendant, fell, and was injured while descending from a box car in the defendant's yard at Weehawken. The cause of his fall was that the fastening of the grab iron on top of the car gave way as he threw his weight upon it. The evidence tended to show two defects in the fastening—one, the use of a screw running less than an inch into the wooden roof, instead of a larger screw, or a bolt running entirely through the roof, and held by a nut underneath; the other, deterioration of the wood through which the screw ran, indicated by the fibers adhering to the thread of the screw after it was renched away. It was proved that the car did not belong to the defendant, but was the property of the Chicago & Erie Railway Company, an Indiana corporation owning and operating a railroad from Hammond, Ind., to Marion, Ohio; that at 12:10 a. m. on June 2, 1901, the car arrived loaded at Port Jervis, coming in a train of 60 freight cars from the west over the Delaware Division on the defendant's road; that it was there inspected by the defendant's inspectors, found satisfactory, and made up by the defendant in another train, which left Port Jervis at 9:30 that evening, and reached the Weehawken yard at 10:55 the next morning. The accident happened about noon the same day. There is no direct testimony in the case as to where, or by whom, the car was loaded, but we think the only legitimate inference is that it came loaded into the possession of the defendant for transportation by it as a common carrier. The fact that it was the property of another owner rebuts any presumption which might arise from possession that it was used by the defendant in its own business, and this rebuttal is strengthened by the further fact that when it first appears in the defendant's possession it was fully loaded, and was afterwards handled by the defendant merely for transportation. The general principles of the law cast upon the plaintiff the burden of proving the duty of the defendant, and we think he sustained this burden only to the extent of such duty as rests upon a railroad company which receives a loaded car of another owner, to be

hauled by the company to the place of destination. The nature of that duty has been the subject of considerable judicial comment. 20 Am. & Eng. Enc. Law (2d Ed.) 80. All authorities agree that it requires the exercise of reasonable care for the safety of employees, but they are not all agreed as to the nature of the care demanded. Sometimes it has been held that the duty was coextensive with the duty of the company respecting its own cars. O'Neil v. St. Louis, etc., Ry. Co. (C. C.) 9 Fed. 337, 3 McCrary, 423; Felton v. Bullard, 37 C. C. A. 1, 94 Fed. 781; Jones v. N. H. & H. R. R. Co., 20 R. I. 210, 37 Atl. 1033. In Massachusetts the rule is said to require only the employment of competent inspectors, who are to be deemed fellow servants of those managing the train, and for whose neglect, therefore, the company is not responsible to its employees. Mackin v. Boston & Albany R. R. Co., 135 Mass. 201, 15 Am. & Eng. R. Cas. 196, 46 Am. Rep. 456; Bowers v. Conn. River R. R. Co., 162 Mass. 312, 38 N. E. 508. We think, however, that the weight of reason and authority is in favor of these propositions: First. That on receiving a car for transportation, the company is entitled to assume that the car had been properly constructed of suitable materials for all the purposes for which the owner intended it to be used. Ballou v. Chicago, etc., R. R. Co., 54 Wis. 259, 11 N. W. 559, 5 Am. & Eng. R. Cas. 480, 41 Am. Rep. 31; Gutridge v. Mo. Pac. Ry. Co., 94 Mo. 468, 7 S. W. 476, 4 Am. St. Rep. 392. Second. That on receiving the car the company is bound to make such examination as would be likely to discover conditions rendering a car so constructed unfit for safe transportation on the company's line. This examination has been called a "cursory examination," an examination not of a very minute character (Richardson v. Great Eastern Ry. Co., 1 C. P. Div. 342), an inspection for defects visible or discernible by ordinary examination (Eaton v. N. Y. Cent. & H. R. R. Co., 163 N. Y. 391, 57 N. E. 609, 18 Am. & Eng. R. Cas., N. S., 391, 79 Am. St. Rep. 600; Gottlieb v. N. Y., Lake Erie & W. R. R. Co., 100 N. Y. 466, 3 N. E. 344, 24 Am. & Eng. R. Cas. 421; Dooner v. Del. & Hud. Canal Co., 164 Pa. 17, 30 Atl. 269; Balt. & Pot. R. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624). And, third, that, at convenient places during the journey the company is bound to make the same inspection and tests of such a car as it should make of its own car for the purpose of discovering defects likely to occur in the course of transportation. Under these rules we are unable to discern any evidence of fault in the defendant contributing to the plaintiff's accident. The defect of which he complains respecting the screw used to fasten the grab iron was one in construction, which the defendant had a right to assume did not exist; and the same statement is probably true regarding the unsoundness of the wood. Neither of these defects was discoverable

by ordinary inspection, or by anything short of a very minute examination, and neither of them could occur in the course of transportation.

We therefore conclude that the motion to direct a verdict for the defendant should have been granted, and because of its refusal the judgment of the plaintiff must be reversed, and a venire de novo awarded.

KANSAS CITY SOUTHERN RY. CO. v. MOLES.

(*Circuit Court of Appeals, Eighth Circuit, March 9, 1903.*)

[121 Fed. Rep. 351.]

Accident from Kicking Cars—Res Gestæ.*

The statement of the conductor of a train, who was on the cars kicked onto the siding that caused the accident, that he knew the car was on the siding to be unloaded, but thought the workmen were at dinner, made at the time and place of the accident, while the cars were still in motion, and while plaintiff's leg was still pinioned—the crash of the cars and the cries of plaintiff and others having brought him to the spot instantly—is admissible as part of the res gestæ.

Same—Obligation of Railroad Company—Instructions.

While ice was being removed from a car to an icehouse by a slide, plaintiff, in the icehouse, was injured by the slide being moved by cars being kicked against the car: *held*, that a requested instruction limiting the obligation of the railway company to exercise 'ordinary care in switching its cars to persons engaged in work in or about the cars on the track was too restricted.

Same—Negligence.

The jury was justified in finding that to send loaded cars by a flying switch onto a siding without warning, and without adequate means of controlling them, whereby a car is struck, and a person unloading it is injured, is negligence.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

The complaint alleges, in substance, that on the 12th day of July, 1900, the plaintiff, in company with Henderson and Dollarhide, at the invitation of the defendant railway company and W. S. Morris, entered a car loaded with ice, which had been set out on a side track at the town of Dequeen, Ark., for the purpose of unloading the ice into W. S. Morris' icehouse, situated a few feet from the side track on which the car stood; that for the purpose of unloading the ice the plaintiff was stationed in the icehouse to receive the ice as Henderson, who was in the ice car, sent it to him over a slide made for the purpose out of timbers fastened together by slats; that while so engaged in unloading the ice the trainmen of one of defendant's trains negligently caused the same to be pulled down the main track to the side track, and then negligently and suddenly, without any precaution, and without keeping any lookout whatever, and without any warning

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*See extensive note appended to Louisville & N. R. Co. v. Landers (Ala.), 6 R. R. R. 96, 29 Am. & Eng. R. Cas., N. S., 96.

being given by bell or whistle or otherwise, kicked, shoved, or pushed a car from the main line up the side track into and against the car which plaintiff and his companions were unloading, with such force and violence that it propelled the car forward to such a distance that it caused the slide running from the icehouse to the car to catch the plaintiff's leg between itself and a sill of the icehouse, thereby causing a fracture of the bone of plaintiff's leg and laceration of the flesh, making a serious and severe wound; that the defendant and its agents and trainmen were aware of the presence of the plaintiff and his companions in the icehouse and car; that it was the custom of the defendant company to cause cars of ice to be set out on this siding for the purpose of being unloaded into this icehouse, and defendant knew that it was the custom for the ice to be unloaded there, and the trainmen and the agents of the company knew, or by the exercise of reasonable prudence would have known, of the presence of plaintiff at the time and place, and that the car was kicked up the switch track without any brakeman manning the same or to control its movements. The answer was a general denial and a plea of contributory negligence. The testimony substantially supported the case made by the complaint, but went much more into detail. There was a trial to a jury, and a verdict and judgment for the plaintiff, and the defendant sued out this writ of error.

James B. McDonough (Gardiner Lathrop, Thomas R. Morrow, and James F. Read, on the brief), for plaintiff in error.

James D. Head (Oscar D. Scott, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is assigned for error that the court permitted the plaintiff to prove the statements of the conductor concerning the accident, to the following effect: The witness Dollarhide testified as follows:

"Q. State to the jury what the conductor said when he got to you? A. He said he didn't want any of us to think hard of him; that he didn't intend to kill a man on purpose. Q. State all he said. A. He said he knew the car was set there for the purpose of being unloaded and he thought, it being noon, that we was to dinner."

Another witness testified that the conductor said:

"'I thought you all had gone to dinner;' that he ought to have been on the lookout, but he thought we had gone to dinner."

These statements were made at the very time and place of the accident, while the cars were still in motion, and while the plaintiff's leg was still pinioned between the slide and the

interior wall of the icehouse. The crash of the cars and the cries of the injured man and others brought the conductor, who was on the cars "kicked" in that occasioned the accident, to the spot instantly, and what he then said was clearly part of the res gestæ. Peirce v. Van Dusen, 24 C. C. A. 280, 78 Fed. 693, and cases cited in foot-note.

No exception was taken to the charge of the court. The defendant preferred several requests for instructions, all of which were rightly refused. By the terms of the first request, the obligation of the railway company to exercise ordinary care in switching its cars was restricted to persons "engaged in work in and about the cars on the track." This was restricting the defendant's obligation within too narrow limits. Moreover, the charge in chief stated accurately and fully the degree of care the defendant was required to exercise.

The third and fifth requests relate to the defense of contributory negligence, but, as there was not a particle of evidence to support such a defense, they were rightly disregarded by the court. By the fourth and seventh requests the railway company, in effect, sought to apply to the case the doctrine of inevitable accident. Upon the proof in the case, it is difficult to treat such a suggestion seriously. The conductor who had charge of the defendant's train was called by the defendant as a witness, and testified:

"We had come to Dequeen at the dinner hour for dinner. We had two loads of ties to set out on the cotton track; and one of my head brakeman cut the cars off and kicked them in, and I rode them, and did not stop just in the clear, and they rolled down and struck the car which was supposed to hurt Mr. Moles."

Asked why he did not stop the cars, he answered, "They were heavy cars, and hard to stop."

The accident in this case resulted from that fruitful source of accidents—a running or flying switch—which has uniformly met with judicial condemnation, and which is prohibited by rule of some, if not all, railroad companies. Shearman & Redfield on the Law of Negligence (5th Ed.) §§ 461, 463, and cases cited; Beach on Contributory Negligence (2d Ed.) § 217; 1 Thompson on Negligence, 423, 452.

In this case, without warning to persons working on or near the track who were liable to be injured by the cars "kicked" in on the switch track, two cars loaded with ties were sent speeding down the track by a flying switch without any adequate means of controlling them, as the conductor of the train, who says he was riding the cars, admits.

The jury were entirely justified in finding that it was an act of negligence to make this flying switch under these circumstances, and that the railway company was liable to the plaintiff for the damages resulting to him therefrom.

The judgment of the Circuit Court is affirmed.

OREGON & CALIFORNIA RAILROAD COMPANY, Appt., *v.* UNITED STATES.

(*Argued March 4, 1903. Decided May 4, 1903.*)

[23 Sup. Ct. Rep. 673.]

Public Lands—Claims under Oregon Donation Act—Right to Perfect Title after Abandonment.

No right to perfect claims, under the Oregon donation act of September 27, 1850 (9 Stat. at L. 496, chap. 76), to lands which have been abandoned before completing the requisite residence thereon, was given by the provisions of the act of July 26, 1894, according the donees the right "to make and file final proofs and fully establish their rights to donations,"—especially in view of the 2d section, which authorizes the Commissioner of the Land Office to cancel a claim proved to be invalid or abandoned, and the 3d section, which expressly saves adverse claims arising under any law other than the donation act.

Same—Same—Selection of Abandoned Lands by Railroad Company as Lien Lands.

Lands on which a settlement was made under the Oregon donation act of September 27, 1850 (9 Stat. at L. 496, chap. 76), and the act of February 14, 1853 (10 Stat. at L. 158, chap. 69), amendatory thereof, but which were abandoned, without compliance with the conditions as to residence or proof, fifteen years before their selection as lieu lands under the grant of July 25, 1866 (14 Stat. at L. 239, chap. 242), to the Oregon Central Railroad Company, were not "reserved" from sale, within the meaning of that act, so as to prevent the grant from attaching to such lands, although the donation notification had not been formally canceled.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Oregon for the cancelation of a patent issued by the United States to a railroad company for lands selected by it as within the indemnity limits of a congressional grant. Reversed and remanded to the Circuit Court, with directions to dismiss the bill.

See same case below, 48 C. C. A. 520, 109 Fed. 514.

Statement by MR. JUSTICE BROWN:

This was a bill in equity filed by the United States, in the circuit court for the district of Oregon, to compel a reconveyance by the railroad company, as the successor and assignee of the Oregon Central Railroad Company, of certain lands within the indemnity limits of the land grant to such company of July 25, 1866 (14 Stat. at L. 239, chap. 242), for which land one John W. Hines, on November 22, 1853, seventeen years before the definite location of the line of the road, had filed a donation notification under the Oregon donation act of September 27, 1850 (9 Stat. at L. 496, chap. 76), and the act of February 14, 1853 (10 Stat. at L. 158, chap. 69), amendatory thereto. These lands the President of the United States, on July 12, 1871, patented to the railroad company by an alleged mistake and without the knowledge of the adverse claim of Hines. By reason of this prior donation the patent was averred to be void, and its cancelation was prayed under the

act of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), authorizing the Attorney General to institute necessary proceedings to cancel patents erroneously issued to railroad companies.

The defendant in its plea averred an approval of its map of definite location January 29, 1870, a selection of the lands prior to July 12, 1871, and the further fact that Hines abandoned the land without having paid for it, or residing thereon four years; nor was he residing thereon at the time the defendant selected the same.

The circuit court decreed the cancelation of the patent, and the court of appeals affirmed the decree.

Mr. Maxwell Evarts for appellant.
Mr. Charles W. Russell for appellee.

MR. JUSTICE BROWN delivered the opinion of the court:

This case is similar to two recent cases bearing the same title, in the first one of which (189 U. S. —, ante, 615, 23 Sup. Ct. Rep. 615) a patent of certain lands within the indemnity limits of the same road, dated February 20, 1893, was canceled in favor of certain entrymen under the homestead laws of the United States, who had settled upon these lands at sundry dates from 1869 to 1890, and before the defendant company had selected the lands in question as indemnity lands, or had received a patent. The court found that, "when the company's lists were approved, neither the Commissioner nor the Secretary had any knowledge of the adverse claims of the above settlers to the lands upon which they respectively resided;" and held that the Land Department had no authority, simply upon the definite location of the road, to withdraw from the operation of the pre-emption and homestead laws lands within its indemnity limits, and that such order did not prevent an occupancy by homestead settlers within such limits up to the time of the approval of the selection made by the railroad company of lieu lands, and that, as it appeared the lands were actually occupied by homestead settlers at the time they were selected by the railroad company, such lands were not open to selection, although such selection was prior to the application of the settlers for entry under the homestead laws. It appeared in the case that the settlers had moved with due diligence to perfect and protect the right acquired by their occupancy of the lands, but were unable to obtain formal entry of the same, because the lands had not been surveyed. "At the time the settler went upon the land in good faith to make it his home and to perfect his title under the homestead laws there was nothing of record that stood in the way of his right to occupy the lands and to remain thereon until he could perfect his title by formal entry under the homestead laws."

The second case was like unto the first, except that there

had been a long delay by the Land Department in having the land surveyed. It was held that the Land Department had acted "with all convenient speed" within the meaning of the act of 1870 (16 Stat. at L. 94, chap. 69, § 2), making the land grant. 189 U. S. —, ante, 620, 23 Sup. Ct. Rep. 620.

In both of these cases, however, the lands were in actual occupation of settlers under the homestead laws at the time selection was made by the railroad company and the patents issued.

In this case the settlement was made under the Oregon donation act (9 Stat. at L. 496, chap. 76), the 4th section of which enacts that "there shall be and hereby is, granted to every white settler or occupant of the public lands, . . . who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one-half section, or 320 acres of land," etc.; and by the 1st section of the amendatory act of 1853 (10 Stat. at L. 158, chap. 69), it was provided that settlers under the former act, in lieu of the term of continued occupation after settlement, as provided by said act, shall be permitted, after occupation for two years of the land so claimed, to pay into the hands of the surveyor general of said territory at the rate of $1.25 per acre of the land so claimed. The plea alleges that Hines abandoned the land without having paid for it under the act of 1853, or residing on it for four years under the original act; and the case turns upon the question whether, by the mere filing of the donation notification in 1853, and the subsequent abandonment of the lands, they fall within the category of those which had been "granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of," within the meaning of the act of July 25, 1866, granting lands for the construction of this road. Clearly the lands do not fall literally within either of the above designations, and, unless a claim existing of record to the lands—which claim had in fact been abandoned for fifteen years—operates to prevent the selection of such lands by the railroad company, such company takes a good title to them.

That a railway grant does not attach to lands which at the time of the definite location of the land have been sold, preempted, reserved, or otherwise disposed of by the United States for any purpose, has been so often decided by this court as to be no longer open to question. Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. Ed. 634; Newhall v. Sanger, 92 U. S. 761, 23 L. Ed. 769; Doolan v. Carr, 125 U. S. 618, 31 L. Ed. 844, 8 Sup. Ct. Rep. 1228; United States v. McLaughlin, 127 U. S. 428, 32 L. Ed. 213, 8 Sup. Ct. Rep. 1177; Cameron v. United States, 148 U. S. 301, 37 L. Ed. 459, 13 Sup. Ct. Rep. 595; Carr v. Quigley, 149 U. S. 652, 37 L. Ed. 885, 13 Sup. Ct. Rep. 961. These cases, however, merely apply the language of the statutes to variant cir-

cumstances. Neither of them turns upon the effect of a claim which has been canceled or abandoned before or after the attachment of the railroad grant, either by the definite location of the line or by the selection of the lands as lieu lands within the indemnity limits.

That question was first considered in Kansas P. R. Co. v. Dunmeyer, 113 U. S. 639, 28 L. Ed. 1125, 5 Sup. Ct. Rep. 566, which involved the title to part of an odd-numbered section within the place limits of the Union Pacific Railroad Company's grants of 1862, 1864, and 1866. The facts were that one Miller made a homestead entry upon this section July 20, 1856, which was valid if the land was then public land. The line of definite location was filed September 21, 1866, so that the entry of Miller brought the land within the exception in the grant as land to which the homestead claim attached at the time the line of the road was definitely fixed. It was argued by the company that, although the homestead entry had attached to the land, and Miller had entered upon it within the time prescribed by law, erected a house upon it, and brought his family to live upon it, and made the tract his home until the spring of 1870, yet that he afterwards abandoned his homestead claim, bought the land from the railroad company, and paid for it, and sold the land to Dunmeyer, who had obtained a conveyance from the company. From this it was argued that the exception no longer operated, and the land had reverted to the company. But it was held that, as Miller's claim was an existing one of public record when the railroad map was filed, it was excepted from the land grant, notwithstanding the subsequent abandonment. The case is readily distinguishable from the one under consideration in the fact that Miller had not only entered upon the land, but was in actual possession of it at the time of the definite location of the road, and that he did not abandon his entry until nearly four years after the line of definite location was filed.

A case not dissimilar is that of Bardon v. Northern P. R. Co., 145 U. S. 535, 36 L. Ed. 806, 12 Sup. Ct. Rep. 856. That case arose from a land grant to the Northern Pacific Company of July 2, 1864 (13 Stat. at L. 365, chap. 217), under which act the company proceeded to designate the general route of its road, and afterwards to have its line definitely fixed. The date when the line was definitely fixed is not stated in the report, and is not treated as material, but it appears that on September 12, 1855, one Robinson settled upon the land, filed his declaration under the pre-emption laws, but died without filing proof or paying the government for the land. On August 5, 1865, this pre-emption claim was canceled for alleged failure to furnish proof of continuous residence prior to July 30, 1857. It was held that, as it appeared the premises had been taken up on the pre-emption claim of Robinson before the railroad grant took effect, and that the

cancelation had not then been made, nor for more than a year afterwards, such cancelation of the pre-emption entry did not restore it to the public domain so as to bring it under the operation of previous legislation which applied to land then public.

In the consideration of the present case, we are not embarrassed by either of these adjudications, since in one case the lands were not only actually occupied by the homestead claimant at the time the railroad grant took effect, but in both cases the proof of such occupation was of record in the proper office, and the lands were abandoned in one case, and the certificate canceled in the other after that date, while in this case the land was abandoned fifteen years before the lands were selected by the company, and nothing remained to indicate that the land was reserved, except the donation notification in the office of the surveyor general.

Two other cases are more directly in point. In Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 33 L. Ed. 363, 10 Sup. Ct. Rep. 112, 40 Am. & Eng. R. Cas. 426, the grant was made to the railroad July 4, 1866, and the line definitely located March 7, 1867. In May, 1865, one Turner applied, through his attorney, to enter the land in question as a homestead. The affidavit did not state that Turner's family, or any member thereof, was residing on the land, or that there was any improvement thereon, and, as a matter of fact, no member of his family was residing, or ever did reside, on said land, and no improvement was made thereon by anyone. The entry was allowed and stood upon the records of the Land Office uncanceled until September 30, 1872, when the entry was canceled. The land was subsequently, in 1877, entered by Whitney as a homestead and a patent delivered. It was held that the homestead entry of Turner excepted it from the operation of the land grant, notwithstanding the entry was invalid on its face. "So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and, therefore, precludes it from subsequent grants."

In Whitney v. Taylor, 158 U. S. 85, 39 L. Ed. 906, 15 Sup. Ct. Rep. 796, one Jones, in May, 1854, settled upon a quarter section of public land in California, and as soon as the land was surveyed (in 1857) declared his intention to claim it as a pre-emption right, paid the fees required by law, and caused notice of the same to be filed in the proper government record. He occupied the tract until 1859, when he left for England and never returned. The land was found to be within the place limits of the grant to the Central Pacific Railroad Company of 1862. This company filed its map of definite location in 1864, and demanded the section in question. In 1885 the pre-emption entry of Jones was canceled. It was held that, the tract being subject to the claim of Jones

at the time when the grant to the railroad company took effect, it was excepted from the operation of that grant, and that after the cancelation of that entry it became part of the public domain, and that such cancelation did not inure to the benefit of the railroad company.

The latest case upon the subject, however, is that of Northern P. R. Co. v. De Lacey, 174 U. S. 622, 43 L. Ed. 1111, 19 Sup. Ct. Rep. 791, 1 Am. & Eng. R. Cas., N. S., 596. In that case the railroad company had filed its map of definite location March 26, 1884. On April 9, 1869, one John Flett filed a declaratory statement of his intention to purchase the land under the pre-emption laws. In the fall of the same year, Flett left the land and did not thereafter reside on the same, although it appears that, in September, 1870, he went to the local land office and told the officers that he had come to prove his claim. He was told that he had lost it, as it had become railroad land. He acquiesced in this statement. In 1887, eighteen years after his original entry, Flett submitted proof in support of his pre-emption claim, founded upon his declaratory statement. A hearing was had in the presence of all the parties, which finally resulted in a decision of the Secretary of the Interior, September 28, 1891, awarding the land in controversy to the railroad company. Flett's declaratory statement was not formally canceled upon the records until December 23, 1891. A suit brought in the circuit court by the railroad company resulted in its favor, but the decree was reversed by the court of appeals, and the case brought here for review.

It was contended that at the time, March 26, 1884, when the map of definite location was filed, the declaratory statement of Flett, filed in the local land office in 1869, remained there as a record, and was an assertion of a pre-emption claim, and that, under the case of Whitney v. Taylor, 158 U. S. 85, 39 L. Ed. 906, 15 Sup. Ct. Rep. 796, the land described in that statement was excepted from the grant to the railroad company. The question was presented, whether the proceedings in the case of Flett were of such a character as to prevent the grant to the company from taking effect at the time of filing its map of definite location, March 26, 1884. It was held that, under the 2d section of the act of July 14, 1870 (16 Stat. at L. 279, chap. 272), claimants of pre-emption rights must make proper proof and payment of the lands claimed within eighteen months after the date prescribed for filing their declartory notices shall have expired; that under the act of March 3, 1871 (16 Stat. at L. 601), twelve months in addition to that provided in the first act were given to the claimants to make proof and payment; that, adding the eighteen months given by the first act to the twelve months given by the second act, all claimants of pre-emption rights were given thirty months to make the proper proof and payment for the lands claimed; and that "whether such proof

and payment were made would be matter of record, and if they were not so made the original claim was canceled by operation of law, and required no cancelation on the records of the Land Office to carry the forfeiture into effect. The law forfeited the right and canceled the entry just as effectually as if the fact were evidenced by an entry upon the record." The case of Whitney v. Taylor was distinguished upon the ground that, in that case, "there was no period within which a pre-emptor was compelled to prove up and pay for his claim, except that it should be done before the land was offered at public sale by the proclamation of the President." It was held that, as the thirty months allowed to Flett had expired years before the filing of the map of definite location, there was no existing claim at that time, and that the grant of the railroad company took effect. "Thereafter there was no claim, for it had ceased and determined, and with reference to the right it was of no more validity after the expiration of that time than if the statement had never been filed."

Recurring now to the case under consideration, it appears that by the 6th section of the Oregon donation act (9 Stat. at L. 498, chap. 76), it was incumbent upon the settler to notify the surveyor general, within three months from the commencement of his settlement, of the precise tract claimed by him; and by § 7, within twelve months from the time the settlement commenced, he must prove to the satisfaction of the surveyor general that the settlement and cultivation required by the act had been commenced, and that at any time after the expiration of four years from such settlement might prove the fact of continual residence and cultivation required by the 4th section, when, upon such proof being made, the surveyor general issues the proper certificate, forwards the same to the Commissioner of the General Land Office, whose duty it is to issue patents for the land.

It is true that by the act of July 26, 1894 (28 Stat. at L. 122, chap. 163, U. S. Comp. Stat. 1901, p. 1522), where proof of settlement had been made under the donation acts and notice given as required by law, but there had been a failure to execute and file in the Land Office proof of continued residence and cultivation of the land so settled upon, so as to entitle the donees to patents, such claimants, their heirs, devisees, assigns, and grantees, were given the right, until January 21, 1896, "to make and file final proofs and fully establish their rights to donations" under the aforesaid act of Congress, and, upon failure to do so, they were to be held to have abandoned their claims. But by § 2 of the same act the Commissioner of the Land Office was given the right, if such right existed, "to allow or direct hearings to be instituted to show that a donation claimant has abandoned the lands described in his notice, or prevent the Commissioner, when

it is proved that such claim is invalid or abandoned, from canceling the same upon the official records, and thereafter disposing of the lands as a part of the public domain;" and by § 3, "nothing in this act contained shall be construed to impair or affect any adverse claims arising under any law of the United States other than said donation act, to or in respect of the lands in this act referred to."

It is entirely clear that the position of the government in this case is not strengthened by anything contained in this act, since it was intended only for the relief of those who had resided continuously upon and cultivated the lands specified in the original donation notification, but had through mistake or negligence omitted to make and file their final proofs and fully establish their rights to such donations. Such donees were given until January 1, 1896, to make such final proof and obtain their patents; but they were not given thereby the right to perfect their claims to lands which they had abandoned before completing a continued residence of four years thereon. This inference is rendered only the more clear by the 2d section, which authorizes the Commissioner, when it is proved that such claim is invalid or abandoned, to cancel the same upon the official records, and by the 3d section, which expressly saves adverse claims arising under any law other than the donation act.

It is clear that title to the land here in question never passed from the United States under the donation acts of 1850 and 1853, since the donation was only made to those "who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act." Hall v. Russell, 101 U. S. 503, 25 L. Ed. 829; Maynard v. Hill, 125 U. S. 190, 31 L. Ed. 654, 8 Sup. Ct. Rep. 723. As these conditions were never complied with, the land continued to be the property of the United States, to which the railroad grant subsequently attached, unless such grant was defeated by the fact that the donation notification still remained of record in the office of the surveyor general. As the land had neither been "granted, sold, . . . occupied by homestead settlers, pre-empted, or otherwise disposed of," the bill can only be sustained upon the ground that at the time land was selected it was "reserved" from sale. But for what purpose was it reserved? Not for the donation settler, since he had abandoned the land fifteen years before; not for the United States, since every possible encumbrance had been removed from them, and they had lapsed into their original conditions of public lands, open to pre-emption or sale. It is true the donation notification had not been formally canceled, but the donation acts made no provision for such cancelation, although it may, perhaps, have been within the power of the Land Department to take such action even prior to the act of 1894. This, however, was not done,

and the land might have remained in that condition permanently, had not some other person applied to enter or purchase it by showing that it had been abandoned by the original donee. But, if this may be done by an individual pre-emptor, why may not a railroad company do the same thing by claiming the land under its grant, and showing in defense to this suit that it had actually been abandoned? It may be said that presumptively the land had been reserved, as shown by the donation notification, and for aught that appeared the donee might still be in possession; but we know of no reason why the railroad company may not show the actual facts as well as an individual who might desire to enter the land upon his own account. Even admitting that the donation notification was on file in the office of the surveyor general, there was no proof, required by § 7 of the act to be filed within twelve months from the time of settlement, that the settlement and cultivation required by the act had been commenced; nor after the expiration of four years from such settlement was there any proof of continual residence or cultivation, required by the same section. The record which informed the company that the land had been settled by a donee also apprised it that the provision of the statute had not been complied with. We think that, considering the fact that fourteen years had elapsed since the original settlement, the railroad company would be authorized to infer that the donee had abandoned the land, as in fact appears to have been the case. Under the facts of this case, we think the lands were not reserved within the meaning of the granting act.

But, even if the position of the government be correct, and the patent be subject to cancelation, we see nothing to prevent the railroad company from again selecting the same land to make good its losses within the limits of its primary grant, no intermediate rights being shown to have accrued. If such be the fact, it would be useless to direct the cancelation of the patent, as it would become the duty of the Land Department to issue immediately a new one for the same property. Germania Iron Co. v. United States, 165 U. S. 379, 41 L. Ed. 754, 17 Sup. Ct. Rep. 337; United States v. Central P. R. Co., 26 Fed. 479.

The decrees of the courts below are therefore reversed and the case remanded to the Circuit Court for the District of Oregon, with directions to dismiss the bill.

MR. JUSTICE McKENNA, having filed the bill in this case as Attorney General, did not participate in this decision.

CHICAGO, R. I. & P. RY. CO. *v.* COLLIER.

(Supreme Court of Nebraska, June 19, 1901.)

[95 N. W. Rep. 472.]

Carriers—Limiting Liability.

Section 5, art. 1, c. 72, Comp. St., does not impliedly give the right to a railway company to limit its liability, under section 3 of the same article, by stipulation.

Witness—Jurors.

A juror is not, by reason of such position, rendered incompetent to testify in the cause in which he sits. Code Civ. Proc. § 328.

Commissioners' Opinion. Department No. 1. Error to District Court, Lancaster County; Hall, Judge.

"Not to be officially reported."

Action by Nettie Collier against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. F. Evans, L. W. Billingsley, R. J. Greene, and M. A. Low, for plaintiff in error.

Webster, Rose & Fisherdick, for defendant in error.

HASTINGS, C. This case is brought here on error from a verdict and judgment of $530 against defendant below for injuries alleged to have been received in a wreck near Lincoln, on defendant's railway. There are 125 separate assignments of error in the petition. Only two points, however, were urged on argument and in plaintiff's brief, and they alone will be considered. It is conceded that the main contention, the unconstitutionality of section 3, art. 1, c. 72, Comp. St., has been decided adversely to the road in other cases. Chicago, R. I. & P. Ry. Co. v. Zernecke, 59 Neb. 689, 82 N. W. 26, 17 Am. & Eng. R. Cas., N. S., 76, 55 L. R. A. 610; Chicago, R. I. & P. Ry. Co. v. Young, 58 Neb. 678, 79 N. W. 556, 14 Am. & Eng. R. Cas., N. S., 343.

It is claimed, however, that this case differs from any of those heretofore decided involving this same transaction, in two particulars, viz., that a juror in the case was sworn as a witness, and that the plaintiff below was riding on a free pass which provided that the road should not be liable for his injuries. As to this last, also, it is conceded that this court has held such stipulations void. O. & R. V. Ry. Co. v. Crow, 47 Neb. 84, 66 N. W. 21; Chicago, R. I. & P. Ry. Co. v. Young, 58 Neb. 678, 79 N. W. 556, 14 Am. & Eng. R. Cas., N. S., 343; Missouri Pac. Ry. Co. v. Tietken, 49 Neb. 130, 68 N. W. 336, 5 Am. & Eng. R. Cas., N. S., 262, 59 Am. St. Rep. 526. It is claimed, however, that this ruling was made without considering the effect of section 5 of the act of 1867 (Laws 1867, p. 89), above mentioned, which counsel assert either modifies section 3, or is to be taken as repealing it.

We are not able to sustain this contention. Section 5 has heretofore been construed by this court as relating to other matters than section 3. Its provisions that notice must be brought to the knowledge of the other party and assented to by him before it can have any effect to limit the carrier's liability

have been supposed to relate to matters other than its liability for safety of passengers.

It is admitted that, in the absence of section 5, the doctrine, "Expressio unius exclusio alterius," would prevent the existence of any limitations on the liability for passengers' safety other than the two mentioned in section 3. There would seem to be no difficulty in construing section 5 as applying to the numerous other liabilities of a carrier. The mere implication of permission to limit liability contained in a provision that it shall not be limited in one particular way, i. e., by notices and contract clauses not brought to the other party's attention, cannot be held to control the positive provision of section 3 as to what the company shall be liable for. We see no reason to depart from the former decisions of the court in regard to such stipulations.

In regard to the swearing of a juror as a witness, no party ought to be compelled to try his case to a jury of witnesses, as things are now, however it may have been in the early days of our legal system. But there is no objection to the juror as a juror in this record. The error complained of is the taking of his evidence. How could the fact that he was a juror affect his knowledge of facts or the truthfulness of his statements of them? Section 328 of the Code makes of a person of capacity sufficient to understand the obligation of an oath a competent witness, except as otherwise therein declared. We do not find jurors in the list of exceptions. The trial judge is expressly included among the competent witnesses by section 348.

The calling of jurors as witnesses is sanctioned by Greenleaf in a note to section 363 of his work, while excluding the judge as incompetent to both sit as such and testify. Apparently the compilers of the Code had no doubt that their general provisions were strong enough to include jurors. Dicta of this court in Richards v. State, 36 Neb. 18, 53 N. W. 1027, and Wood River Bank v. Dodge, 36 Neb. 708, 55 N. W. 234, are to the same effect. For this reason, possibly, no mention by statute was made of them while including the judge.

As an objection to the competency of evidence, the fact that it comes from a juror seems clearly insufficient. An objection to a juror that he was an important witness in the cause would stand on very different ground. But there is none in this record. The voir dire examination of the jurors was not preserved. Presumably both parties knew, or ought to have known, when he was sworn as a juror, just what knowledge he had. The defendant, having made no objection then, can make none now to his acting as a juror. The plaintiff had a right to rely on the broad provisions of our statute, that every one having knowledge of the case may be required to speak, with the prescribed exceptions.

In our opinion, the case should be affirmed.

DAY and KIRKPATRICK, CC., concur.

Affirmed.

ORDELHEIDE *v.* WABASH R. CO.

(Supreme Court of Missouri, Division No. 2, June 9, 1903.)

[75 S. W. Rep. 149.]

Railroads—Liability for Fires—Contract to Hold Harmless—Public Policy.*

A contract by a railroad company to relieve itself from liability for fire in a building, communicated thereto by its negligence, is not against public policy; not being with a passenger or shipper, or in regard to a contract of carriage.

Appeal from Circuit Court, Montgomery County; E. M. Hughes, Judge.

Action by E. F. Ordelheide against the Wabash Railroad Company. The St. Louis Court of Appeals reversed a judgment for plaintiff, and on a dissent of one of the judges the cause was transferred to the Supreme Court. Judgment of circuit court reversed.

Geo. S. Grover, Geo. Robertson, and G. Pitman Smith, for appellant.

A. H. Drunert, J. D. Barnett, H. W. Johnson, and C. W. Wilson, for respondent.

GANTT, J. This appeal is in this court by virtue of a dissent of one of the judges of the St. Louis Court of Appeals. It was argued and submitted, but, owing to the fact that a case growing out of the same fire was pending in the court in banc, it was deemed best to await the opinion of the whole court on some of the questions involved in both appeals. The opinion of the court in banc will be found reported in Wabash R. Co. v. Ordelheide, 72 S. W. 684.

The pleadings and agreed statement of facts upon which this case was determined in the circuit court and Court of Appeals are fully set out in the opinion of Judge Bland in the St. Louis Court of Appeals, 80 Mo. App. 357, and we adopt the same, as follows:

"The petition is as follows:

"'Plaintiff states that the defendant is a corporation duly incorporated under and by virtue of the laws of the state of Missouri, and was at the time of the grievance hereinafter mentioned, as such corporation, the owner and occupier of a certain railroad, together with depots, switches, side tracks, and facilities for receiving and unloading freight, stock, and goods, which said railroad runs through the counties of Warren and Montgomery, in the state of Missouri, and, as said corporation, was at said time operating, working, managing, and running its said railroad by its agents, servants, and employees, and using thereon its locomotives, engines, cars, and trains; that on or about the 6th day of April, 1895, the plaintiff was the owner of a certain building, used as a

*See notes at end of case.

warehouse, elevator, or grainhouse,. together with horse power, belting, and all appliances and machinery necessary and required to run, work, and operate the same, which said building, with the said horse power, belting, appliances, and machinery therein, stood adjoining or near by the depots, switches, side tracks, at or near the defendant's station or depot at Wright City, in said Warren county, all of which was of the value of two thousand dollars; that on or about said date the defendant so carelessly and negligently operated, worked, run, and managed its said railroad, and carelessly and negligently used thereon defective and insufficient locomotives and engines, and so carelessly, negligently, and unskillfully operated, worked, and managed and run its locomotives, engines, cars, and trains on its said switches, railroad, and side tracks, that fire escaped from its locomotives and engines, and was communicated to plaintiff's said building, warehouses, elevator, or grainhouse, and the same, together with said horse power, belting, and appliances and machinery therein as aforesaid, were damaged and destroyed, to plaintiff's damage in the sum of two thousand dollars. Wherefore, by reason of the premises, the plaintiff says he is damaged in the sum of two thousand dollars, for which and costs of suit he asks judgment.'

"Defendant answered as follows:

" 'Now comes the defendant in the above-entitled cause, by its attorneys, and, for its answer to the petition of plaintiff therein filed, admits that it is, and was on the 6th day of April, 1895, a corporation duly incorporated under and by virtue of the laws of the state of Missouri. Defendant denies each and every other allegation contained and set forth in plaintiff's petition. For other and further answer to the petition of the plaintiff, defendant says that on or about the 1st day of November, 1892, the plaintiff herein entered into a certain written and printed agreement with the defendant for the lease of certain ground then belonging to the defendant in Warren county, Missouri, in said agreement described, for the purpose of erecting thereon a certain grainhouse, said agreement expiring, under its terms, on or about the 31st day of October, 1897, which said agreement was in words as follows, to wit:

" " "This agreement, made and entered into this first day of November, A. D. 1892, by and between the Wabash Railroad Co., party of the first part, and E. F. Ordelheide, of Wright, in the county of Warren, and state of Missouri, party of the second part.

" " "Witnesseth, that the said party of the first part, for and in consideration of the sum of one dollar per annum, in advance, to said party of the first part paid by said second party, and upon the express condition and stipulation that said second party shall assume all risk of fire from every cause, and shall hold and keep harmless said first party from any and

all damages whatsoever, from fire or any other cause, to any building or buildings that may be erected on the land herein leased, or their appurtenances or contents, which guarantee enters into and forms part of the consideration that induces said first party to make this lease; and for the further covenants and agreements hereinafter contained on the part of the second party to be kept and performed, hereby grants unto the said second party the right to occupy and use for the purposes of grainhouse, the following described part of the grounds of the said party of the first part, at Wright, county of Warren, and state of Missouri, to wit: At a point on the west line of South street, twenty-three (23) feet north of the center of the Wabash main track; thence northward along the south side of South street forty-five (45) feet to the north line of Wabash right of way; thénce westward along the right of way line one hundred and ten (110) feet; thence southward at right angle thirty-eight (38) feet to a point seven and one-half (7½) feet north of the center of the Wabash house track; thence eastward parallel to the house track, and seven and one-half (7½) feet from the same, to the point of beginning.

"'"And said first party further covenants to and with said second party, that said second party shall have the right to occupy and use such portions of land, selected and designated as aforesaid, for the location of said grainhouse, for and during the full term of five (5) years from the date of this agreement, unless the occupancy of said premises shall be sooner terminated in the manner hereinafter provided.

"'"And the said second party covenants and agrees with the said party of the first part, to pay all taxes that may be assessed on said grainhouse and the herein leased premises, and to conduct the business of storing and forwarding grain or other property, according to such rules as the party of the first part may prescribe in relation to such business at its stations generally.

"'"And the said second party hereby further agrees for himself, his heirs or assigns, that they hereby assume all risk of fire, from any cause whatsoever; that if any insurance is effected during the continuance of this lease or any renewal thereof by said second party, or any party interested therein, on said grainhouse or the contents thereof, that said second party will, before such insurance is effected, exhibit this lease to the agent or agents, officer or officers of the insurance company or companies through whom said grainhouse is to be insured, and procure the endorsement hereon of said agent or agents, officer or officers, and also upon the policies of insurance issued by them or any renewal thereof, to the effect that said insurance company will not, under any circumstances, bring or cause to be brought any claim or action at law against the party of the first part, its successors or assigns, for damages occurring during the term of this lease, or any renewal thereof, by fire or otherwise, to the said grainhouse or

appurtenances erected on said land, or to the contents thereof.

"'"And it is hereby mutually agreed between the parties hereto, that in case said grainhouse shall, at any time during the continuançe of this agreement, be destroyed by fire or otherwise, the contract shall not cease and determine by reason thereof, but the said second party shall be allowed thirty (30) days within which to rebuild the same; and in case the said grainhouse shall not be, by said second party, rebuilt in all respects equal to one so destroyed, within thirty days from the time of the destruction by fire or otherwise, then this contract shall, at the option of the party of the first part, cease and determine, and be no longer binding upon the parties thereto.

"'"And the party of the second part also further agrees with the party of the first part, that he will remove said grainhouse from off the grounds of said party of the first part at any time during the aforesaid term of five years (5) after having received from the said party of the first part ——— days' notice to do so.

"'"And the party of the first part agrees to recognize said grainhouse as the property of the party of the second part, and permit him to remove the same, at any time, from the premises of the party of the first part.

"'"And it is also expressly understood between the parties hereto, that at expiration of the time mentioned for the continuance of the right herein granted to the second party, the said second party shall have reasonable time for removing said grainhouse from off the ground of the party of the first part, said removal to be at the expense of said second party; and till such removal, the provisions of this lease regarding damages occasioned by fire, or otherwise, shall remain in full force and virtue.

"'"And said second party hereby agrees that he will not sublet said leased land nor assign nor transfer this agreement without the consent in writing of the general manager of the party of the first part, endorsed hereon, and subject to all the conditions, covenants, limitations and restrictions of this lease, and that he will use said leased land for no other purpose than that contemplated by the terms of this contract.

"'"And the said second party hereby further agrees to paint all buildings erected by him on the herein leased premises a color in conformity with the uniform color established by said party of the first part for its buildings generally.

"'"And it is distinctly understood and agreed between the parties hereto that in case the second party shall make default in any of the covenants on his part, to be kept and performed, or shall insure said grainhouse on said leased land without procuring the endorsement hereon, as hereinbefore provided in that respect, then in that case it shall and may be lawful for the said first party, its assigns, suc-

cessors, agent or attorney, at its election, to declare this agreement at an end, and into or upon said premises, with the said grainhouse and appurtenances hereon or any part thereof, to enter with or without process of law, and the said second party or any persons occupying said premises and said grainhouse or appurtenances, to expel, remove and put out, using force as may be necessary for that purpose, and occupy and possess said premises, and hold and occupy the grainhouse and appurtenances thereon till they can be removed or the conditions of this lease shall have been complied with by said second party; but no action or proceeding under this paragraph by the party of the first part shall in any manner release the party of the second part from the obligations and duties assumed as regards damages occasioned by fire, or otherwise, as provided for in this agreement of lease."

"'Further answering, defendant says that, for the various considerations named in said agreement, the plaintiff herein agreed to assume, and by said contract did assume, all risk of fire to his property then or thereafter to be located upon defendant's land as aforesaid, from any cause whatever, and that under said agreement, for said consideration, the plaintiff further assumed all risk of fire from every cause, and undertook and agreed to hold and keep harmless the defendant from any and all damages whatsoever from fire or any cause to any building or buildings that might be erected upon said land, or their appurtenances and contents. Wherefore defendant says that plaintiff ought not to have or maintain this case, and, having fully answered, prays to be discharged, with its costs.'

"The issues were submitted to the court on the following agreed statement of facts, to wit:

"'It is hereby agreed by and between the parties hereto as follows:

"'First. That the property sued for is correctly described in the petition, and was of the value therein stated, and was destroyed by fire on the day, at the place, and in the manner alleged in the petition.

"'Second. That the lease between the parties thereto, E. F. Ordelheide and the defendant, Wabash Railroad Company, dated on the 1st day of November, 1892, running five years from the date thereof, was executed by said parties as therein set forth, and that a correct and true copy of said lease is set out in the defendant's answer herein, and proof thereof is hereby dispensed with in this case.

"'This agreement shall constitute a part of the record in the above-entitled cause, and may be introduced in evidence in support of a demurrer, motion to strike out, reply, or other pleadings to be hereafter filed by the plaintiff in said cause, or upon trial thereof.'"

The petition alleges and the agreed statement of facts

admits that the building of plaintiff was constructed on defendant's right of way under a contract in which plaintiff expressly stipulated that the plaintiff "would assume all risk of fire from any cause whatsoever"; that the warehouse was destroyed by fire negligently put out by defendant's servants. The stipulation is comprehensive enough to include within its terms fire caused by defendant's own negligence; but plaintiff insists that, however broad the language, it cannot cover defendant's negligence, because a common carrier cannot contract against its own negligence, such a contract being against public policy, and therefore void. In Insurance Co. v. C. & A. Ry. Co., 74 Mo. App. 89, Judge Smith, in a most satisfactory opinion, ruled that a contract of lease substantially like this was not violative of public policy. He says: "None of the property so destroyed was in process of transportation by defendant, none of it was awaiting delivery by the defendant to its consignees after transportation, and none of it has been received by the company for transportation. The elevator and warehouse and the property in it bore the same relation to the carrying business of the defendant that the store and contents of any merchant or commissionman would bear to it. Neither the lease, nor the relation of the property to the defendant, arose out of the discharge of any duty imposed upon it by its position as a common carrier, or by its character of a quasi public corporation. The fact that defendant is a common carrier has no place in this case." A similar contract was sustained in Rutherford v. Wabash Co., 48 S. W. 921, 147 Mo. 441. The Court of Appeals in this case, through Judge Bland, after a review of the authorities on this subject, held this contract did not contravene public policy; and this court in banc, in Wabash R. Co. v. Ordelheide, 72 S. W. 684, held this identical contract was not against public policy, not being a contract with a passenger, employee, or shipper with regard to a contract of carriage, nor contravening any duty devolved upon it by law to its employees. Section 1111, Rev. St. 1899, which renders every railroad company liable for damages, irrespective of negligence, to every person whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use on said railroad, expressly authorizes the railroad companies to procure insurance against such damages. In Wabash R. Co. v. Ordelheide, 72 S. W. 684, this court in banc held that this contract was one of indemnity against loss occurring by fire set out by the engines of defendant, and it was not against public policy to allow it to make such a contract with plaintiff. We are satisfied with the reasoning and conclusions reached by the court in banc in construing this contract, and they must control this case also. The views therein expressed are in accord with the decision of the Supreme Court of Iowa in Griswold v. Ill. Central R. R., 57 N. W. 843, 24 L. R. A. 647, 57 Am. & Eng. R. Cas. 59, and Hart-

ford Fire Ins. Co. v. Ry. Co., 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193, 16 Am. & Eng. R. Cas. 779; Stephens v. Ry. Co., 109 Cal. 86, 41 Pac. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17. We deem it unnecessary, in view of these decisions, to repeat the reasons given at length. The company had the option to lease or to refuse to lease, and if it did lease to plaintiff, and stipulated for indemnity from damages caused by its negligence in firing the property of plaintiff placed upon its right of way by its permission, that contract in no way relieved it from the discharge of any duty to the public, or to any passenger or shipper or any employee, that the law or public policy imposed upon it.

It results that the judgment of the circuit court must be, and is, reversed. All concur.

NOTES.

FIRES ALONG RIGHT OF WAY—WHETHER COMPANY MAY STIPULATE AGAINST LIABILITY FOR ITS NEGLIGENCE.

General Rule.

The reasons for the rule which forbids a common carrier from stipulating with passengers or shippers against liability for injury or loss resulting from its negligence, do not extend to the forbidding of a contract whereby a railway company stipulates with the owner of property near its track, or with persons desiring to erect structures upon its right of way, that it shall not be liable for the loss or injury of such property by fire resulting from its negligence or otherwise. Griswold *v.* Ill. Cent. Ry. Co., 90 Iowa 265, 57 Am. & Eng. R. Cas. 59, 57 N. W. 844, 24 L. R. A. 647, overruling 56 Am. & Eng. R. Cas. 100, 53 N. W. 295; American Cent. Ins. Co. *v.* Chicago, etc., R. Co., 74 Mo. App. 89; Wabash R. Co. *v.* Ordelheide (Mo.), 72 S. W. 684; Stephens *v.* Southern Pac. Co., 109 Cal. 86, 41 Pac. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17; King *v.* Southern Pac. Co., 109 Cal. 96, 41 Pac. 786, 29 L. R. A. 755; Northern Pac. R. Co. *v.* McClure, 9 N. Dak. 73, 81 N. W. 52, 47 L. R A 149; Missouri, K. & T. Ry. Co. *v.* Carter (Tex.), 3 R. R. R. 538, 26 Am. & Eng. R. Cas., N. S., 538, 68 S. W. 159; Hartford Fire Ins. Co. *v.* Chicago, etc., R. Co., 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84, 16 Am. & Eng. R. Cas., N. S., 779, affirming 70 Fed. 201, 30 L. R. A. 193, 62 Fed. 904. See also, Rutherford *v.* Wabash R. Co., 147 Mo. 441, 48 S. W. 921; Rood *v.* New York & E. R. Co., 18 Barb. 80.

Same—Property on Right of Way.

As to such a contract being forbidden by any reason of public policy in the case of one desiring to erect a warehouse, elevator, or coal yard, upon the right of way of the company, it may be answered, that without the permission of the company, no person has any right to place such structures upon the right of way; and if they are so placed without permission, it is a trespass, and the company owes no duty, save not to wantonly or wilfully injure them. If, however, the company does give such permission, its liability changes, and it becomes subject to the new duty and burden of exercising ordinary care to prevent the burning of the buildings and property placed therein. But as there is no rule of law or public policy whereby the company is compellable to give its consent, it is competent for it to grant the permission upon terms, such as that it shall not be subject to any greater liability or risk than it was before; or, in other words, it may say to the party seeking the privilege, "You may erect your structure on my property on condition that, as between us, you become your own insurer against my negligence." Hartford Fire Ins. Co. *v.* Chicago, etc., R. Co., 175 U. S.

Notes

91, 16 Am. & Eng. R. Cas., N. S., 779, 20 Sup. Ct. 33, 44 L. Ed. 84, affirming 70 Fed. 201, 30 L. R. A. 193, 62 Fed. 904.

Again, no analogy can be drawn from the argument that a carrier on the one hand, and a shipper or passenger on the other, do not stand in equal relation. It is not the case of one party holding out terms which the other is bound to accept or go without. The company does not own all the land in the state, and there is no reason why the structure may not be placed elsewhere. Hartford Fire Ins. Co. *v* Chicago, etc., R. Co., 175 U. S. 91, 16 Am. & Eng. R. Cas., N. S., 779, 20 Sup. Ct. 33, 44 L. Ed. 84, affirming 70 Fed. 201, 30 L. R. A. 193, 62 Fed. 904.

And it does not matter that the erection and maintenance of the structure upon the right of way is of the greatest interest to the public, and with a view to its accommodation and convenience; or that the ultimate purpose of the railroad in entering into such contract is the promotion of its business as a common carrier, and that it exacts from the party erecting the same a guaranty that he will transact the business for which it is intended in a prompt and careful manner, at reasonable charges, and with a view to the public convenience. In neither case does the company contract as a common carrier, nor is there any rule of public policy rendering the contract invalid. Griswold *v.* Illinois Cent. Ry. Co., 90 Iowa 265, 57 Am. & Eng. R. Cas. 59, 57 N. W. 844, 24 L. R. A. 647, overruling 56 Am. & Eng. R. Cas. 100, 53 N. W. 295.

Same—Property Not on Right of Way.

Where the structure is off the right of way, and the owner, upon sufficient consideration, such as securing some benefit or privilege which he cannot otherwise enjoy, is willing to release the company from its duty to exercise ordinary care to avoid the destruction of his property, it is no more than a contract of insurance, and the owner and the company deal at arm's length, and upon equal footing; as where the owner of a sawmill near the right of way agreed, in consideration of the company's building a side track thereto, to assume all risk of damage by fire resulting from the company's negligence. Missouri, K. & T. Ry. Co. *v.* Carter (Tex.), 3 R. R. R. 538, 26 Am. & Eng. R. Cas., N. S., 538, 68 S. W. 159.

Rule Not Confined to Exemption from Liability for Fire.

This principle, that the company may contract against liability for its own negligence, is not confined to the single case of exemption from liability for loss by fire, but applies in other cases; as when the owner of lands adjoining the right of way agrees, upon sufficient consideration, to exempt the company from liability for the negligent killing of his stock, or agrees to build, maintain, or dispense with the fence which the company is required by statute to maintain. C. H. & D. R. Co. *v.* Waterson, 4 Ohio St. 434; Pittsburg, etc., R. Co *v.* Smith, 26 Ohio St. 124; Thomas *v.* Hannibal, etc., R. Co., 82 Mo. 538; Warren *v.* K. & D M. R. Co., 41 Iowa 484; McCoy *v.* So. Pac. R. Co., 94 Cal 568, 56 Am & Eng. R. Cas. 132, 29 Pac. 1110; Louisville, etc., R. Co. *v.* Webster, 106 Tenn. 586, 22 Am. & Eng. R. Cas., N. S., 410, 61 S. W. 1018.

In a Virginia case, Johnson's Adm'x *v.* Richmond & Danville R. Co., 86 Va. 975, 11 S. E. 829, the principle involved was the same as that here, though the case was not one of injury by fire. There the company had contracted with a firm engaged in quarrying granite upon its right of way, that it should not be liable for the death or injury of any of the firm or its employees, whether occurring through the company's negligence or otherwise. It was a provision of the contract, however, that the trains of the company in passing the quarry, should move at a speed not exceeding six miles per hour. Plaintiff's decedent was killed by a train moving at a speed of twenty miles per hour. In holding the company liable, the court said: "Nothing is better settled, certainly in this court, than that a common carrier cannot by contract exempt himself from responsibility for his own or his servants' negligence in the carriage of goods or passengers for hire; * * * and the principle which vitiates a stipulation for exemption from liability for one's own negligence, is not confined to the contracts of carriers as such; it applies uni-

versally." It will be observed, however, that this sweeping statement was obiter dictum merely, for the reason that at the time the deceased met his death, the company was violating one of the conditions, under which it was to enjoy exemption from liability for the negligence of itself or servants, by running its train past the quarry at a greater speed than six miles per hour. Therefore it was not material to the decision of the case whether the contract was valid or invalid, since the company had not complied with its terms so as to be able to successfully plead it in defense. See criticism of Justice Gray in Hartford Fire Ins. Co. *v.* Chicago, etc., R. Co., 175 U. S. 91, 16 Am. & Eng. R. Cas., N. S., 779, 20 Sup. Ct. 33, 44 L. Ed. 84.

Rule Not Affected by Statute Prohibiting Carriers from Limiting Their Liability.

It is hardly necessary to state that such a contract is not forbidden nor in any wise affected by a statute which prohibits railroads and other common carriers from limiting their liability as it exists at common law, or in any manner whatever; for, as shown in the foregoing, the company in entering into such an agreement does not contract as a common carrier; nor does such an agreement embrace property for which the company is liable as carrier. Missouri, etc., R. Co. *v.* Carter (Tex.), 3 R. R. R. 538, 26 Am. & Eng. R. Cas., N. S., 538, 68 S. W. 159; Griswold *v.* Illinois Cent. Ry. Co., 90 Iowa 265, 57 Am. & Eng. R. Cas. 59, 57 N. W. 843. 24 L. R. A. 647, overruling 56 Am. & Eng. R. Cas. 100, 53 N. W. 295.

Rule Not Affected by Statute Fixing Company's Liability for Fire.

Nor is such a contract forbidden by a statute which makes the company absolutely liable for fires started along its right of way. Such statute being for the protection of property owners along the right of way, a particular owner may waive its provisions as to himself. Griswold *v.* Ill. Cent. Ry. Co., 90 Iowa 265, 57 Am. & Eng. R. Cas. 59, 57 N. W. 843, overruling 56 Am. & Eng. R. Cas. 100. 53 N. W. 295; Wabash R. Co. *v.* Ordelheide (Mo.), 72 S. W. 684.

Liability to Third Persons.

Not only may one erecting a structure on the right of way of a railroad company, exempt the company from all liability for the loss by fire of his own property, but he may covenant to save the company harmless as to any loss which may result to third persons by reason of the burning of such property. Northern Pac. R. Co. *v.* McClure. 9 N. Dak. 73, 81 N. W. 52, 47 L. R. A. 149; McAdams *v.* Missouri, etc., R. Co., 19 Tex. Civ. App. 82, 45 S. W. 936.

Same—Contract Operative Only between Parties and Privies.

Such a contract is operative only between the parties and their privies, for the company cannot, of course, when sued by A. for the destruction of his property, defend that it is not liable because B. has agreed to save it harmless from the destruction of A.'s property. Its liability to A. remains the same, and its remedy in such case is by action over against B. for the breach of his contract. McAdams *v.* Missouri, etc., R. Co., 19 Tex. Civ. App. 82, 45 S. W. 936; Northern Pac. R. Co. *v.* McClure, 9 N. Dak. 73, 81 N. W. 52, 47 L. R. A. 149.

Thus it is liable to the agent of a warehouseman with whom it has such a contract, for the loss of the agent's goods stored in the warehouse; and this notwithstanding the agent had knowledge of the contract of exemption between the warehouseman and the company. King *v.* So. Pac. Co., 109 Cal. 96, 41 Pac. 786, 29 L. R. A. 755.

Same—Notice Not Sufficient to Make Third Person a Party to the Contract.

The person whose goods are burned is not to be taken as consenting to the contract between the company and the warehouseman, or as becoming a party thereto, merely because he has knowledge thereof. King *v.* Southern Pac. R. Co., 109 Cal. 96, 41 Pac. 786, 29 L. R. A. 755; McAdams *v.* Missouri, etc., R. Co, 19 Tex. Civ. App. 82, 45 S. W. 936.

Notes

Same—Goods Placed in Warehouse without Knowledge of the Owner.

Nor is it a material circumstance that the goods were placed in the building without the knowledge of the owner thereof. Walker *v.* Missouri Pac. R. Co., 68 Mo. App. 465.

Same—Where Agreement Did Not Extend to Property of Third Persons.

And so where there was no contract exempting the company from liability for injury to the property of adjacent owners by fire, but one of such owners, finding his bogs on fire, and the employees of the company engaged in extinguishing the same, told them to let it burn, as he preferred that the bogs should burn, such action on his part was held not to release the company from liability to a third person to whose property the flames finally extended. The plaintiff could not be prejudiced by any arrangement between the company and another person. Simmonds *v.* New York, etc., R. Co., 52 Conn. 264, 23 Am. & Eng. R. Cas. 369.

Of course a contract between property owners along the right of way as to which shall assume the risk of loss by fire as to property placed near the track, does not inure to the benefit of the company. For example, where cotton on the platform of a compress company was destroyed by fire resulting from the negligence of the company, it was held to be no defense to an action against the railway company for the loss of the cotton, that there was a contract between the owner of the cotton and the compress company, to the effect that, as between the parties to such contract, the cotton was on the platform at the risk of the owner. Edwards *v.* Campbell, 12 Tex. Civ. App. 236, 33 S. W. 761.

Same—Liability to Insurance Company Paying Loss.

A railroad company which has by contract exempted itself from liability for the loss of property burned through its negligence, is not liable to an insurance company which has been compelled, under policies held on the property, to make good the loss resulting from such cause. The simple reason is, that the insurance company in such case is only entitled to subrogation to the rights of the owner of the property, and he has no rights against the railroad company, for he has waived them by his contract of exemption. Griswold *v.* Illinois Cent. Ry. Co., 90 Iowa 265, 57 Am. & Eng. R. Cas. 59, 57 N. W. 843, 24 L. R. A. 647, overruling 56 Am. & Eng. R. Cas. 100, 53 N. W. 295; Hartford Fire Ins. Co. *v.* Chicago, etc., R. Co., 175 U. S. 91, 16 Am. & Eng. R. Cas., N. S., 779, 20 Sup. Ct. 33, 44 L. Ed. 84, affirming 70 Fed. 201, 30 L. R. A. 193. See also, Phœnix Fire Ins. Co. *v.* Erie, etc., Transp. Co., 117 U. S. 312, 6 Sup. Ct. 750, 1176.

Whether Contract Inures to Benefit of Reorganized or Consolidated Company.

As to whether lessees of a portion of the company's right of way, who have covenanted to save the company harmless from loss by fire resulting from the company's negligence, whether to their own property or that of third persons, are liable on such covenant to a reorganized company which has succeeded to all of the former company's rights and liabilities, it was held, in a case where the lease contained a stipulation that all of its covenants and conditions should be binding upon the assigns of both parties, and where there was a statute declaring that the assignee of the reversion should be entitled to the same remedies for nonperformance of any of the terms of the lease as the assignor, and where the lessees attorned to the reorganized company as the assignee of the reversion, that said covenant ran with the reversion, and inured to the benefit of the reorganized company, and that the lessees must save such company harmless from the loss of the property of third persons by fire resulting from its negligence. Northern Pac. R. Co. *v.* McClure, 9 N. Dak. 73, 81 N. W. 52, 47 L. R. A. 149. And so where the owner of a sawmill, in consideration of the company's building a side track to the mill for his convenience and accommodation,

exempted the company from all liability for the possible loss of the mill and its appurtenances by fire resulting from the negligence of the company, or otherwise, it was held to inure to the benefit of a consolidated company which succeeded to all the rights and liabilities of the former company, including the duty of maintaining the side track to the mill. Missouri, etc. Ry. Co. v. Carter (Tex.), 3 R. R. R. 538, 26 Am. & Eng. R. Cas., N. S., 538, 68 S. W. 159.

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MOORE v. LINDELL RY. CO.

(*Supreme Court of Missouri, Division No. 1, May 27, 1903.*)

[75 S. W. Rep. 672.]

Injury to Pedestrian at Street Railway Crossing—Negligence and Contributory Negligence.*

A decedent's contributory negligence in knowingly attempting to pass in front of an approaching street car at a street crossing, in such close proximity thereto as to make the danger of collision imminent, bars a recovery, though the street railway company was negligent in failing to sound the gong of the approaching car running at an excessive rate of speed, and even though it also failed to use proper care to stop the car after the dangerous position of the decedent became known to it.

Appeal—Review.

Where the verdict of the jury is for the right party and in accordance with the law, it will not be disturbed, though the court gave erroneous instructions.

Accident at Street Railway Crossing—Contributory Negligence.

Plaintiff's decedent was killed by a street car at a crossing. The street was clear of obstructions, and there was plenty of light to see distinctly. There was no evidence that decedent looked or listened before going on the track, except that of the motorman, who testified that when he saw her he hit his gong, but she continued until she got on the south-bound track; that at that time the car, which was on the north-bound track, was within probably 20 feet from her; that she paused for an instant, and when the car got within five feet of her she deliberately walked on the north-bound track in front of the car and attempted to cross, when the car killed her: *held*, as a matter of law, that decedent was guilty of contributory negligence.

Appeal from Circuit Court, St. Louis County; Rudolph Hirzel, Judge.

Action by Thomas Moore against the Lindell Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

A. R. Taylor, for appellant.

Geo. W. Easley and Boyle, Priest & Lehmann, for respondent.

MARSHALL, J. This is an action, under the statute, to recover $5,000 damages for the death of the plaintiff's wife, on the 14th of October, 1896, caused by being run into and injured by one of the defendant's electric cars on Fourteenth street, opposite the termination of Belmont street, in the city

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*See foot-note appended to Barry v. Burlington Ry. & Light Co. (Iowa), 6 R. R. R. 676, 29 Am. & Eng. R. Cas., N. S., 676.

of St. Louis. There was a verdict and judgment for the defendant, and the plaintiff appealed.

The petition charges that the plaintiff's wife was crossing Fourteenth street, "on the north crossing of Belmont street" (the evidence on both sides showed she was crossing on the south crossing), and that the car, without any warning being given of its approach by ringing the bell or otherwise, ran upon her, knocked her down, and so injured her as to cause her death. The petition assigns as further negligence that there was a city ordinance in force which required motormen and conductors to keep a vigilant watch for vehicles and persons on foot, especially children, either upon the track or moving towards it, and upon the first appearance of danger to stop the car within the shortest time and space possible, and that the defendant's motorman and conductor failed to obey the requirements of this ordinance. The petition assigns as further negligence that there was a city ordinance in force which prohibits the defendant from running its cars at a greater rate of speed than 10 miles an hour, and that the car that struck the plaintiff's wife was running at a greater rate of speed than 10 miles an hour. The petition charges that, in consideration of the grant by the city of the right to operate its cars, the defendant undertook and bound itself to observe and obey the provisions of the ordinances herein referred to. The answer is a general denial, and a plea of contributory negligence, in that the plaintiff's wife walked "upon defendant's track in front of its car, without looking or listening for an approaching car, in such proximity to the car that it was impossible to stop the car and avoid the collision and injury."

The locus in quo was this: Fourteenth street runs north and south, and is 80 feet wide, and the defendant has a double track thereon, near the center of the street, the west track being used by the south-bound cars, and the east track by the north-bound cars. Belmont street is 25 feet wide, and intersects Fourteenth street on its west side. It stops at Fourteenth street. East of Fourteenth street, but not on a direct prolongation of Belmont street, there is an alley 15 feet wide. The next street south of Belmont is Spruce street, and the distance between the two is only 150 feet. The next street north of Belmont is Clark avenue, and the distance between these two is also only 150 feet.

The undisputed facts in the case are that the deceased was the wife of the plaintiff; that they lived at 1411 Belmont street; that about 10 o'clock on the night of October 14, 1896, she left the house to get the plaintiff something to eat; that she went east to Fourteenth street, and then started across Fourteenth street, at the south crossing of what would be the prolongation of the south side of Belmont street; that the street was free of obstruction, and, while there were no lights at that point, there were lights at Spruce street on the south,

and at Clark avenue on the north; that the night was clear; that there was plenty of light there, and an approaching car could have been easily seen as far south as Spruce street and as far north as Clark avenue; that the plaintiff's wife was proceeding across Fourteenth street, going in an easterly direction, when she was injured; and that Fourteenth street, at the point of the accident, is slightly up grade.

The disputed facts are as follows: The evidence on the part of the plaintiff tended to show that she was walking very slowly; that the car was running very rapidly, as much as 15 miles an hour; that no gong was sounded; that she was struck by a north-bound car just as she was about to step off the east track; that the car did not slacken its speed before it struck her; that the car was stopped at a point about 30 feet beyond the point of the accident; that a car running at the rate of six miles an hour could be stopped by means of the brakes in about 10 feet, and by using the reverse power in 3 to 4 feet; that running 8 or 10 miles an hour it could be stopped in 30 feet by using the brakes; that running 15 miles an hour it could be stopped in a car length and a half by using the reverse power.

The witnesses for the plaintiff were standing at the northwest corner of Fourteenth and Spruce streets at the time of the accident. Because the car was between them and the plaintiff's wife, they did not see the car strike her. But they said when she was between the sidewalk on the west side of Fourteenth street and the railroad track the car was at Spruce street.

The city ordinances pleaded were offered in evidence, and it was admitted that the defendant had accepted them.

The evidence of the defendant's motorman was that he saw the plaintiff's wife when the car was about 30 feet north of Spruce street; that she was then between the curb on the west side of Fourteenth street and the south-bound car track; that the car was then running about five miles an hour; that he sounded the gong when he first saw her, and reduced the speed of the car to four miles an hour; that she continued on her way until she got to the south-bound track; that "at that time when she stepped there I was within probably perhaps 20 feet of her; she paused for an instant, and when I got within five feet of her she just deliberately walked over the track. I reversed my car, but she was too close, and it hit her. Ques. Which part of the car hit her? Ans. The east side of the car—the opposite side—she almost cleared the track. It was the fender hit her about at the ankle, and she fell down on the street." This witness testified that, if the reverse current is applied to a car going at the rate of five miles an hour on a slight grade, the car will slide 30 feet. The conductor of the car testified that the car was running about five miles an hour, and that the motorman rang the gong continuously as he approached Belmont street; that it

was foot bell; that the car stopped with the rear platform "alongside" of where the plaintiff's wife laid. The superintendent of the defendant testified that the car weighed eight tons, and that it would take 4½ seconds to stop the car if it was running at a rate of four or five miles an hour, and that the car will slide from five to ten feet even on a slight up grade. The assistant superintendent of the City Hospital testified that when the plaintiff reached the hospital she had a contusion of the skull, and was under the influence of liquor. "She had the odor of alcohol on her breath."

1. Under this state of the record, counsel for the appellant very properly says: "For the purpose of this hearing we will concede that there was evidence for the defendant tending to sustain the answer and make the issue for the jury, and we claim a reversal of the case upon the grounds herein stated" —that is, that the trial court erred in a matter of law in giving the defendant's instructions. To fully understand the case, it is necessary to set out all the instructions bearing upon the question of the liability of the defendant and the duty of the deceased that were given at the request of either the plaintiff or the defendant, and by the court of its own motion.

The instructions given for the plaintiff are as follows: "(1) If the jury find from the evidence in this case that on the 13th day of October, 1896, the defendant was operating the railway and car herein mentioned, as a public conveyance, for the purpose of transporting persons for hire from one point to another, within the city of St. Louis, as a street railway; and if the jury further find from the evidence that at said time Fourteenth and Belmont streets, at the place mentioned in the evidence, were public streets within the city of St. Louis; and if the jury find from the evidence that Jennie Moore, mentioned in the evidence, was the lawful wife of the plaintiff; and if the jury find from the evidence that on the night of October 13, 1896, the plaintiff's wife, Jennie Moore, was passing over the south crossing of Belmont and Fourteenth streets, and whilst doing so the defendant's car ran against her and so injured her that she died from said injuries; and if the jury find from the evidence that said car was, by the defendant's servants in charge of same, being run at a greater rate of speed than 10 miles per hour at said time; and if the jury further find from the evidence that such excessive rate of speed, over 10 miles per hour, directly contributed to cause said car to so strike and injure plaintiff's said wife; and if the jury further find from the evidence that plaintiff's wife exercised ordinary care to look and listen for an approaching car while going upon and over defendant's track—then plaintiff is entitled to recover. (2) If the jury find from the evidence that on the 13th day of October, 1896, the defendant was operating the railway and car, mentioned in the evidence, for the purpose of transporting persons for hire from one point to another within the city of St. Louis, as a street rail-

way; and if the jury find from the evidence that at said time Fourteenth and Belmont streets were public streets, within the city of St. Louis, at the place mentioned in the evidence; and if the jury further find from the evidence that on the night of said day the plaintiff's wife, Jennie Moore, was on the. south crossing of said streets, passing from the west side of Fourteenth street to the east side thereof across defendant's tracks; and if the jury further find from the evidence that, as the plaintiff's wife moved towards and across defendant's tracks, defendant's motorman saw her; and if the jury further find from the evidence that as plaintiff's wife approached and went upon defendant's track she was in danger of being injured by defendant's north-bound car; and if the jury further find from the evidence that defendant's motorman on the north-bound car saw, or by keeping a vigilant watch could have seen, that the plaintiff's wife, as she approached and went upon defendant's north-bound track, was in danger of injury from said car, and therefore could have averted injury to plaintiff's wife by stopping said car within the shortest time and space possible, and neglected to do so—then plaintiff is entitled to recover five thousand dollars. (3) If the jury find from the evidence that, as the defendant's car, moving northward, approached the south crossing of Belmont street, the plaintiff's wife was passing over said crossing; and if the jury further find from the evidence that said crossing was a public crossing for pedestrians; and if the jury further find from the evidence that as plaintiff's wife was so passing over said crossing she was struck and injured by defendant's north-bound car so that she died from said injuries; and if the jury further find from the evidence that as said car approached said crossing defendant's servants in charge of the car failed to give any signal, by bell or otherwise, of the approach of said car to said crossing; and if the jury further find from the evidence that said failure to give said signal directly contributed to cause the injury and death of plaintiff's wife; and if the jury find from the evidence that plaintiff's wife was exercising ordinary care whilst approaching and passing over said track—then plaintiff is entitled to recover five thousand dollars; provided the jury believe from the evidence that such failure to give such signal was negligence on the part of the servants of the defendant. (4) By the term 'ordinary care,' as used in the instructions, is meant that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances. A failure to exercise ordinary care as thus defined would be negligence. (5) The court instructs the jury that if they find from the evidence that the deceased, Jennie Moore, did see the approach of defendant's car before it struck and injured her, yet if said car was distant from her a sufficient distance to have enabled her to cross the track ahead of the car in safety

by the exercise of ordinary care and expedition, if said car was running not exceeding 10 miles per hour, then she had the right to proceed to cross defendant's track, if she used ordinary care and expedition in doing so, and if she did not know or have reason to believe said car was in fact running more than 10 miles per hour (if, in fact, said car was running more than 10 miles per hour)."

The instructions given at the request of defendant are as follows: "(1) The jury are instructed that the negligence alleged against the defendant is: First, that the defendant failed to give warning of the approach of the car by sounding the bell or otherwise; second, that the defendant did not keep a vigilant watch for persons on foot upon the tracks or moving towards them, and did not, upon the first appearance of danger, stop the car within the shortest time and space possible; and, third, that the defendant ran its car at the time in question at a rate of speed exceeding 10 miles an hour. And the court instructs the jury that it is incumbent upon the plaintiff to prove that the defendant was guilty of one or the other of these specified acts of negligence, and that such negligence on its part caused the injury complained of. And even though the jury find that the defendant was guilty of one or the other of the acts charged, and even if they find that such negligence contributed to the injury complained of, still, if they further find that the deceased, Mrs. Moore, was negligent in attempting to cross the track of defendant as she did, and that such negligence on her part contributed to the accident, then the plaintiff is not entitled to recover. (2) The court instructs the jury that, although they may believe and find from the evidence that the defendant, through its agents and servants in charge of its said car, was negligent in failing to sound the gong, and that it was negligent in running said car at a rapid rate of speed, yet the plaintiff is nevertheless not entitled to recover if you further believe that the deceased knowingly tried, by hurrying, to pass in front of said moving car, in such close proximity thereto as to make the danger of collision imminent; and this is true even though you may further find that the agents and servants of the defendant failed to use proper care to stop said car after such dangerous position of the deceased became known to them. (3) The court instructs the jury that, although they may believe and find from the evidence that the motorman of defendant's car saw the deceased wife of plaintiff approaching the track, on which said car was moving, afoot, and with said car in view, said motorman nevertheless had the right to assume that said deceased would not pass in front of said car, but that she would stop before passing onto the same, and that, under such assumption, he had the right to proceed with the speed of said car unabated, unless you believe that the same was being run at an unlawful or negligent rate. (4) Even though the motorman saw Mrs. Moore

crossing the street and moving toward the track along which this car was moving, still he had the right to assume that she knew the car was approaching and would have regard for her own safety, and not attempt to pass in front of the same if it was obviously dangerous to attempt to do so. And the motorman had the right to assume that she would stop when she came to the track, and not attempt to cross in front of his car if it was manifestly unsafe to do so. And the motorman had the right to proceed at a lawful rate of speed, and was not bound to stop his car until she placed herself in a position of peril by coming upon the track, or so close to it as to endanger her."

The court of its own motion gave to the jury the following instruction: "The jury are instructed that the negligence alleged against the defendant is: (1) That at the time in question the defendant failed to give warning of the approach of the car by sounding the bell or otherwise. (2) That the defendant did not keep a vigilant watch for persons on foot upon the tracks or moving towards them, and did not, upon the first appearance of danger, stop the car within the shortest time and space possible. (3) That the defendant ran its car at the time in question at a rate of speed exceeding 10 miles per hour. And the court instructs the jury that it is incumbent upon the plaintiff to prove that the defendant was guilty of one or the other of these special acts of negligence, and that such negligence on its part caused the injury complained of. And even though the jury find that the defendant was guilty of one or the other of the acts charged, and even though they find that such negligence contributed to the injury complained of, still, if they further find that the deceased, Mrs. Moore, was negligent in attempting to cross the track of defendant as she did, and that such negligence on her part contributed to the accident, then the plaintiff is not entitled to recover, unless you further find from the evidence that the defendant motorman saw, or by the exercise of reasonable care might have seen, that the plaintiff's wife was in a position of danger or peril, and that the said motorman thereafter could have averted the injury to plaintiff's wife by the exercise of reasonable or ordinary care, but negligently failed to do so."

It is unnecessary to notice the first instruction given for the plaintiff, further than to say that there is no evidence whatever in the record that the deceased looked or listened for an approaching car while going upon or over the defendant's track. The plaintiff introduced no evidence whatever bearing upon this proposition, and the defendant's evidence shows that she paused an instant while on the south-bound track when the car was 20 feet from her, and then deliberately stepped upon the north-bound track when the car was within 5 feet of her.

The plaintiff's second instruction predicates a right of recovery upon a violation of the pleaded and accepted city

ordinance, and, read in connection with the defendant's third and fourth instructions, and with the instruction given by the court of its own motion, the jury could not fail to understand the law of the case as made.

The appellant, however, attacks the second instruction given for the defendant. The dominant idea expressed by this instruction is that, notwithstanding the defendant may have been primarily negligent, nevertheless the plaintiff cannot recover if thereafter both the defendant and the deceased were guilty of concurrent, subsequent negligence, nor can the plaintiff recover if both were guilty of negligence of such kind, character, or degree as to constitute it recklessness or wantonness. The rule is thus stated in 7 Am. & Eng. Enc. Law (2d Ed.) pp. 385, 386: "And so when the negligence of the person inflicting the injury is subsequent to, and independent of, the carelessness of the person injured, and ordinary care on the part of the person inflicting the injury would have discovered the carelessness of the person injured in time to avoid its effects and prevent injuring him, there is no contributory negligence, because the fault of the injured party becomes remote in the chain of causation. In such a case the want of ordinary care on the part of the injured person is not held a juridical cause of his injury, but only a condition of its occurrence. Conversely, when the carelessness of the person inflicting the injury is antecedent to the negligence of the person injured, and the latter might by ordinary care have discovered the failure of the former to use such care, in time to avoid the injury, there can be no recovery because the intervening negligence of the injured person is the direct and proximate cause of his injury." Judge Cooley states the law with his usual force and clearness, as follows: "Regarding the case of a negligent injury, the general result of the authorities seems to be that if the plaintiff or party injured, by the exercise of ordinary care under the circumstances, might have avoided the consequences of defendant's negligence, but did not, the case is one of mutual failure, and the law will neither cast all of the consequences upon the defendant, nor will it attempt any apportionment thereof." Cooley on Torts (2d Ed.) 812. The rule, however, is nowhere more clearly or accurately stated than in the recent work of Nellis on the Law of Street Surface Railroads, pp. 383, 384, where he says: "It may be stated as a rule that a plaintiff who, by his own negligence, has placed himself in a dangerous position where an injury was likely to result, may still recover for such injury, if the defendant, with knowledge, or such notice as is equivalent to knowledge, of plaintiff's danger, failed to exercise reasonable care by which the injury might have been avoided, unless the injury was the result of concurrent negligence of both parties." In Murphy v. Railway Co., 153 Mo., loc. cit. 261, 54 S. W. 442, the court, speaking through Brace, J., said: "The violation of an ordinance by the

defendant could not be the proximate cause of an injury which was the product of such negligence and the concurrent negligence of the plaintiff. The concurrent negligence of both in such a case is the proximate cause of the injury, and the plaintiff cannot recover. This is the law universally prevalent in this country, and to it there is but one exception in this state made on the score of humanity, and that is, if sufficient time and opportunity intervene between the concurrent acts of negligence which produced the dangerous situation and the injury to have enabled the defendant by the exercise of ordinary care to have prevented the injury, and he fails to exercise such care, then he will not be protected by this rule, but to the failure to exercise such care will the injury be attributed as the proximate cause thereof, and for such failure the plaintiff may recover." To this rule I add the logical and necessary corollary that, if both parties are guilty of recklessness or wantonness, there can be no recovery. For, if the injured party is guilty of recklessness or wantonness, he is no more entitled to recover for the defendant's recklessness or wantonness than he would be if it was the plain case of negligence and contributory negligence in the first degree. Holwerson v. Railroad, 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850.

It has always been the law in this state that it is such gross negligence as precludes a recovery for a person to step on a railroad track directly in front of an approaching train, and so close to it as to render it impossible to stop the train in time to avoid injury. Boyd v. Railroad, 105 Mo. 317, 16 S. W. 909; Watson v. Railroad, 133 Mo., loc. cit. 250, 34 S. W. 573; Kelly v. Railroad, 75 Mo., loc. cit. 140; Sinclair v. Railroad, 133 Mo., loc. cit. 241, 34 S. W. 76; Kries v. Railroad, 148 Mo. 321, 49 S. W. 877; Holwerson v. Railroad, 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850; Hook v. Railroad, 162 Mo. 569, 63 S. W. 360; Tanner v. Railroad, 161 Mo. 497, 61 S. W. 826; Van Bach v. Railroad (Mo. Sup.) 71 S. W. 358. And this is true even if the train was running at a rate of speed in excess of the maximum rate permitted by law. Tanner v. Railroad, 161 Mo. 497, 61 S. W. 826. For in such case the negligence of the injured party, and not the rate of speed of the train, is the proximate cause of the injury. To go upon a track in front of an approaching train, and so close to it as to render it impossible to stop the train in time to avoid injury, is negligence, whether the train is moving rapidly or slowly; and the only question in any case is whether, notwithstanding such negligence of the injured party, the train could have been stopped in time to have avoided the injury; and if the plaintiff bases a right to recover upon the failure of the defendant to exercise ordinary care to prevent the injury after the peril of the plaintiff, or party injured, was known, or could have been known by the exercise of ordinary care, the burden of alleging and proving that such was the fact rests

upon the plaintiff. If, however, the undisputed facts show that the injured party was guilty of such contributory negligence as will preclude a recovery, and if there is no evidence of a willful, reckless, or wanton disregard of human life on the part of the operatives of the train, there is nothing for a jury to pass upon, and the court should sustain a demurrer to the evidence. Tanner v. Railroad, 161 Mo. 497, 61 S. W. 826; Kellny v. Railroad, 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783; Holwerson v. Railroad, 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850; Van Bach v. Railway (Mo. Sup.) 71 S. W. 358; Guyser v. Railroad (No. 10,634, not yet officially reported) 73 S. W. 584. If, instead of so doing, the trial court submits the case to the jury, and gives improper and erroneous instructions, and the jury find for the defendant, the verdict will not be disturbed, notwithstanding such misdirection, because it is in consonance with the true law, and is for the right party, and because the plaintiff would not be entitled to a verdict at all upon such a showing. Hill v. Wilkins, 4 Mo., loc. cit. 88; Orth v. Dorschlein, 32 Mo. 366; Kelly v. Railroad, 88 Mo. 534; Ellerbe v. Bank, 109 Mo. 445, 19 S. W. 241; Homuth v. Railroad, 129 Mo., loc. cit. 642, 31 S. W. 903; Haven v. Railroad, 155 Mo., loc. cit. 223, 224, 55 S. W. 1035, and cases cited.

In this case there is no evidence whatever that the deceased looked or listened for a car before going upon the track. All the evidence there is in the record is that furnished by the defendant's motorman, and he says that: "When I just saw her I hit my gong, and she kept coming until she got on the south-bound track. At that time when she stepped there, I was within probably perhaps 20 feet of her. She paused for an instant, and when I got within five feet of her she just deliberately walked over the track. I reversed my car, but she was too close, and it hit her." If the deceased saw the car coming, as her pausing on the south-bound track would indicate, and if the car was then within 20 feet of her, it was negligence for her to go upon the north-bound track in front of the approaching car and when it was within five feet of her, whether the car was running at 4, 5, 8, 10, or 15 miles an hour. The street was clear of obstruction, and there was plenty of light to see distinctly. The motorman saw the deceased. She saw the car, or could have done so if she had looked. The motorman saw her approaching the track. He sounded the gong. She continued to approach until she reached the south-bound track. There she paused. The car was then 20 feet from her. The motorman had a right to believe that she intended to remain in her then place of safety until the car passed. Instead of doing so, however, when the car was within five feet of her, she stepped on the track in front of the car, and attempted to cross the track. Then for the first time she placed herself in a place of imminent peril. Then it was too late to stop the car in time to avoid the

injury, and this, too, whether the car was running at the rate of 4 miles an hour, as the defendant's evidence shows, or at the rate of 15 miles an hour, as the plaintiff's evidence shows. There is no evidence whatever of willfulness, recklessness, or wantonness on the part of the operatives of the car. The operatives of the car kept a vigilant watch for persons approaching or on the track, and on the first appearance of danger stopped the car in the shortest time and space possible, and therefore obeyed the city ordinances. The accident was painful and shocking. But it would not have occurred except for the negligence of the deceased in going upon the track when the car was within five feet of her. The plaintiff, therefore, made out no case for the jury, and the court should have so declared. The verdict of the jury is for the right party, and in harmony with the true law. The verdict will not, therefore, be disturbed, no matter whether the court misdirected the jury or not.

This conclusion makes it unnecessary to consider the other points urged for a reversal, further than to say that the facts upon which such points rest were sharply contested in the trial court, and that court found them in favor of the defendant, and, as no abuse of discretion appears, this court will not disturb the finding of the trial court in this regard.

The judgment of the circuit court is affirmed.

BRACE, P. J., concurs. VALLIANT, J, concurs in the result. ROBINSON, J., absent.

DELAWARE, L. & W. R. CO. v. DEVORE.

(Circuit Court of Appeals, Second Circuit, April 16, 1903.)

[122 Fed. Rep. 791.]

Railroads—Injuries at Crossing—Contributory Negligence—Evidence—Question for Jury.

Plaintiff, an infant, was driving with his parents, and approached a railroad crossing, at which he was injured, after dark. Plaintiff's parents were unfamiliar with the crossing, and as they approached had a consultation about being near the same. The father pulled the horse down to a walk, and both father and mother looked and listened for a train, but saw nothing until the horse was on the track, when they were suddenly struck by defendant's fast passenger train, which approached without ringing the bell, or blowing the whistle, or giving other indication thereof. The approach to the crossing wound down a hill, and the view of the track was obstructed by bushes, trees, and buildings. Before reaching the crossing, the track ran through a deep cut, and the evidence as to how far the headlight could be seen from the crossing was conflicting, but would have justified a finding that from 74 to 50 feet from the inside rail the track could be seen for a distance of from 300 to 443 feet, and that, with the exception of a space of 15 feet between points 50 and 65 feet distant from the track, the end of the cut could not be seen until a point 37 feet from the rail was reached: *held*, that whether plaintiff's parents were guilty of contributory negligence was for the jury.

Same—Contributory Negligence—Presumptions—Instructions.

Where, in an action for injuries to plaintiff at a railroad crossing at

night, the court charged that it was the duty of every person traveling on the highway to use reasonable care, and not to approach a railroad crossing recklessly or heedlessly, but that he must use his faculties, keep his eyes and ears open, look in both directions, and take such care as a reasonably intelligent person is required to take under such circumstances, and the evidence showed that, though plaintiff's parents had exercised due care in approaching the crossing, they might have failed to see the lights from the train, and would, therefore, have been justified in crossing, it was not error for the court to refuse to charge that, because the lights of the train were visible prior to the accident, the fact that they were not seen demonstrated or raised a presumption of contributory negligence.

Same—Care Required.

An instruction, in an action for injuries at a railroad crossing, that the law requires such care and prudence by the railroad company as is necessary to protect the lives and limbs of those who were lawfully on the premises of the railroad, and that it is the duty of every person traveling on a highway to exercise reasonable care and caution, and not approach a railroad crossing heedlessly or recklessly, but that he must use his faculties, keep his eyes and ears open, look in both directions, and take such care as a reasonably intelligent person is required to take in such circumstances, was not objectionable as imposing a greater degree of care on the railroad company than on travelers on the highway.

Same—Witnesses—Harmless Error.

Where plaintiff's witnesses in an action for injuries at a railroad crossing did not have equal opportunities with defendant's witnesses for knowing whether the locomotive's bell was rung and the whistle blown, error, if any, in an instruction on such subject, in requiring that the witnesses testifying thereon should have equally good opportunities for observation, was not prejudicial to defendant.

Same—Objections to Evidence.

An objection that a question asked a witness on cross-examination was incompetent and immaterial was insufficient to justify its exclusion on the ground that it was not relevant to any evidence given on the witness' direct examination.

In Error to the Circuit Court of the United States for the Southern District of New York.

Hamilton Odell, for plaintiff in error.

Walter K. Barton and W. D. Tyndall, for defendant in error.

Before WALLACE and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. Writ of error by defendant from a judgment of the United States Circuit Court for the Southern District of New York, entered upon a verdict of a jury in favor of the plaintiff for damages for injuries sustained while attempting to cross the tracks of defendant's railroad. The assignments of error challenge the correctness of the action of the trial court in refusing to direct a verdict for defendant on the ground of plaintiff's contributory negligence, and in submitting to the jury the question of the contributory negligence of plaintiff's parents.

At the time of the accident, November 22, 1892, plaintiff was about 14 months old, and lived with his parents at Wallpack, N. J. On the morning of said day his parents drove with him in a top buggy, with a gentle horse, from their

home to Belvidere, crossing the defendant's railroad in a southwesterly direction at a point known as "Hope Crossing," the place of the accident. The crossing is at right angles to the railroad tracks, which, in this vicinity, run northwest and southeast. They started to return home by the same road at about 6 o'clock in the evening; the husband seated on the right side of the buggy, and driving; the wife holding the plaintiff in her arms. The night was very dark, cloudy, and stormy. It was hailing or sleeting and snowing occasionally. The wind was blowing hard, striking the buggy at the back. The top of the buggy was partly lowered. Plaintiff's parents were not familiar with said crossing. It is doubtful whether either of them had ever been over said road until that morning. Plaintiff's mother testified that as they approached the railroad they had a consultation about being near the crossing they had come over in the morning, and, in consequence thereof, plaintiff's father pulled the horse from a trot down to a walk; that she looked on either side to see whether she could see a train approaching; that they were each looking each way, and listening; that they went slowly on; that she saw nothing until she saw the glittering of something at the horse's feet just as they were struck by a railroad train; and that she heard no bell rung or whistle blown, nor any indication of the train at any time. The accident occurred at about 23 minutes past 7. The front part of the buggy was struck by the engine of one of defendant's passenger trains coming from the southeast on the further or northwest-bound track. The train was running at the rate of 40 to 50 miles an hour. Plaintiff's father died as the result of the collision. The sole testimony as to the fact of the accident and what preceded it is that of plaintiff's mother.

Counsel for defendant contends that upon the facts proved it affirmatively appears that the accident was caused by the contributory negligence of plaintiff's parents, and that, if they had looked, as she testified they did, they must have seen the lights of the approaching train in time to avoid the collision. Counsel, therefore, invokes the application of the rule as stated by the Supreme Court of the United States in Northern Pacific Railroad Company v. Freeman, 174 U. S. 379, 17 Sup. Ct. 763, 43 L. Ed. 1014, 15 Am. & Eng. R. Cas., N. S., 89, that:

"When it appears that, if proper precautions were taken, they could not have failed to prove effectual, the court has no right to assume, especially in face of all the oral testimony, that such precautions were taken."

This crossing was a particularly dangerous one. The approach winds down a hill, and the view to the southeast is obstructed by bushes and a hedge, a house, outbuildings, and trees. The track in that direction runs through and is obstructed from view by a long cut, which at 1,200 feet from the crossing is 15 feet deep, and ends at a point 735 feet from

the crossing. There is a conflict of testimony as to the distance at which the light of an approaching train could have been seen on the night in question, but there was evidence from which the jury were justified in finding that at distances varying between 74 feet and 50 feet from the inside rail of the northwest-bound track the track could be seen for a distance of only 300 feet to 443 feet; that, with the exception of a space of 15 feet between points 50 and 65 feet distant from said track, the end of said cut could not be seen until a point 37 feet from said rail was reached. In these circumstances the jury were justified in believing that only a very few seconds could have elapsed between the moment of the collision and the moment when the light from the approaching train could have been seen by a person who was constantly looking in the direction in which it was approaching. The witness did not know that a train was due, or in which direction it might be expected. The wind at her back interfered with her hearing its approach. At the time when she was looking toward the southeast, her view might have been obstructed by snow, or by her husband sitting on her right, or she might reasonably have been looking in the opposite direction during the brief interval in which the light was visible. In these circumstances the judge would not have been justified in taking the case from the jury, and assuming, as is contended by counsel for defendant, that it was "physically impossible" that plaintiff's parents could have looked without seeing the train. The case was peculiarly one in which the jury, in view of all the circumstances, should be permitted to determine whether the preponderance of evidence showed contributory negligence on the part of plaintiff.

Various exceptions were taken to the charge of the court. Thus it is assigned as error that the court refused to charge that:

"If either Mr. Devore or Mrs. Devore could have seen the train if they had looked, the presumption is that they did not look, and so were negligent."

"If Mr. Devore could have seen the lights of the train in season for safety, the accident itself demonstrates that he did not look, or that, if he did, he ventured upon a hazardous effort to cross in spite of the danger."

"If Mrs. Devore could have seen the lights of the train in season for safety, the accident itself demonstrates that she did not look, or that, if she did, she ventured upon a hazardous effort to cross in spite of the danger."

The court had already charged the jury as follows:

"It is the duty of every person traveling upon a highway to exercise reasonable care and caution, and not approach a railroad crossing recklessly or heedlessly. Such a person must use the faculties which the Almighty has given him; must keep his eyes and ears open; must look in both directions; and

must take such care as a reasonably intelligent person is required to take in such circumstances."

We think, in view of the conditions already discussed, that the court was not bound to add the foregoing statements to the instructions already given. These requests assume that, because the lights were visible prior to the accident, the fact that they were not seen demonstrated or raised a presumption that the witnesses did not exercise due care. The evidence, on the contrary, showed that, although the witnesses had exercised due care, they might have failed to see the lights, and would, therefore, have been justified in proceeding as they did. The legal rule raised by the request was fully and accurately stated in the charge of the court, and especially in the portion quoted above.

The seventh assignment of error is as follows:

"Seventh. The darkness and storm required greater watchfulness on the part of both Mr. and Mrs. Devore than if the crossing had been made in the daytime or on a clear night."

Upon this point the court charged as follows:

"In the case of a railroad company engaged, as it is necessarily, in a hazardous occupation, the law requires such care and prudence as is commensurate with the danger and with the risks to be assumed. Such care and prudence must be taken by the company as are necessary to protect the lives and limbs of those, whether servants, employees, or the public generally, who are lawfully upon the premises of the railroad. * * * It is the duty of every person traveling upon a highway to exercise reasonable care and caution, and not approach a railroad crossing recklessly or heedlessly. Such a person must use the faculties which the Almighty has given him; must keep his eyes and ears open; must look in both directions; and must take such care as a reasonably intelligent person is required to take in such circumstances."

The argument upon this point is not so much directed to the failure of the court to sufficiently state the obligation as to watchfulness resting upon plaintiff's parents as to the foregoing statements in the charge, which it is claimed impose a greater degree of care upon a railroad company than upon travelers where the railway and highway intersect; while the rule is that their obligations, rights, and duties are equal and reciprocal. It is sufficient to say upon this point that the statements in the charge as to which this objection is now raised were not excepted to. The language of the charge as to the obligation of watchfulness in the case of persons approaching a crossing, taken in connection with the full review of the circumstances of the case, sufficiently informed the jury as to the character and degree of care required on such an occasion.

It is unnecessary to discuss the exceptions to the charge in regard to the ringing of the bell and blowing of the whistle. The court fully and accurately stated and illustrated the rule

and its exceptions. The limitations introduced therein that the witnesses should have had equally good opportunities for observation, even if erroneous, could not have injured the defendant, for the evidence showed that the witnesses for plaintiff did not have equal opportunites with the witnesses for defendant; and therefore the testimony of the latter, under the rule as stated, would be entitled to greater weight.

On the previous appeal in this case this court said:

"The request asserts the proposition that positive testimony of witnesses is entitled to more weight than the negative testimony of other witnesses, and makes no discrimination in regard to the credibility in other respects of the two classes of witnesses. The positive class may impress the triors with lack of confidence in their trustworthiness, their disinterestedness, their accuracy; but the request establishes as a rule of law that positive testimony is entitled to superior credit whether other things are equal or not, and is, we think, a broader rule than a court should be called upon to give to a jury, without reference to the credibility of the witness in other respects." D. L. & W. R. R. Co. v. Devore, 52 C. C. A. 77, 114 Fed. 155, 156.

The following question was asked of a witness on cross-examination:

"Q. I will read another question: 'I regard Hope Crossing as a dangerous crossing. Any one going north, when he gets to the hill, Emery's house obstructs the view until you get near the track,' and you say 'within 33 feet of it before you can see through the cut.' Did you say that?"

It was objected to on the ground that it was "incompetent and immaterial." It was not relevant to any testimony given by the witness on his direct testimony, and, if objected to on that ground, should have been excluded. The exception was not properly taken.

It is unnecessary to discuss the other assignments of error. We are satisfied that there was nothing in the charge or refusals to charge which would justify a new trial. The charge fully and fairly submitted to the jury the questions of fact, together with the rules of law applicable thereto.

The judgment is affirmed, with costs.

KINTER v. PENNSYLVANIA R. CO.

(*Supreme Court of Pennsylvania, Jan. 5, 1903.*)

[54 Atl. Rep. 276.]

Accident at Crossing—Stop, Look, and Listen.*

Where a person driving a wagon approached a railroad crossing at grade, and stopped at a point where he could not see the track far

*See foot-note appended to Peck v. Oregon Short Line R. Co. (Utah), 4 R. R. R. 358, 27 Am. & Eng. R. Cas , N. S., 358.

enough to observe an approaching train, but, if he had got down from his wagon, and walked about five feet, he could have seen the train, he was guilty of contributory negligence in not doing so as a matter of law.

Same—Same.

Where a driver is about to cross a railroad track, and he cannot see down the track, he should stop, look, and listen, and, if necessary, get out of his wagon and lead his horses.

Appeal from Court of Common Pleas, Allegheny County; Stowe, Judge.

Action by Maggie W. Kinter against the Pennsylvania Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Joseph A. Langfitt, H. W. McIntosh, and S. J. Telford, for appellant.

M. W. Acheson, Jr., Thomas Patterson, and James R. Sterrett, for appellee.

BROWN, J. The deceased was killed at a most dangerous railroad crossing in the borough of Wilkinsburg. The train that struck him was coming from the east. He approached the crossing on South avenue, and to his left—the direction from which the train was coming—the street makes an acute angle with the railroad, on which there were five tracks. In this angle there was a plumbing shop, which obstructed the view of the railroad. It was 8 feet and 10 inches from the first rail. The through passenger train which collided with the deceased was rapidly approaching on the first track. When about 350 feet from South avenue, it crossed over on a switch to the middle, or third, track, on which it ran into the team. In the direction from which the train came there was a straight stretch of over half a mile from the crossing, but there was no point nearer than five feet from the first rail where there could be a view of it. Kinter was driving a two-horse wagon loaded with coal. He was sitting about in the middle of it, and a man named Musser, who was to put the coal away, was on the rear end. There was no view of the tracks to their left as they approached them. When the heads of the horses were at the first rail of the track nearest to him, Kinter stopped them. From their positions on the wagon, with the plumbing house alongside of them and cutting off the view to the left, neither man could see the coming train, and their view of the track on which it was rapidly coming was for but 240 feet. They could not even see Wilkinsburg station, barely a square away; but there was a point beyond the house, five feet from the track, from which the deceased could have seen the danger. Neither he nor the man with him went forward to look from this, the only, point from which they could see what was coming upon them; and, in an unguarded moment, the driver started his team, and drove on to his death. As

soon as he passed the plumbing house, Musser jumped, and his life was saved; but it was too late for Kinter to escape from the deadly peril. With these facts developed, the court below entered a judgment of nonsuit on the ground of the contributory negligence of the deceased.

Negligence is the absence of care under the circumstances. The more imminent the danger, the greater should be the care exercised in the presence of it. The rule upon one about to cross the tracks of a railroad is that he must stop, look, and listen. Some crossings are much more dangerous than others, and many of them in towns, with views on either side obstructed by buildings, are, as in the present case, notoriously so. Railroad companies may be regardless of their duty in protecting the public from the constant danger that besets them at such crossings, but the man who drives over them is not, on that account, relieved from the duty of exercising care himself. On the contrary, the very highest degree of it is wisely required of him; and there could be no better illustration than that given by the present case of the wisdom of the rule that if one approaches a railroad in a vehicle, and cannot, from his seat in it, have a view of the tracks, he must get down from it, and walk to where he can. The observance of this rule by Kinter would manifestly have saved his life. Our enforcement of it may save many others; departure from it would send many victims into these death traps.

The duty of Kinter was to stop and look and listen at a place where he could have a view of the tracks which would enable him to see the approaching train. Central R. R. Co. of N. J. v. Feller, 84 Pa. 226; Ely v. Pittsburgh, etc., Railway Co., 158 Pa. 233, 27 Atl. 970. He did not stop at such a point, and, concededly, not having been able to see where he did stop, it was for the court to say that he had not observed the rule requiring him to look. "Where there is a doubt as to the proper place to stop, look, and listen, as a general rule such question will be referred to the jury. But where there is no such doubt—where the deceased stopped at a point where he could not see—it is for the court to determine whether it was a proper place." Urias v. Penna. R. R. Co., 152 Pa. 326, 25 Atl. 566. When it must have been manifest to the deceased, as he approached the tracks, that he could not have a view to his left, he might have protected himself by exercising ordinary prudence. Instead of driving his horses on until their feet nearly touched the first rail of the tracks, and then stopping, and trying to look from his seat in the wagon, where he could not see the danger that was almost upon him, he ought, as a prudent man, to have stopped further back, got down from his wagon, walked forward beyond the obstruction, and looked. That this was his duty is clear from the standpoint of prudence and proper care, and that we have so repeatedly declared is not uncertain. His failure to observe this duty cost him his life, and has left his

widow and children without remedy for the serious consequences which may have resulted from the defendant's negligence.

In Pennsylvania Railroad Co. v. Beale, 73 Pa. 504, 13 Am. Rep. 753, where, as here, there was an obstruction to the view of the railroad, we held that, if one driving and about to cross a track cannot have a view of it by looking out from his vehicle, it is his duty to get out, if necessary, and lead his horse and wagon. This principle has been uniformly recognized in later cases. It was reaffirmed the same year in Pennsylvania Railroad Co. v. Ackerman, 74 Pa. 265, by the same member of this court that had announced it. In Ellis v. Lake Shore, etc., Railroad Co., 138 Pa. 506, 21 Atl. 140, 21 Am. St. Rep. 914, attention is called to the rule "that it is the duty of a traveler, when about to cross a railroad, if he cannot see the track, to stop, look, and listen, and, if necessary, to get out and lead his horse;" and in Lehigh Valley Railroad Co. v. Brandtmaier, 113 Pa. 610, 6 Atl. 238, we held: "It was the duty of the plaintiff before crossing to stop, look, and listen for the approach of trains. It was his duty to do so immediately before crossing, and, as the learned court instructed the jury, 'if he could not see up and down the track from any point upon the road before reaching the rails, it was his duty to go upon the track itself, and look and listen, before attempting to drive his team across.'" The case before us calls for the application of this rule, and it must be enforced. That Kinter passed safely over the first track, and was struck on the third, can make no difference in the application of the rule; for, it he had observed it, he would have seen not only the train coming towards him on the first track, but the switches as well, leading to the other tracks, over which the train in its regular course might go, and, as a matter of fact, did.

Judgment affirmed.

DANIELS v. NEW YORK, N. H. & H. R. CO. (two cases).

(Supreme Judicial Court of Massachusetts, Norfolk, May 22, 1903.)

[67 N. E. Rep. 424.]

Accident at Crossing—Signals—Positive and Negative Testimony—Question for Jury.*

Whether the whistle was blown for a railroad crossing is a question for the jury, though numerous witnesses testified it was; others, who were in a position where they might have heard it, testifying that they heard nothing till the danger signals were given, though it did not appear they were giving much attention, and there being declarations of deceased that he heard nothing till the train was right on him, and also evidence that the whistling post, at which, according to some, the

*For comparative weight of positive and negative testimony as to whether crossing signals were given, see foot-note appended to Jones v. Lehigh & N. E. R Co. (Pa.), 2 R. R. R. 26, 25 Am. & Eng. R. Cas., N. S. 26.

whistle was first blown, was less than 80 rods—the statutory distance—from the crossing.

Same—Proximate Cause—Insanity.

The voluntary, willful act of suicide of an insane person, whose insanity was caused by a railroad accident, and who knows the purpose and physical effect of his act, is a new cause, so that his death is not by reason of the negligence of the railroad company, within Pub. St. 1882, c. 112, § 213, in such case giving a right of action therefor.

Same—Same—Same—Instruction.

An instruction that recovery could be had of a railroad company for death of one injured by its negligence, who committed suicide during insanity caused by the accident, if he had not the power of rational volition, is misleading; the term "rational volition" being likely to be understood to mean volition attended by powers of reason, to consider and judge of the act in all its relations—moral as well as physical.

Exceptions from Superior Court, Norfolk County.

Two actions—one by Mancy E. Daniels, and the other by his executrix, Mary E. Daniels—against the New York, New Haven & Hartford Railroad Company. There were rulings adverse to defendant, and it brings exceptions. Sustained in part.

Gaston, Snow & Saltonstall and Malcolm Donald, for plaintiff.

Choate & Hall, for defendant.

KNOWLTON, C. J. These actions are brought, one by Mancy E. Daniels, and the other by his executrix; the first to recover damages suffered in his lifetime, and the second to recover for his death resulting from a collision with an engine and train at a crossing of a highway on the defendant's railroad. The negligence of the defendant which is chiefly relied on is the failure to give the cautionary signals required by the statute to be given at crossings of highways. The defendant, on its bill of exceptions, has argued only two questions: First, whether there was evidence which would warrant a finding that the signals were not given; and, secondly, whether the death of Daniels, which resulted from his strangling himself while he was probably insane, was caused by the defendant's negligence, within the meaning of the statute.

As to the first question, although there was testimony from numerous witnesses that the whistle was blown for the crossing at the time the collision occurred, there was also testimony from others, who were in positions where they might have heard the signals if they had been given, that they heard nothing until the danger signals were given, just before the accident; and there was also testimony of the declarations of the deceased that he heard nothing until the train was right upon him, and that he was absolutely sure that there was no whistle until the danger signal was sounded. Although it did not appear that these last witnesses were giving much attention, we think they were so situated that their failure to hear or notice a signal was competent for the consideration of the jury. This was especially true of the deceased, who was

approaching the crossing, and very near it. There was also evidence that the whistling post at which, according to some of the witnesses, the whistle was first blown, was less than 80 rods from the crossing. If the signal was first given there, it was a failure to comply with the statute. Pub. St. 1882, c. 112, § 163; St. 1890, p. 142, c. 173; Duggan v. New England Railroad Company, 172 Mass. 337, 52 N. E. 519. We are of opinion that this question was rightly submitted to the jury. Menard v. Boston & Maine Railroad, 150 Mass. 386, 23 N. E. 214; Johanson v. Boston & Maine Railroad, 153 Mass. 57, 26 N. E. 426.

The important question in the second case relates to the manner of Daniels' death, and to the law applicable to a death caused as his was. He received a blow on the head and other injuries at the time of the accident, which occurred on August 12, 1899, and he died on the 3d day of the next October. The evidence tended to show that his mind was clear for several weeks after the accident, but after that he showed symptoms of insomnia and restlessness, and began to suffer from severe attacks of headache, was melancholy, and at times delirious. The autopsy after his death showed circumscribed meningitis, which produced mental aberration. On October 3d he was left alone on his bed in a room from which the door opened into the dining room. This door was left open, and after a time it was found closed, and locked from the bedroom on the inside. His wife entered the room through a window, and he was discovered lying on his bed, with a napkin, which had been left on a tray used for bringing his food, twisted tightly around his neck, and held tightly in his hands, so as to produce strangulation. He was not then dead, but died soon afterwards. Experts testified that he was probably insane when he took his life. The question is whether his life was lost by the collision, within the meaning of the statute. The jury were well warranted in finding that his mental condition was caused by the collision. If his mental condition had remained normal, probably he would not have died in this way. We are thus brought to the consideration of the question—which is often very difficult to decide—whether an essential condition precedent is the active, efficient, proximate cause of a subsequent event, or is only a producer of conditions which open the door to another cause which directly and actively produces the result. Was death in this case a remote consequence of the collision, or was it an effect actively produced by it? A similar question has often been considered under policies of life insurance which except from the terms of the contract cases of death by suicide or by the hand of the assured. The decisions upon this question are conflicting. All agree that death self-caused in an uncontrollable frenzy, without knowledge or appreciation of the physical nature of the act, would not be death by suicide, or by one's own hand, within the meaning of such a

provision in a policy. Some judges make a distinction between death by one's own hand and death by suicide, but most judges consider the language in either form as meaning death by one's own act. Some courts hold that if death is the result of volition by one who has a conscious purpose to end his life, and has intelligence to adapt means to ends, it is his own act, within the meaning of such a contract, even though he is so far insane as not to be morally responsible for his conduct. That is the doctrine of this court, as stated in Dean v. American Insurance Company, 4 Allen, 96, and in Cooper v. Massachusetts Mutual Life Insurance Company, 102 Mass. 227, 3 Am. Rep. 451, following Boradaile v. Hunter, 5 M. & G. 639, and Clift v. Schwabe, 3 M., G. & S. 437. The same doctrine has been laid down as the true rule by several other American courts. On the other hand, the Court of Appeals of New York and the Supreme Court of the United States, and some other courts, hold that if one, by reason of his insanity, is unable to appreciate the nature and qualities of his own act in its relations to the moral world, so that he is not criminally responsible for it, he does not commit suicide, or cause death by his own hand, within the meaning of such a policy, if he deliberately and willfully takes his own life. Breasted v. Farmers' Loan & Trust Company, 8 N. Y. 299, 59 Am. Dec. 482; Life Insurance Company v. Terry, 15 Wall. 580, 21 L. Ed. 236; Manhattan Life Insurance Company v. Broughton, 109 U. S. 121, 3 Sup. Ct. 99, 27 L. Ed. 878. The question is not precisely the same in these cases as in the case now before us. The question in such policies is, what did the parties mean by their language? And some courts have invoked the principle that the language should be interpreted most strongly against the insurer who used it. In the present case the question is, what is meant by the language of the statute in reference to a death that occurs a long time after the collision, from direct causes which come into existence and take form after the lapse of weeks or months, or possibly years, although they may be traced back to the collision as a first cause? In interpreting the present statute in reference to such facts, the question is not exactly whether the insane person who takes his life dies by his own hand or commits suicide. It is whether the act of volition—the willful, deliberate purpose to take his life, when put in execution—is to be treated as an independent, direct, and proximate cause of the death, notwithstanding that he was so far insane as to be unable fully to comprehend the moral quality of his act. In a condition such as is here supposed, the injury has caused mental disease which has weakened the forces that hold one in check and restrain him from acts of violence, and that enable him to appreciate the reasons for not interfering with the natural laws of his being. Very likely the disease also causes him extreme suffering, and deprives him of the pleasures of life, and thus exposes him to great temptation, from

which he would be free if in good health. In this weakened and wretched condition, lacking a sound mind to guide him morally, but still having powers which enable him to know what he thinks he wants to do and how to do it, by an act of volition he chooses to die, and thereupon takes his own life. It may be said that he is forced to the deed by his disordered faculties. Some contend that we are all slaves of destiny. Our subject brings us near to the vexed theological problem as to free will and predestination. Without attempting to pursue these inquiries too far, we are of opinion that the voluntary, willful act of suicide of an insane person, whose insanity was caused by a railroad accident, and who knows the purpose and the physical effect of his act, is such a new and independent agency as does not come within and complete a line of causation from the accident to the death.

Suppose, under such conditions, one of an aggressive and irritable disposition should take the life of another person, when, if his mind had not been weakened by the disease, he would have held himself in control; would it be said that the life of the other was lost by the collision on the railroad? Insanity is often a permanent condition of mind, lasting many years, and it calls for care, and often for restraint, of the insane person. Would suicide or the homicide of another person, resulting from such conditions, after the expiration of many years, be held to be caused by the collision, within the meaning of this statute, if the insanity was the effect of a collision?

We are of opinion that the principal reasons which induced the decisions in the first class of cases under insurance policies, to which we have referred, are still stronger to compel a decision that a defendant is not liable under this statute for a death such as we have supposed. Indeed, the Supreme Court of the United States, which holds that an insane person who takes his own life does not die by his own hand, within the meaning of the words in the insurance policies, has decided unanimously in Scheffer v. Railroad Company, 105 U. S. 249, 26 L. Ed. 1070, that the representative of a person who was injured in a railroad accident, and took his own life while insane, about eight months afterwards, could not recover under a statute like that now before us by showing that his insanity was caused by the accident. We are satisfied with the conclusions reached in Dean v. American Insurance Company and Cooper v. Massachusetts Mutual Life Insurance Company, ubi supra; and under this statute, involving different but similar considerations, we are of opinion that the liability of a defendant for a death by suicide exists only when the death is the result of an uncontrollable impulse, or is accomplished in delirium or frenzy caused by the collision, and without conscious volition to produce death, having knowledge of the physical nature and consequences of the act. An act of suicide resulting from a moderately intelligent

power of choice, even though the choice is determined by a disordered mind, should be deemed a new and independent, efficient cause of the death that immediately ensues. We are of opinion that the term "rational volition," used in the charge, was understood by the jury to mean volition attended by the powers of reason, to consider and judge of the act in all its relations—moral as well as physical—and that the charge was in this respect too favorable to the plaintiff.

The burden of proof was on the plaintiff to show that the death was caused by the collision. All the evidence tended to show that the deceased, with deliberate purpose, planned to take his own life; that he closed the door, and locked it, with a view to exclude others and prevent interruption; and that he then took the napkin, and used it effectively to strangle himself. All this points to an understanding of the physical nature and effect of his act, and to a willful and intelligent purpose to accomplish it. That he was insane, so as to be free from moral responsibility, is not enough to make the defendant liable. We are unable to discover any evidence that he was acting without volition, under an uncontrollable impulse, or that he did not understand the physical nature of his act. In the absence of any affirmative evidence for the plaintiff on this point, the jury should have been instructed to render a verdict for the defendant.

In the first case, the exceptions are overruled. In the second case, the exceptions are sustained. So ordered.

DEFRIEZE v. ILLINOIS CENT. R. CO.

(Supreme Court of Iowa, April 11, 1903.)

[94 N. W. Rep. 505.]

Private Crossings—Signals.*

There is no duty incumbent on a railroad company, either at common law or by statute, to give signals at private crossings.

Same—Signals for Public Crossings †

A person using a private crossing over a railroad in the vicinity of a public crossing has the right to rely on the giving of proper signals by the company's servants at the public crossing.

Same—Same—Proximate Cause—Question for Jury.

Whether the failure of railroad employees to give proper signals at a public crossing was the proximate cause of plaintiff's injury was a question for the jury.

Crossings—Care Required of Traveler.‡

One about to cross a railroad track is not required to keep a constant

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*See note appended to Louisville & N. R. Co. v. Bodine (Ky.), 19 Am. & Eng. R. Cas., N. S., 551.

†See monograph appended to Philadelphia & B. C. R. Co. v. Holden (Md.), 22 Am. & Eng. R. Cas., N. S., 192.

‡See foot-note appended to Boggero v. Southern Ry. Co. (S. Car.), 4 R. R. R. 376, 27 Am. & Eng. R. Cas., N. S., 376.

outlook for trains, but is obliged to use only such ordinary prudence as a reasonable man should exercise under like circumstances.

Same—Contributory Negligence—Question for Jury.

Whether plaintiff in an action for injuries received while crossing a railroad track at a private crossing was guilty of contributory negligence was, under the evidence, properly submitted to the jury.

Same—Same—Instructions.

In an action against a railroad company for injuries at a crossing, an instruction that, if the circumstances were such as to induce a reasonably prudent man to believe that he could use the crossing with safety "without precautions," their omission was not negligence, was erroneous.

Instructions—Error Not Cured.

In an action against a railroad company for injuries at a crossing, where an instruction given incorrectly stated the duty of plaintiff to use precautions, the error was not cured by other instructions stating the correct rule.

Same.

Where requested instructions, in so far as they embodied correct rules of law, were embodied in the charge as given, their refusal was not error.

Appeal from District Court, Hardin County; S. M. Weaver, Judge.

Action at law to recover damages for personal injuries received by plaintiff in a collision with a freight train on defendant's road at a private crossing on a farm belonging to plaintiff's wife. Trial to a jury. Verdict and judgment for plaintiff, and defendant appeals. Reversed.

John F. Duncombe, W. S. Kenyon, and J. H. Scales, for appellant.

C. M. Nagle and B. P. Birdsall, for appellee.

DEEMER, J. The alleged ground of negligence is defendant's failure to give the ordinary statutory signals for a public highway crossing 3,541 feet west of the place where plaintiff was injured. Defendant says the signals were given; that, if not given, the plaintiff had no right to recover, for the reason that such signals were not required for his benefit; and finally that, even if he may take advantage of such failure, the omission was not the proximate cause of the injury. As to the first point there is a decided conflict in the evidence, and the jury evidently settled that issue in plaintiff's favor. As to the second, there is no duty, either at common law or under our statutes, to give signals for private crossings. Whether or not one about to cross a private crossing may take advantage of the railway company's failure to give the statutory signals for a public crossing in the vicinity of the private one is a proposition on which the authorities are in conflict. We have never heretofore had the exact question, but in several cases a rule has been announced, which, followed to its logical conclusion, results in a holding that one at or near a private crossing may take advantage of the failure to give statutory signals for a public crossing. In Ward v. C., B. & Q. R. R., 97 Iowa, 50, 65 N. W. 999, we said: "The

bell signal is not only for the benefit of those who are on or about to cross the track, but for those who are lawfully using teams near the track." In Lonegren v. R. Co., 87 Iowa, 755, 49 N. W. 852, 56 Am. & Eng. R. Cas. 323, 53 N. W. 236, 17 L. R. A. 254, it was held that the signal enables all persons who may be exposed to danger by the approaching engine to escape it, and such persons may rely upon the discharge of the duty required by statute, as in all other cases, and act accordingly. In the opinion on rehearing in that case we quoted with approval the cases wherein it is held that one using a private crossing may rely on proper signals being given for a public crossing in proximity to the private one. That rule, it seems to us, is bottomed on principle, and sustained by the weight of authority. See Cahill v. R. Co. (Ky.) 18 S. W. 2, 49 Am. & Eng. R. Cas. 390; Sanborn v. Detroit Co., 91 Mich. 538, 52 N. W. 153, 16 L. R. A. 119; Wakefield v. R. Co., 37 Vt. 330, 86 Am. Dec. 711; C., B. & Q. R. Co. v. Metcalf, 44 Neb. 858, 63 N. W. 51, 28 L. R. A. 824. Whether or not failure to give the public crossing signals was the proximate cause of plaintiff's injury was a question for the jury, under proper instructions from the court. The instructions relating to this issue are not complained of, but it is said there was not sufficient evidence to take the case to the jury on this proposition. We cannot agree with learned counsel for defendant on this proposition. Ward v. R. R., supra, seems to settle this point.

2. Appellant argues that plaintiff not only failed to show his freedom from negligence contributing to his injury, but that he affirmatively established his own negligence proximately contributing to the result. This calls for an examination of the evidence, to discover whether or not, on the facts established, reasonable men might honestly differ as to the proper conclusion. On the day of the accident, plaintiff, with a daughter and a hired man, each of whom was in charge of a team and wagon, were engaged in gathering corn from a field north of defendant's right of way. The day was foggy, and a sort of mist was falling. In order to reach the place where the corn was being cribbed, they were obliged to cross the railway on the private crossing hitherto mentioned. On the day in question the three teams were in the cornfield, and at about the hour of 12 noon the parties started for the crib with their wagons filled, or partially filed, with corn. The daughter led the procession with her team, followed by the hired man with his, and after him the plaintiff. The daughter crossed the right of way in safety, but the hired man stopped on the north side thereof, and tied his horses about 90 feet from the railway tracks. Plaintiff drove up to where the team was tied, stood upon his load, and looked for a train. Not seeing or hearing one, he resumed his seat on the east side of his wagon, with his back toward the west, and, just as he was ready to cross the track, noticed the hired man com-

ing from the south with the team the daughter had driven. This man proceeded across the railway track, and plaintiff noticed as he passed over it that he was looking for a train. As soon as the hired man man had passed over the crossing, plaintiff, without again looking for himself, started to cross the track. In making the crossing, his wagon was struck by a freight train coming from the west, and plaintiff received the injuries of which he complains. From the time plaintiff stood up in the wagon until he attempted to cross the track, something like two minutes intervened, but in the interim the hired man had crossed the tracks in safety. From the time plaintiff started to drive from the field to the crossing, he listened for a signal at the public crossing to the west, on which he relied; and, hearing none, he proceeded to cross, under the circumstances detailed. The train was nearly 3 hours late, and was running at a high rate of speed for a freight train, to wit, about 30 miles an hour. About 600 feet west of the private crossing there is a cut varying in depth from 5 to 9 feet, and on the north side of the cut there was a high snow fence, extending for practically its entire length. The ground at the private crossing was considerably lower than the bottom of the cut to the west. East of the private crossing the view of the track was obstructed. At the west end of the cut of which we have spoken is a row of willows, which, running toward the north, obstructed the plaintiff's view; and the jury may have found that there was no point between the place where plaintiff looked and listened and the railroad track itself where plaintiff could have seen the train until it emerged from the cut, something like 600 feet away; but from that point to the crossing plaintiff could have seen the train, had he looked for it. On the right side of the wagon box in which plaintiff was riding were "throw boards," something like 4½ feet high; and, when plaintiff sat down after looking and listening, he could not, on account of these boards, see a train approaching him from the west. One hundred and sixty-two feet west of the private crossing there is a railway bridge 168 feet in length. The railway track from the private crossing to the first railway station west, something like 4½ miles, is practically straight. At the time the accident occurred the ground was rough and frozen. The wagon in which plaintiff was riding was but partially filled, but was in such condition that plaintiff could not safely stand up in it to drive across the track. Assuming, as we must, that the crossing signals were not given, and that plaintiff was relying thereon, we have to decide whether or not there was sufficient evidence to take the case to the jury on the issue of contributory negligence. It is practically conceded that from the place where plaintiff stopped before crossing the track, which was something like 90 feet from the railway tracks, he could have seen the train from the time it emerged from the cut to the west, or for a distance of something like

600 feet. But he was not required to keep a constant outlook for trains. The care required of him was that ordinary prudence which a reasonable man should exercise under like circumstances. But he had the right to rely on the crossing signals, as we have already seen; and as he swears that he listened for the signals from the time he started to go to the crib, and did not hear them, his conduct must be measured with reference to the defendant's duty. Of course, he could not drive blindly across the track without taking any precautions, but his actions must be measured by what reasonable men would and should do under like circumstances. Having looked for the train, and listened for the signals which should have been given, he had the right to rely on the fact that the statute requires such signals, and to govern himself accordingly. But for the fact that the hired man had, almost immediately before plaintiff proceeded to cross the track, passed in safety, and that this man was evidently looking for approaching trains, we should have much doubt on the question now under discussion. In view of this fact, and the other circumstances in the case, we are constrained to hold that the matter was for the jury, under proper instructions from the court. The case is in this respect quite like Funston v. C., R. I. & P. R. R., 61 Iowa, 460, 16 N. W. 518, 14 Am. & Eng. R. Cas. 640. See, also, cases cited in that opinion, and Winey v. C., M. & St. P. R. R., 92 Iowa, 622, 61 N. W. 209; Harper v. Barnard, 99 Iowa, 159, 68 N. W. 599; Moore v. St. P. & K. C. R. R., 102 Iowa, 595, 71 N. W. 569; Mackerall v. O. & St. L. R. R., 111 Iowa, 547, 82 N. W. 975, 19 Am. & Eng. R. Cas. 59. Regard must also be had of the fact that the view to the east was obstructed, and that plaintiff was required to look and listen for trains in that direction. It would be profitless to enter upon a discussion of all our previous cases. The rules are well settled, and the cases are made to turn upon an application of the facts to these established rules. Cases, therefore, are not of great help in settling these controversies. We think the case was properly submitted to the jury.

3. The seventh instruction given by the trial court reads as follows: "Seventh. The ordinary rule is that a person about to cross a railroad track must both look and listen for approaching trains, and, if the circumstances be such as to reasonably require it, he must stop before venturing upon the track, and satisfy himself, as an ordinarily prudent man, that the way is clear. But such rule is not universal, and if the situation of the crossing, and the circumstances surrounding the attempt to use it, be such that the traveler is justified, as a reasonable and prudent man, in believing he can use it with safety without precautions, then their omission is not negligence." We surmise that this instruction is not properly quoted, but appellee has made no attempt to correct it, and our surmise should not be allowed to prevail over the record.

The last sentence of the instruction is manifestly erroneous. We cannot imagine a case where one about to cross a railway track is not required to take precautions. If this were the rule, railway companies would practically become insurers against all accidents at crossings. The instruction, as it reads, holds to the rule that if one, as a reasonably prudent man, believes he can cross a railway track with safety without taking any precautions, his omission to do so is not negligence. This entirely nullified the rule that railway crossings are known places of danger, and practically justified the jury in inferring that a reasonably prudent man may, under certain circumstances, use such a crossing without taking any precaution whatever. This is manifestly erroneous doctrine. Appellee cites the Funston Case, supra, as approving the rule. But it does not do so, as a cursory examination will show. But it is argued that the error was cured in other instructions given by the court. It is true that in other parts of the charge the correct rule was given, but the trouble is that the instructions in this respect were contradictory, and the jury may have followed the seventh, and concluded that this was a case where plaintiff, as a reasonably prudent man, was justified in believing that he could cross the track without taking any precautions. A quotation from the ninth instruction, which it is claimed covered the error, will demonstrate the soundness of this conclusion. It is as follows: "If, as a reasonably prudent man, he ought, under the circumstances, to have stopped his team, or to have looked again to the westward, after entering upon the right of way, but failed to do so, and if by so stopping or looking he would have avoided injury, then he was guilty of contributory negligence." Had the word "precautions" been qualified by the comparative adjective "such," doubtless there would have been no error. But it was not, and herein lies the fundamental error. The necessary inference therefrom is that a reasonably prudent man may cross a railway track without taking any precautions.

4. A number of instructions were asked by defendant which were refused. In so far as they announced correct rules of law, they were embodied in the charge as given, and we find no error in denying the requests. But for the error pointed out, the judgment must be reversed.

WEAVER, J., taking no part.

PASSMAN v. WEST JERSEY & S. R. R.

(Court of Errors and Appeals of New Jersey, March 9, 1903.)

[54 Atl. Rep. 809.]

Crossings—Care Required of Traveler.*

A traveler on a highway, about to pass over a railroad track, must make reasonable use of his senses to ascertain if such crossing can be

*See generally, foot-note appended to Meeks v. Ohio River Ry. Co. (W. Va.), 5 R. R. R. 662, 28 Am. & Eng. R. Cas., N. S., 662.

safely made, before attempting it. If his failure to do so contributes to his injuries, he cannot recover damages therefor.

Same—Invitation to Cross—Divided Train.

The cutting of a train of cars on a side track, leaving some on one side and some on the other of a highway, where the view of the other tracks is partially obscured thereby, is not an invitation to the public to cross without using ordinary precaution to ascertain if such crossing can be safely made.

Same—Care Required of Bicyclist.†

A traveler on a bicycle is required to use the same care and prudence before passing over a railroad as is required of a pedestrian.

(Syllabus by the Court.)

Error to Circuit Court, Atlantic County.

Action by Laura H. Passman, administratrix of William Passman, deceased, against the West Jersey & Seashore Railroad. Judgment for defendant, and plaintiff brings error. Affirmed.

John W. Wescott, for plaintiff in error.

Joseph H. Gaskill and Nelson B. Gaskill, for defendant in error.

VOORHEES, J. It is necessary in the decision of this case to consider only the assignment of error directed to the instruction of the court to the jury to find a verdict for the defendant. The action was brought by the administratrix of William Passman to recover damages for his death, which was caused by one of the engines of the defendant company colliding with him as he was attempting to cross its tracks on Ohio avenue, in Atlantic City, on a bicycle. The testimony developed the fact that the deceased had for several months prior to the accident been employed by a lumber dealer whose office was less than 100 feet from the crossing, and that in the ordinary business of his employment, and in going to and coming from his home, which was in the southern part of the city, on the opposite side of the track from the place of his employment, he necessarily passed over this crossing several times a day, and was presumably acquainted with the times and manner of running trains thereover. The railroad and Ohio avenue cross each other at this point at nearly a right angle; the avenue extending north and south, and the railroad east and west. At the time of the accident the railroad had four tracks across the avenue. The two nearest the deceased's place of employment were sidings or tracks used for the shifting and storing of cars. The two furthest were the regular express or incoming and outgoing tracks. Just prior to the accident a train of empty cars had been drilled upon the siding tracks, and it was in evidence, although denied by some of the witnesses, that this train had been cut, leaving some cars to the east and some to the west of the avenue; thus permitting passage over the avenue for vehicles and pedestrians. A witness who was walking on the avenue in a southerly

†See foot-note appended to Law v. Lake Shore & M. S. R. Co. (Mich.), 15 Am. & Eng. R. Cas., N. S., 95.

direction, toward the crossing, saw the deceased just before the accident standing with his bicycle at the door of the office where he was employed, talking with some one. This witness proceeded on his way towards the crossing, and when between the empty cars, or on approaching the lower track, seeing the regular evening express of the defendant company coming at a high rate of speed on the southerly or incoming track, turned and shouted to the deceased to warn him of the danger, and then tried to "grab" him, and, if possible, prevent by force his proceeding in front of the train. In this he was unsuccessful. He says the deceased was almost upon him when he turned; was riding on his bicycle at a moderate rate of speed, and going directly in front of the train, by which he was struck and instantly killed.

It was contended by the counsel of the plaintiff that the empty cars left on the side track obstructed the view of the incoming train; that the cutting of this train of empty cars was an implied invitation to the public and to the plaintiff's intestate that the tracks could be crossed in safety; and also that none of the statutory signals were given by the defendant of the approach of its train, and therefore it was liable in damages for his death. No negligence, however, on the part of the railroad employees, would excuse the plaintiff's intestate from exercising reasonable and ordinary care in approaching this crossing, which was a place of obvious and known danger, so that his failure to observe such care would preclude the plaintiff's right of recovery. The cutting of the train was not an invitation to cross without exercising reasonable care. It was only for the purpose of furnishing an opportunity to those who might desire to cross while using the ordinary prudence required by the law under the circumstances apparent from the condition of the crossing. The absence of the statutory signals did not justify the deceased in assuming that it was safe for him to cross. He should have used reasonable care for his own preservation, and, failing therein, he cannot shift the sole responsibility upon the company. If by taking ordinary care he could have avoided the danger, his failure to do so negatives the plaintiff's right of recovery. One cannot recover for the breach of duty of another when he is lacking in ordinary prudence himself.

The respective rights of railroad companies and persons attempting to pass over their tracks at regular crossings are reciprocal. The company has the right of way. It must, however, give the statutory signals of the approach of its trains. A person about to cross a railroad track on a highway is presumed to know the danger, and, while he may reasonably expect to be warned by the prescribed signals of an approaching train, he cannot justify himself in risking the danger unless he has exercised the senses nature has given to protect him from harm; and he must exercise such faculties in the manner that an ordinarily prudent person would exercise them under similar circumstances. The greater the diffi-

culty of discovering the danger, as apparent from the surroundings, the greater is the care required; and, if the circumstances are such that one sense is rendered less reliable, the others must be used to a correspondingly greater extent. As early as 1854, in Moore v. Central R. Co., 24 N. J. Law, 268, Justice Potts, in speaking for the Supreme Court, said, "I am certainly of opinion that the plaintiff was bound to show that he used all ordinary care, all reasonable caution, to avoid the collision." This was a crossing case. The plaintiff was seriously injured. On the trial he did not prove any negligence on the part of the defendant, or the exercise of ordinary prudence on his own part. This case was before the Supreme Court on a rule to show cause, and was afterwards affirmed by this court, on a writ of error, in 24 N. J. Law, 824, wherein Justice Haines said the court intended to adopt the principle laid down by the Supreme Court. Negligence is a fault, and will not be presumed against either litigant in the absence of proof. Pennsylvania R. Co. v. Middleton, 57 N. J. Law, 154, 31 Atl. 616, 51 Am. St. Rep. 597. The proper caution to be exercised before attempting to pass over a railroad crossing has been clearly defined in this state by a large number of decisions. A few only are cited here: Haslan v. Morris & Essex R. Co., 33 N. J. Law, 147; Pennsylvania R. Co. v. Righter, 42 N. J. Law, 180; Central R. Co. v. Smalley, 61 N. J. Law, 277, 39 Atl. 695; Green v. Erie R. Co., 65 N. J. Law, 301, 47 Atl. 418.

The plaintiff's intestate in this case was riding on a bicycle —a vehicle propelled by his own power, over which he had personal control. The general rule to be applied requires a bicyclist, on approaching a railroad crossing, where the view of the track is in any way obscured, to dismount, or at least bring his wheel to such a stop as will enable him to look up and down the track and listen before attempting to cross; and, while his acts may vary in certain details, the law requires of him practically the same reasonable care as is required of a pedestrian. Robertson v. Pennsylvania R. Co., 7 Am. & Eng. R. R. Cas. (N. S.) 605.

The deceased was guilty of contributory negligence. There was no error in the order directing a verdict for the defendant, and the judgment thereon should be affirmed.

CHESAPEAKE & O. RY. CO. v. RIDDLE'S ADM'X.

(*Court of Appeals of Kentucky, Feb. 18, 1903.*)

[72 S. W. Rep. 22.]

Pleading.

Where defendant demurred to plaintiff's reply, it was proper to carry the demurrer back to the first paragraph of defendant's answer, and sustain the same as to it, if insufficient.

Action in Federal Court—Effect of Dismissal.

That plaintiff brought her action originally in the United States

court, and thereafter dismissed the same without prejudice, was no bar to an action subsequently brought by her for the same cause in the state court.

Pleading—Amendment.

Where a petition of an administratrix to recover for the death of her intestate alleged that he was a resident of the county in which the suit was brought at the time of his death, an application at the trial to file an amended answer denying intestate's residence, after the introduction of certain evidence raising a doubt as to intestate's residence in that county, was properly refused for lack of diligence.

Accident at Crossing—Reputation for Sobriety.

In an action against a railroad company for killing plaintiff's intestate at a crossing, evidence of intestate's general reputation for sobriety was inadmissible.

Same--Signals—Evidence.

Where a railroad track, at the point where plaintiff's intestate was killed, was used by two different companies, the admission of evidence that after the accident witness crossed the track at that place, and listened for a whistle or bell, and heard none, and did not perceive or hear the train until he was within 20 feet of the crossing, was prejudicial error.

Same—Degree of Care--Instructions.*

In an action for the killing of plaintiff's intestate at a railroad crossing, an instruction that the duty of both parties as to care was reciprocal,—it being defendant's duty to exercise such care as to signals, speed, and lookout as might be expected of ordinarily prudent persons operating a railroad under like circumstances, and the duty of plaintiff's intestate to use such care as might be expected of an ordinarily prudent person, situated as he was, to learn of the approach of a train,—and, if the crossing was especially dangerous, it was incumbent on both parties to exercise increased care, commensurate with the danger, was proper.

Appeal from circuit court, Woodford county.

"Not to be officially reported."

Action by Mary Riddle, administratrix of Clabe Riddle, against the Chesapeake & Ohio Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Wallace & Harris and Jno. T. Shelby, for appellant.
Burton Vance and S. E. Blackburn, for appellee.

BARKER, J. On the 24th day of February, 1899, Clabe Riddle, in company with Erasmus Breeden, while driving along the Frankfort & Lexington Turnpike Road in a buggy, at a point where the highway intersects with the track of the Louisville & Nashville Railroad Company, near Ducker's Station, in Woodford county, Ky., was run into, and instantly killed, by appellant's train of cars which was being operated over the Louisville & Nashville Railroad Company's track, at said point under a contract with the said Louisville & Nashville Railroad Company. Whereupon his mother, Mary Riddle, was appointed, by order of the Scott county court, administratrix of his estate, and, as such administratrix, instituted an action against appellant in the United States district court for the district of Kentucky for said injury, claiming damage in the sum of $10,000. Afterwards, by leave of

*See foot-note appended to Chicago, B. & Q. R. Co. v. Roberts (Neb.), 6 R. R. R. 277, 29 Am. & Eng. R. Cas., N. S., 277.

said United States district court, she dismissed said action without prejudice, and then instituted this action in the Woodford circuit court, to recover for said injury the sum of $2,000. Her petition sets out the facts of the killing of Clabe Riddle, and charges that his death was caused by the negligence of appellant's servants operating said train. Appellant's answer sets up as a defense, first, the institution by appellee of her action in the United States district court, as a bar to her right to prosecute this action in the state court; claiming, in substance, that, by reason of the institution of the action in the United States district court, it had obtained jurisdiction of the case, and the same could not be tried in the state court, for want of jurisdiction. Said answer also denies negligence upon the part of its agents and employees, and pleads that the death of appellee's intestate was the result of his contributory negligence. This was put in issue by the reply. Appellant filed a demurrer to appellee's reply. The demurrer was carried by the court back to the first paragraph of appellant's answer, which sets up the want of jurisdiction in the Woodford circuit court, by reason of the fact that the action had first been instituted in the United States district court for the district of Kentucky, as aforesaid, and said first paragraph was dismissed; and thus the issues were finally made up. Upon the trial of the case a verdict was rendered by the jury in favor of appellee in the sum of $2,000. Appellant's motion for a new trial having been overruled, the case is here on appeal for a review.

We think that the lower court did not err in carrying the demurrer back to the first paragraph of appellant's answer, and dismissing said paragraph. The case of Cox v. The East Tennessee, V. & G. Railroad Co., 68 Ga. 446, and Baltimore & Ohio Railroad Co. v. Fulton, 59 Ohio St. 575, 53 N. E. 265, 44 L. R. A. 520, established the doctrine that where an action is instituted in the state court, and is removed by the defendant to the United States court under the act of congress regulating such procedure, thereafter the plaintiff cannot deprive the defendant of his right to a trial in the United States court, either by dismissing without prejudice, or by so acting as to force the court to nonsuit him; but there is a wide distinction between that proposition and the one at bar. When the defendant exercises his right, under the act of congress, to remove the action against him to the United States court, he thereby, as said before, acquires a right to have the case tried by that court, and of this right it is not in the power of the plaintiff to deprive him. The defendant, having set in motion the law of removal, acquires vested rights, and confers upon the United States court a jurisdiction which cannot be devested by any act of the defendant. But no such reason exists where the plaintiff goes herself into the United States court with her cause of action. When she so goes, her standing there is precisely the same as it would have

been in the state court, had she first instituted her action therein; and there is no principle of law or procedure which requires that her standing, under these circumstances, should be different in the two courts. We think she clearly had the right to dismiss her action in the United States court without prejudice, by permission of the court; and, having done so, she was free to bring it in any other court she chose, which had jurisdiction.

Pending the trial in the Woodford circuit court, appellant offered to file an amended answer denying the residence of Clabe Riddle in Scott county, and denying the jurisdiction of the Scott county court to appoint appellee administratrix of the estate of her son. This motion was based upon certain answers which were made by appellee on the witness stand, conveying to appellant, for the first time, a doubt as to the residence of Clabe Riddle in Scott county. The motion to file this amended answer was overruled by the court, and we think properly. The trial of the case had begun, and the court very naturally concluded that the question of Clabe Riddle's residence was as open to investigation at the hands of appellant before the trial as any other fact set up in the petition as a basis of appellee's cause of action; and there was no more reason why it should accept as true the allegation that Clabe Riddle lived in Scott county than for it to accept as true any other allegation in the petition; and, if it was true that Clabe Riddle had not lived in Scott county, a little diligence on the part of appellant could have discovered it before the trial. That fact may have been more obscure than some other facts in the case, but it was open to investigation, none the less.

During the trial of the case, appellee was permitted to introduce evidence, over the objection of appellant, as to the general habits of her intestate for sobriety. On this point, Capt. James Blackburn was allowed to testify that he was a perfectly sober man, and that he had never seen him take a drink in his life. This evidence was introduced in anticipation of evidence subsequently introduced by appellant that, at the time he was killed, decedent had about him a strong odor of whisky, and that on the day before he was killed he had, in company with Erasmus Breeden, purchased three pints of whisky. We do not think it was competent for appellee to introduce any evidence tending to show the general reputation of her decedent for sobriety. This evidence would not meet or elucidate the question as to whether or not the decedent was sober at the time he was killed, as a man may generally keep sober, and yet at some particular time in his life be drunk or under the influence of whisky.

Mr. Robert B. Franklin was allowed to testify for appellee that, long after the accident in question, he had crossed the railroad track at the place where Clabe Riddle was killed; that he had listened for a railroad whistle or bell, and heard none,

and that he did not perceive or hear the train until he was within 20 feet of the crossing; that he could have heard the bell or whistle if one had been sounded or rung, but that he heard none. This evidence was clearly incompetent and prejudicial to appellant. In the first place, it would have been incompetent to have shown that the employees on one of appellant's trains had failed to do their duty in regard to giving warning of the approach of the train to the crossing in question at a subsequent time; but it was especially erroneous because of the fact that there are two different lines of railroad trains operated over the same right of way,—one belonging to appellant, and the other to the Louisville & Nashville Railroad Company; and there was no evidence that the train which Mr. Franklin saw pass was not that of the Louisville & Nashville Railroad Company, instead of appellant's. In the case of Hutcherson v. Louisville & Nashville Railroad Co., 52 S. W. 955, 15 Am. & Eng. R. Cas., N. S., 846, this court said: "The fact that those in charge of other trains approaching the crossing and failed to give signals would not be admissible as evidence conducing to show that those in charge of the train that is alleged to have caused plaintiff's injury failed to give the necessary signals of its approach." In the case of Eskridge's Ex'rs v. Cincinnati, N. O. & Tex. Pac. Ry. Co., 89 Ky. 372, 12 S. W. 581, 42 Am. & Eng. R. Cas. 176, this court said: "But whether a signal was given at the approach of a train to a station or crossing on any particular occasion is a question of fact that cannot be affected one way or another by showing the conduct of the subordinate officers or servants in charge of some other train or trains, who may or may not be mindful of their duty." And in the case of The Louisville & Nashville Railroad Co. v. Berry, 88 Ky. 225, 10 S. W. 473, 21 Am. St. Rep. 329, this court cited in approval the principle announced in Gahagan v. Railroad Co., 1 Allen, 187, 79 Am. Dec. 724, in the following language: "The issue presented was as to the negligence of the company in the use of the highway at the time the plaintiff's intestate received the injury for which recovery was asked. The plaintiff offered to prove the habit of the company at other times in the use of the highway, to show negligence, and the court held that it had no legitimate bearing on the issue, and was properly excluded."

Appellant complains of the instructions of the lower court, in that they failed to prescribe with sufficient clearness the duty of appellee's intestate as to the care he should exercise before crossing the railroad, and also that a different degree of care is required of appellant from that required of appellee's intestate. We are not sure that this contention is altogether sound, or that the instructions of the court, upon the whole, are unfavorable to appellant. We think the law upon this subject is laid down with great clearness and accuracy in the case of L. & N. R. R. Co. v. Cummins' Adm'r,

63 S. W. 594; and, as this case is to go back for trial, we make the following extract for the guidance of the court. Speaking of the instructions in the case cited, this court said: "They are also defective in not informing the jury that the duty of both parties as to care was reciprocal, and in imposing a different degree of care on the appellant from that imposed on the deceased. In using the railroad and the street crossing, both parties were required to exercise the same degree of care. It was incumbent on appellant to give such notice of the approach of the train to the crossing, to run the train at such speed, keep such lookout and use such care, to avoid injury to persons thereon, as might usually be expected of ordinarily prudent persons operating a railroad under like circumstances. It was incumbent on the intestate to use such care as might usually be expected of an ordinarily prudent person, situated as he was, to learn of the approach of the train, and keep out of its way. If the crossing was especially dangerous, it was incumbent on both parties to exercise increased care commensurate with the danger."

For the reasons herein given, the case is reversed for proceedings consistent with this opinion.

STONE v. BOSTON & M. R. R.

(*Supreme Court of New Hampshire, Belknap, June 30, 1903.*)

[55 Atl. Rep. 359.]

Accident at Crossing—Evidence.

In an action against a railroad for negligent death at a crossing, testimony of deceased's widow that "times had been hard" was not so prejudicial as to require a new trial, especially in view of the fact that the court immediately instructed the jury not to heed such testimony.

Same—Same.

In an action against a railroad for negligent death at a crossing, testimony of deceased's widow that in passing the crossing on previous occasions deceased had remarked upon its dangerous character, and taken precautions against collision, was competent on the issue of due care.

Same—Opinion as to Speed—Objections.

In an action against a railroad for negligent death at a crossing, an objection to testimony of a passenger on the train colliding with deceased that its speed "might have been 60 miles an hour," on the ground that witness was not qualified to give an opinion, goes merely to the weight and credibility of such testimony, and presents no question of law.

Same—Evidence as to Time of Accident—Watch of Deceased.

In an action against a railroad for negligent death at a crossing the watch in deceased's pocket, which was stopped, was competent, with other testimony, on the issues of darkness and whether the train which collided with deceased was running on schedule time.

Same—Signals—Negative Testimony.*

In an action against a railroad for negligent death at a crossing, the

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*As to the comparative weight of positive and negative testimony in regard to whether crossing signals were given, see foot-note appended to Jones v. Lehigh & N. E. R. Co. (Pa.), 2 R. R. R. 26, 25 Am. & Eng. R. Cas., N. S., 26.

testimony of passengers, who were not observing, that they did not hear the crossing whistle, was properly admitted.

Same—Speed.

In an action against a railroad for negligent death at a crossing, evidence as to the speed of the same train on other occasions before and since the accident, and as to observations on the strength of the reflection from the locomotive headlight a few days before the trial, was admissible.

Same—Signals—Evidence.

In an action against a railroad for negligent death at a crossing, evidence that defendant did not give the 80-rod whistle required by statute, and an admission by defendant that no warning whistle was given when deceased was discovered about 2 rods from the crossing apparently paying no attention to the approach of the train, was sufficient to justify a finding that death was caused by defendant's negligence.

Case at Bar.

In an action against a railroad for negligent death at a crossing, evidence examined, and *held* insufficient to show contributory negligence in law.

Exceptions from Superior Court.

Action by Edwin Stone, administrator of Fred Stone, deceased, against the Boston & Maine Railroad for injuries at a railroad crossing. Verdict for plaintiff, and defendant excepts. Transferred from the superior court. Affirmed.

The railroad curves toward the east as it approaches Winnisquam crossing from the north at a descending grade. From a point about 200 feet north of the crossing to a point about 750 feet north of it there is a bank on the easterly side of the track, which varies in height above the rails from 3½ feet at the former point to 25 feet at the latter. The highway approaches the railroad from the east at a descending grade. A person standing in the middle of the traveled part of the highway 25 feet east of the easterly rail can see a locomotive at a point 500 feet north of the crossing. From a point in the highway 12 feet east of the easterly rail, a locomotive is visible when 579 feet north of the crossing. The accident occurred about an hour after sunset. The sky was somewhat cloudy. The ground was frozen. The train which struck Stone was the south-bound Montreal express, known as "No. 184," and at the time of the accident was running a few minutes behind its schedule. The plaintiff's evidence tended to prove the following facts: Stone was 34 years old, in good health, and possessed all his faculties. For three weeks immediately preceding his death he had been employed as a farm laborer by Martha Bowers, of Sanbornton, for whom he had worked on a former occasion. He frequently drove to Laconia, and on each trip passed over the Winnisquam crossing. At the time of the accident he was driving a safe horse attached to a hayrack containing an empty barrel and a tin washboiler. As he drove upon the crossing from the east, he was struck by the locomotive, and received injuries which caused his death. A witness for the plaintiff testified that he was listening for the whistle, and that it was not sounded. The defendants' evidence tended to prove the following facts:

A traveling engineer of the defendants, who occupied the fireman's seat in the cab of the locomotive, first observed Stone when the team was about two rods from the crossing, and the train was about 300 feet from it. Stone was apparently looking straight ahead, and did not turn or seem to pay any attention to the train. The horse was trotting at a rate of about five miles an hour. In response to the question whether Stone could have then stopped and avoided the collision, the witness replied that he did not know. It was admitted that no danger signal was given after Stone was first observed from the locomotive. The defendants' evidence also tended to prove that the crossing whistle was regularly sounded, that the headlight was burning, that the speed of the train was about 40 miles an hour, and that all means were employed to stop the train after Stone was observed in dangerous proximity to the track. The widow of the decedent was asked on direct examination if "there had been hard times in Laconia." An exception was claimed, but before it could be fully stated the witness answered in the affirmative. The court thereupon excluded the question, and said to the jury: "It will make no difference to you whether the times are easy or otherwise." Subject to the defendants' exception, the decedent's widow was permitted to testify that she rode over the Winnisquam crossing with her husband in the autumn of 1901; that he then drove slowly, listened, and said that the crossing was dangerous; and that he made the same remark at the same place at other times. Martha Powers was permitted to give similar testimony in corroboration, subject to exception. Subject to exception on the ground that the witness was not qualified to give an opinion, George Plummer, who was a passenger on the day of the accident, and had traveled by the same train five or six times in three years, testified that the speed of the train "might have been sixty miles an hour." Subject to exception, a watch alleged to have been carried by the decedent at the time of the accident, was produced and shown to the jury for the purpose of showing the time at which it stopped. Three witnesses, who were passengers on the train, and who were not listening, testified that they did not hear a crossing whistle, subject to exception. Subject to the defendants' exception, Daniels, a witness called by the plaintiff, testified that many times before and since the death of Stone he had timed the speed of train No. 184 between stations a few miles south of Winnisquam crossing, and that a distance of three miles was frequently covered in 3¼ or 3 1-3 minutes. One witness testified, subject to exception, that a few days before the trial he made observations as to the speed of train No. 184, and computed it to be 50½ miles an hour. Another witness testified, subject to exception, that a few days before the trial he made observations of the reflections from the headlight of a train supposed to be No. 184, and that the light was not thrown upon the highway

at a point 30 feet distant from the crossing, nor upon any objects visible from that point. The defendants seasonably moved for a nonsuit, and that a verdict be directed in their favor. Both motions were denied, and they excepted.

Shannon & Young and Beckford & Hibbard, for plaintiff.
Jewett & Plummer and Streeter & Hollis, for defendant.

REMICK, J. 1. The question and answer regarding the condition of the "times" in Laconia were not "so inconsistent with legal fairness of trial as to make it a matter of law that there should be a new trial," especially in view of the immediate action of the court excluding the evidence and instructing the jury not to heed it. Aldrich v. Railroad, 67 N. H. 380, 382, 36 Atl. 252; Gilman v. Laconia, 71 N. H. 212, 51 Atl. 631.

2. Bearing upon the probability whether the decedent exercised care at the crossing upon the occasion in question, it was competent to show by the decedent's widow and Martha Bowers that in passing over the crossing upon previous occasions he had remarked upon its dangerous character, and taken precautions against collision. Evans v. Railroad, 66 N. H. 194, 21 Atl. 105; Lyman v. Railroad, 66 N. H. 200, 203, 204, 20 Atl. 976, 11 L. R. A. 364.

3. The objections to the testimony of George Plummer go entirely to its weight and credibility, and present no question of law.

4. Upon the questions of darkness, and whether the train was running on schedule time, the watch which was in the decedent's pocket when the collision occurred, and which was stopped, had some probative value, and was competent, in connection with the other testimony, upon those points.

5. The testimony of passengers who were not observing, that they did not hear the whistle, was open to no legal objection.

6. The observations of Daniels and others as to the speed of the train in question at other times and points presents no question of law, and the same is true of the testimony regarding the reflection of the locomotive headlight. Parkinson v. Railroad, 61 N. H. 416; Proctor v. Freezer Co., 70 N. E. 3, 45 Atl. 713; Whitcher v. Railroad, 70 N. H. 242, 248, 46 Atl. 740.

7. The motions for nonsuit and verdict were properly denied. There was evidence that the defendants did not give the 80-rod whistle required by statute for the protection of travelers at railroad crossings, and it was admitted that no warning whistle was given by the defendants when they discovered the decedent about 2 rods from the crossing, approaching the crossing, and apparently paying no attention to the approach of the train. Upon the case presented by the record, we think reasonable men might find that the decedent's injury was caused by the defendants' negligence.

But it is urged that the decedent was guilty of contribu-

tory negligence. In view of the evidence of the decedent's frequent recognition of the dangerous character of the crossing, and of his previous care in passing over it; that on the occasion in question he was traveling in a hayrack containing an empty barrel and tin wash boiler, over frozen ground, upon a night more or less dark; that the statutory whistle was not given; that the schedule time for the crossing of the train had passed; that the track was obscured by the lay of the land in the vicinity of the crossing so that the decedent could not see the train 300 feet away until he was within about 2 rods of the crossing; that his horse, attached to the rigging mentioned, was trotting at the rate of about five miles an hour when the two-rod point was reached—we think it cannot be said as matter of law that the decedent was guilty of contributory negligence, upon the mere evidence of the traveling engineer (the weight and credibility of which might be materially affected in the minds of the jury by the other evidence and circumstances bearing upon its probability), that he saw the decedent about 2 rods from the crossing, when the train was about 300 feet away, looking straight ahead, and apparently paying no attention to the approaching train, especially in view of the statement of the witness that he did not know whether the decedent would then have had time to stop and avoid the injury. The case is distinguishable from Waldron v. Railroad, 71 N. H. 362, 52 Atl. 443, and is more like Smith v. Railroad, 70 N. H. 53, 47 Atl. 290, 85 Am. St. Rep. 596; Davis v. Railroad, 68 N. H. 247, 248, 44 Atl. 388; Folsom v. Railroad, 68 N. H. 454, 38 Atl. 209; Evans v. Railroad, 66 N. H. 194, 21 Atl. 105; Lyman v. Railroad, 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364; and State v. Railroad, 52 N. H. 528.

Exceptions overruled. All concurred.

CLEVELAND, C., C. & ST. L. RY. CO. v. WISEHART.

(*Supreme Court of Indiana, June 26, 1903.*)

[67 N. E. Rep. 993.]

Watercourses—Obstruction.

Under Burns' Rev. St. 1901, § 5153, subd. 5, authorizing a railroad company to construct its road across any stream of water, "so as not to interfere with the free use of the same, which the route of its road shall intersect, in such a manner as to afford security for life and property, but the corporation shall restore such stream * * * to its former state or in a sufficient manner not to unnecessarily impair its usefulness," etc., a railroad company constructing its road across a stream so as to completely fill it up, and digging a ditch to carry off the water, is not liable, in the absence of willfulness or negligence, for damages arising from the water overflowing the adjoining land because in the construction of its embankment it permitted dirt to fall into the ditch and obstruct it so as to prevent the water from flowing therein.

Cleveland, etc., Ry. Co. *v.* Wisehart

Contributory Negligence—Pleading.*

A complaint in an action for the recovery for injuries to property caused by negligence must allege that plaintiff was not guilty of contributory negligence.

Appeal from Circuit Court, Henry County; Wm. O. Barnard, Judge.

Action by Sarah A. Wisehart against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Transferred from the Appellate Court under section 1337u, Burns' Rev. St. 1901.

Forkner & Forkner, for appellant.

W. A. Brown and F. C. Gause, for appellee.

JORDAN, J. Appellee successfully prosecuted this action against appellant railroad company for damages arising out of an alleged tort committed (1) by flowing water from a natural water course onto her lands; (2) in gathering surface water into a basin upon its right of way, and discharging such water onto her premises. The cause was submitted to the jury upon the second, third, and fourth paragraphs of the complaint. The record expressly discloses that the jury found in favor of appellee upon the third and fourth paragraphs. Alleged errors based on overruling the demurrer to each of the two latter paragraphs, and denying a motion for a new trial, are discussed and urged by counsel for appellant for a reversal of the judgment below.

The third paragraph of the complaint alleges the plaintiff's ownership of the lands described, and avers that the defendant is a railroad company and corporation owning and operating a railroad through Henry county, Ind.; that its right of way abuts on the north upon the lands of the appellee. The pleading then alleges as follows: "That there is and has been from time immemorial an ancient natural water course on and across the lands of the plaintiff herein described, in which said water course the water has flowed from a northeasterly direction on and across the lands of the plaintiff in a general southwesterly direction, and prior to the construction of the road and roadbed of the defendant said waters flowed in an ancient natural water course from off the lands of the plaintiff into and across the lands immediately adjoining upon the south, and thence southwesterly, as an ancient and natural water course to Blue river. That, at the time the defendant acquired title to the right of way, it constructed on and upon said right of way, along the south line of the plaintiff's said land, and adjacent thereto, a roadbed of earth and timbers, and so constructed the same as to completely fill up and obstruct said natural water course, and to completely cut off and prevent the water so flowing in said natural water course from off the lands of the plaintiff; and

*See foot-note appended to Haner *v.* Northern Pac. Ry. Co. (Idaho), 19 Am. & Eng. R. Cas., N. S., 628.

for the purpose of conducting the water so flowing in said water course from the point where said defendant so obstructed said water course westwardly to Blue river, a distance of about forty rods, it dug and constructed an open ditch and channel from said point of said obstruction to said river, and thereby diverted the water from its natural course at said point. That said ditch so constructed from said point of obstruction was at said time, and ever since has been, entirely inadequate to carry the water so flowing in said natural bed across the lands of the plaintiff from said point of obstruction to said Blue river. That at the time said defendant so constructed its said roadbed along, and adjacent thereto, the lands of the plaintiff as aforesaid, it constructed a large trestle bridge as a part of its said roadbed, about fifteen feet high and one hundred and fifty feet long, the east end of which adjoins up to a high earth embankment near the southwest corner of the lands of the plaintiff above described, which said trestle bridge extended from thence west one hundred and fifty feet, and over and across a public highway, and over and across said Blue river and the lowlands adjacent thereto. That afterwards, and prior to the time of the further grievances herein stated, the defendant built and constructed a large embankment where said bridge stood, and by that means and thereby caused the earth used in said construction to spread off of its right of way on the north side thereof, and fall into and fill up the ditch and water way which it had constructed from the point of said obstruction aforesaid, and has ever since permitted and allowed said water way to become, be, and remain obstructed so as to prevent the water from flowing therein to said Blue river. That said ditch and water way so constructed by said defendant from the point where it cut off and obstructed said natural water course by the obstruction of said embankment is partly cut and dug on the lands of the plaintiff, and on land adjoining on the west owned by persons other than defendant. That by reason of which the water so flowing in said natural water course across the lands of the plaintiff, thence into the ditch and water way so constructed by the defendant as aforesaid, the water backs upon the lands of the defendant, and stands in pools and stagnates in the summer time upon the lands of the plaintiff, and spreads out and overflows said lands so as to completely drown and destroy the crops of the plaintiff, and render said land wholly unfit for cultivation."

It is contended that this third paragraph of complaint is insufficient on demurrer, and several reasons are assigned, among which it is said that the act of which appellee complains is not shown by any direct averments of fact to be due to the negligence of appellant; the argument being advanced as follows: "The defendant, in doing what it did do, was in the lawful exercise of its corporate rights. It was especially authorized by statute to divert and fill up the stream, and the

right to dig side ditches and drain surface water off its right of way is a right inherent in all railroad companies—incident to the very act of constructing and maintaining the road. It is certainly elementary that no action can arise from the doing of a lawful act in a lawful manner, and unless it is done in an unlawful, wrongful, or negligent manner; and, wherever the act complained of is or may be in itself lawful, in order to constitute a good cause of action based thereon, the complaint must aver that the lawful act was unlawfully done, wrongfully, negligently, or carelessly. This the complaint in this case nowhere avers."

It will be observed that what is alleged in the first part of the pleading in question discloses that appellant, in the construction of its roadway at the time it acquired title to its right of way, obstructed a natural water course so as to completely cut off and prevent the water thereof from flowing onto the lands of the appellee, and, for the purpose of conducting said water to Blue river, it dug and constructed an open ditch or channel, and thereby, as alleged, it diverted the water from its natural course; that said ditch was entirely inadequate to carry the water from the point of obstruction to Blue river. These facts are apparently alleged as a matter of inducement or preliminary to the principal grievance of which appellee complains, viz , that, by constructing an embankment near where it had built a trestle bridge, it caused the dirt used in the construction of said embankment "to spread off its right of way," and to fall into and fill up the ditch or water way which it had constructed, and has ever since permitted the said artificial water way or ditch to be and remain obstructed, so as to prevent the water from flowing therein to Blue river, and that by reason thereof the water flowing into said ditch or water way backs upon the lands of the defendant, and stands in the summer time in stagnant pools upon the lands of the plaintiff, and spreads out and overflows the same so as to drown and destroy her crops and render said lands unfit for cultivation, etc. Counsel for appellee interpret the pleading as follows: "The act complained of is the filling up by this appellant of the natural water course, and failure to restore the same to its original condition, and this act is made unlawful by the statute above quoted." The statute referred to by counsel for appellee is the fifth subdivision of section 5153, Burns' Rev. St. 1901, under which a railroad corporation is empowered "to construct its road upon or across any stream of water, watercourse, road, highway, railroad or canal, so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream or watercourse, road or highway, thus intersected, to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchise." Undoubtedly a railroad

company, in the exercise of its rights under this statute in constructing its road upon or across any stream or water course, must do so in such a manner as not thereby to injure the property of other persons; and, after the crossing is made, it is required to restore such stream or water course to its former state, at least so far as it is necessary to preserve its use and franchise. The New York, etc., R. Co. v. The Hamlet, etc., Co., 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269. But the company, in building its road upon or across such stream or water course, is not to be considered or held an absolute insurer against all injury or damage to the property of others, but it is required to exercise proper care and skill under the circumstances in order to avoid injury or damage to the property of another; but beyond this it is not required to go. Bellinger v. New York, etc., R. Co., 23 N. Y. 42; Terre Haute, etc., R. Co. v. McKinley, 33 Ind. 274. If appellee, as her counsel apparently argue, is seeking redress for damages sustained by reason of appellant's neglect to properly restore the water course, which, as alleged, it had obstructed in the construction of its road, such theory is not clearly disclosed by the averments of the paragraph in question. The statute hereinbefore set out expressly authorized the railroad company to construct its road upon or across the stream or water course in controversy, subject to the conditions therein provided, and merely doing what the law authorized certainly affords appellee no cause of action. Appellant undoubtedly had the right to construct the trestle bridge and the embankment, as shown, on its own premises or right of way. These were necessary, as we may assume, to the successful operation of its road. Therefore, to render tortious the act of appellant in allowing or causing the dirt used in the construction of the said embankment to spread or fill up the ditch or water way as alleged, there should have been some averments or allegations to show that the act of filling up the ditch on its own lands, and thereby obstructing the flow of the water, was either willfully or negligently done, to the injury of appellee. Bellinger v. New York, etc., R. Co., 23 N. Y. 42; Wallace v. Columbia, etc., R. Co., 34 S. C. 62, 12 S. E. 815; Koch v. Delaware, etc., R. Co., 54 N. J. Law, 401, 24 Atl. 442; Pittsburg, etc., R. Co. v. Gilleland, 56 Pa. 445, 94 Am. Dec. 98; Terre Haute, etc., R. Co. v. McKinley, 33 Ind. 274; Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E. 874; Powers v. St. Louis, etc., R. Co., 71 Mo. App. 540; 3 Elliott on Railroads, §§ 937, 1005, 1057; 1 Chitty on Pleading, p. *403. The rule is well settled that, if a person does a lawful act on his own premises, he is not liable for damages resulting therefrom, unless the act was so done as to constitute actionable negligence. Wallace v. Columbia, etc., Co., supra, is a case, at least to an extent, very similar to the one at bar. The railroad company therein was charged with having obstructed and stopped the natural flow of a stream of

water by reason of constructing a dam on its right of way, and thereby causing the water to back upon and flood the lands of the plaintiff to his damage. It was held by the court that "in an action against a railroad company for damage done to plaintiff's land, through which a right of way had been given, caused by the obstruction by defendant of flowing streams, the complaint fails to state facts sufficient to constitute a cause of action where it does not allege any facts tending to show that the railroad company, in constructing its roadbed, wantonly or negligently or unskillfully obstructed these streams at their crossing." In Pittsburg, etc., R. Co. v. Gilleland, supra, the railroad company, in order to support its roadbed, which was built over a small stream of water, dug and constructed a culvert near plaintiff's premises. This culvert, as alleged in the declaration, was entirely insufficient and too small, in time of hard rains and floods, to serve as an outlet for the waters from the stream or water course. The defendant became the owner of the railroad and of the culvert, and continued to own and use the road with knowledge that the culvert which was constructed by its predecessor was too small to carry off the water; and, as a consequence of its being inadequate, the flow of the water from the stream or water course in time of hard rains was obstructed and backed upon the lands of the plaintiff, to his injury. It was charged in the declaration that it became the duty of the defendant to enlarge the culvert and provide a free passage for the waters. The pleading then alleged that the defendant neglected its duty in the premises, and neglected to enlarge the culvert, although notified to do so, and by reason of the negligence of the defendant in not enlarging the culvert, but in continuing to maintain it in its defective condition, the waters from the stream were backed onto the plaintiff's premises, destroying his property, etc. The court in that case said: "The entry of a company to build its railroad being lawful, it stands as if it were on its own ground, and the maxim applies, 'Sic utere tuo ut alienum non lædas.' It should so perform its act as not to carry over its injurious consequences beyond the hurt it may lawfully inflict. * * * The test of exemption from liability for injury arising from the use of one's own property is said to be the legitimate use or appropriation of the property in a reasonable, usual, and proper manner, without any unskillfulness, negligence, or malice. Carbars v. Auburn, 22 Barb. 297. The distinction is vital, says Thomas, J., in Rockwood v. Wilson, 11 Cush. 221, for nothing is better settled than that, if one do a lawful act upon his own premises, he cannot be held responsible for injurious consequences that may result from it, unless it was so done as to constitute actionable negligence. But lawful acts may be performed in such a manner—so carelessly, negligently, and with so little regard to the rights of others—that he who, in performing them, injures another, must be responsible for the damage." There is an entire absence in the paragraph in question of

any direct averments or statements of fact to show that the injury or grievance of which appellee complains was due either to the negligence or willfulness of appellant, and for this reason, if for no other, the pleading is insufficient on demurrer.

It is also further insisted that the paragraph is bad because it does not show that the plaintiff was without fault or negligence on her part. It is true that the rule in respect to contributory negligence has no application where the wrong is willfully committed, but, where a plaintiff seeks to recover for injury or damages to property by reason of the negligence of the defendant in the action, he is required to show in his complaint an absence of fault or negligence on his part. This rule extends and applies to actions where the negligent act or acts of the defendant consists in allowing water to flow over or upon the lands or premises of the plaintiff. City of Anderson v. Hervey, 67 Ind. 420; City of South Bend v. Paxon, 67 Ind. 228; City, etc., v. Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82.

The fourth paragraph attempts to proceed upon the theory that the defendant has gathered large quantities of surface water into a basin or receptacle upon its premises, and then negligently permitted such surface water to run onto the lands of the plaintiff, to the destruction of her crops, and causing other injury and damages. This paragraph is also insufficient, for the reason alone, if for no other, that it fails to aver or show that plaintiff was without fault or negligence on her part.

Other alleged errors are argued, but, as these may not necessarily arise again upon another trial, we pass them without consideration.

Judgment reversed and cause remanded, with instructions to the lower court to sustain the demurrer to the third and fourth paragraphs of the complaint, with leave to amend, and with permission generally to the parties, if they desire, to reform the issues.

STATE v. PETIT.

(*Supreme Court of Washington, June 27, 1903.*)

[72 Pac. Rep. 1021.]

Burglary—Breaking and Entering—Building—Flat Car.

An indictment for burglary, charging that defendant did break and enter a railroad car, to wit, a flat car loaded with wheat, in bags covered by a tarpaulin made of heavy canvas, which entirely inclosed the wheat, and was securely fastened to the car at the sides and ends, did not state an offense within 2 Ballinger's Ann. Codes & St. § 7104, declaring it burglary to break and enter a "railroad car."

Appeal from Superior Court, Kittitas County; Frank H. Rudkin, Judge.

J. C. Petit was indicted for burglary, and on a judgment sustaining a demurrer to the indictment the state appeals. Affirmed.

C. V. Warner, C. B. Graves, and Austin Mires, for appellant.

Pruyn & Slemmons, Govnor Teats, and E. W. Taylor, for respondent.

DUNBAR, J. The defendant was charged with burglary upon the following information: "The said J. C. Petit, on the 19th day of October, A. D. 1902, in the county of Kittitas, state of Washington, did then and there unlawfully break and enter in the nighttime a railroad car, to wit, a flat car used for carrying freight and merchandise, belonging to and property of the Northern Pacific Railway Company, said flat car being then and there loaded with wheat in bags or sacks, and said car and wheat upon it being entirely covered by a tarpaulin made of heavy canvas, and which tarpaulin entirely inclosed said wheat, and was securely fastened to said car at the sides and ends thereof so as to form a roof and sides and ends for the upper portion of said car, with the intent then and there to commit a misdemeanor therein." A demurrer was interposed to the information on the ground that the facts charged did not constitute a crime. The court sustained the demurrer to the information, and the cause was brought to this court for review.

The question is, is the car or the structure on wheels described in the information a railroad car, such as was within legislative contemplation in section 7104, 2 Ballinger's Ann. Codes & St., where burglary is defined as follows? "Every person who shall unlawfully enter in the night time, or shall unlawfully break and enter in the day time any dwelling house or outhouse thereto adjoining and occupied therewith, or any office, shop, store, warehouse, malt house, still house, mill, factory, bank, church, school house, railroad car, barn, stable, ship, steamboat, water craft or any building in which any goods, merchandise or valuable things are kept for use, sale or deposit within the body of any county with intent to commit a misdemeanor or felony, shall be deemed guilty of burglary," and the penalty is imprisonment in the penitentiary for any period not more than 14 years. It is conceded that the car described in the information is the ordinary flat car which is used by railroad companies for the transportation of wheat. These cars are matters of common observation to people who have occasion to observe the freighting interest of the country by rail, the tarpaulin or cover being evidently not for the purpose of forming part of an inclosed structure, but principally to protect the grain from the inclemency of the weather, and possibly to assist in a measure in keeping the sacks on the car from shifting their places. These cars, it seems to us, do not come within the definition given by the statute, which evidently had relation to box cars, or some kind of a car that is inclosed so that an entry can be made. Under the ordinary understanding of the words "break and enter" it is difficult to see how a person could break and enter a flat

car loaded with wheat upon which a canvas is laid. The authorities cited by the appellant, it does not seem to us, are at all in point.

It is the contention of the appellant that the statutes of various states of the Union enlarge or modify the common-law definition of burglary until by codific evolution the species has been entirely lost, and that we have positive enactments which say certain acts are burglary, the word "burglary" being employed simply to give it a heinous character. The common-law definition of burglary is breaking and entering the dwelling house of another in the nighttime with intent to commit a felony. It is not true, we think, that by codific evolution the species has been entirely lost. While there has been an enlargement of the definition, the central idea which has obtained for hundreds of years, viz., the unlawful breaking and entering of some kind of an inclosed structure, has been retained, the statute finally dropping the element of breaking when the structure was unlawfully entered in the nighttime; and we do not think that it was the legislative intent to confuse the crimes of burglary and larceny, or substitute one definition for the other. It is no doubt true that the Legislature has the power to denominate any kind of larceny, or, for that matter, any other crime, burglary; but in legislating on crimes the definitions of which have been so well and commonly understood as the crimes of burglary and larceny, the substitution will not be presumed unless the intention is manifest—as it is not in this case.

The demurrer was properly sustained, and the judgment is affirmed.

FULLERTON, C. J., and ANDERS, HADLEY, and MOUNT, JJ., concur.

BONNER v. RIO GRANDE S. R. CO.

(Supreme Court of Colorado, June 1, 1903.)

[72 Pac. Rep. 1065.]

Public Lands—Railroad Companies—Right of Way—Mining Claim—Abandonment—Relocation.

Act March 3, 1875, § 1, 18 Stat. 482, c. 152 [U. S. Comp. St. 1901, p. 1568], grants a right of way through public lands to any railroad company which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, etc. Section 4 (18 Stat. 483, [U. S. Comp. St. 1901, p. 1569]) declares that any railroad company desiring to secure the benefits of the act shall, within 12 months after the location of 20 miles of its road, file with the register of the land office a profile of its road, etc. A railroad filed a plat in the land office, which was approved by the Secretary of the Interior, and thereafter the road was constructed; a part of it passing through a mining claim, from the locators of which the railroad company accepted a deed for a right of way. Subsequently the mining claim was abandoned, and afterwards relocated: *held* that, on abandonment of the claim, it became public land, to which the right of way of the railroad company attached, so that the relocation was subject to the easement of the railroad company.

Appeal from District Court, San Miguel County.

Action by the Rio Grande Southern Railroad Company against Levi Bonner. From a judgment for plaintiff, defendant appeals. Affirmed.

R. H. Wilson, for appellant.
Wolcott, Vaile & Waterman, for appellee.

STEELE, J. This is an action in ejectment, brought by the Rio Grande Southern Railroad Company to sustain its adverse filed in the United States land office against the application of Levi Bonner for patent to the Loopton lode-mining claim. The company claims a right of way 100 feet in width on each side of the center line of its track across the territory claimed by the appellant under his location. In support of its claim the company introduced a plat of the route of the road filed in the land office in March, 1891, which was approved by the Secretary of the Interior September 4, 1891. Witnesses testified that the center line of the road was run in the summer, that the work of construction was begun in July, and that the road was constructed across the territory in controversy in the fall of 1890. The claim of the appellant is that on the 4th of July, 1892, he was, and still is, the owner of the Loopton lode-mining claim, and that he is entitled to the possession thereof by virtue of a full compliance with the laws of the United States and of the state of Colorado. Defendant introduced in evidence the location certificate of the Loopton lode, dated July 4, 1892, and recorded July 18, 1892, and the amended location certificate, dated May 16, 1900, and recorded May 21, 1900. The defendant offered to prove that the Happy Home placer was located in the year 1890, that the land in controversy was within the boundaries of the Happy Home, that the Happy Home was abandoned in the year 1891, and that a deed for a right of way 40 feet in width had been accepted from the locators of the Happy Home by the railroad company. The offer was refused. At the close of the testimony the court instructed the jury to return a verdict in favor of the company, and the defendant appealed.

The judgment should be affirmed. It was held by this court in D. & R. G. R. R. v. Hanoum, 19 Colo. 162, 34 Pac. 838, that the right of way privileges conferred by the act of Congress of March 3, 1875, 18 Stat. 482, c. 152 [U. S. Comp. St. 1901, p. 1568], attached when the line of road is definitely fixed, either by actual construction or the filing of a map showing its definite location. In the opinion the sections of the act of congress applicable are set out in full, and the ruling of the Secretary of the Interior is quoted with approval to the point that the right of way privileges do not attach upon the filing of the articles of incorporation with the Secretary of the Interior, but upon the filing of the map of definite location as prescribed by the fourth section of the act. Dakota Central R. R. Co. v. Downey, 8 Land Dec. 115. In a later case this ruling of the Secretary of the

Interior has been modified, and in 21 Land Dec. 250, the Secretary holds that: "Whenever a railroad company, duly organized under the laws of any state or territory or by an act of Congress of the United States, shall file with the Secretary of the Interior a copy of its articles of incorporation and due proofs thereunder, it acquires, by virtue of the act of March 3, 1875, a present grant of the right of way through the public lands of the United States upon the line of roads indicated by its charter. * * * The filing of the map of location within the time prescribed by the act fixes the right of the road as to all lands which shall be traversed by it. and after the road is so located all lands upon the line thereof, to which no claim or right had attached at the date of the filing of articles of incorporation and due proofs of organization thereunder with the Secretary of the Interior, were subject to such right of way." Although there has been a modification of the ruling of the Secretary of the Interior, the new ruling does not strengthen the case of the plaintiff in error. By the late decision the right of the company attaches when the articles of incorporation are filed, if there is contained in the papers a description of the line of the road. The record does not show whether the land in question was surveyed at the time the center line of the road was run, and is silent as to when the articles of incorporation were filed with the Secretary of the Interior. In the case cited from 19 Colo. 162, 34 Pac. 838, it appeared that the railroad company constructed its road through the Indian reservation, and filed its maps of definite location before the land was restored to the public domain; that the appellee Hanoum settled, in the fall of 1881, on a quarter section of land within the reservation, and through which the railroad company had, prior to that time, surveyed its line of road; and in July, 1884, he filed his declaratory statement. In September, 1885, he made final proof and payment for the land, and patent issued to him in 1889. The land was restored to the public domain July 25, 1882. The question for consideration was: "Does the patent give the plaintiff an absolute title to the whole quarter section, unincumbered by any servitude or easement, or is the land subject to the right of way claimed by defendant for its railroad?" It was held that Hanoum took the land subject to the easement of the railroad company. Notwithstanding the fact that the land was not public land at the time Hanoum made his settlement, and at the time the railroad company built its road and filed its map, the government approved the map of the company and accepted Hanoum's entry.

No proof was introduced showing when the Happy Home was located. The offer of proof was that the Happy Home was located during the year 1890, and that it was located prior to the time the road was built. It is conceded that the road was built and in operation at the time of the location of the Loopton, and we are of opinion that the locator took the

land subject to the right of way. It is also conceded that the Happy Home was abandoned in the year 1891. The land then became public domain and was subject to entry. The right of the company is that of an easement onlv, and when the locators of the Happy Home abandoned the property the company was not required to refile its map to acquire the right of way. The company, we think, took an easement, not only over the land which was unappropriated at the time its right attached, but across the land which was restored to the public domain after the filing of its map of definite location; and when the locators of the Happy Home abandoned their claim the right of the company attached. It has been held by the Supreme Court of the United States that lands within the limits of a railroad grant, to which a claim has been initiated in the proper land office at the time of the filing of the map of the definite location of the road, do not pass with the grant to the railroad company upon abandonment, but are open to entry under the land laws to the first applicant; but in these cases the statute granting subsidy lands was construed as expressly excluding from the operation of the grant land to which a claim bad been initiated in the land office. The act of Congress under consideration will not, we think, bear such construction.

Our judgment, therefore, is that, upon the abandonment of the Happy Home placer location in the year 1891, the land embraced therein became public land, and, as such, burdened with the right of way of the railroad company as shown by the map of definite location filed in March, and approved by the Secretary of the Interior in September, 1891, and that the location of the Loopton lode in July, 1892, was subject to the easement of the railroad company. The judgment is therefore affirmed.

Affirmed.

DOUGHERTY v. YAZOO & M. V. R. CO. *et al.*

(Circuit Court of Appeals, Fifth Circuit, March 31, 1903.)

[122 Fed. Rep. 205.]

Removal of Causes—Diverse Citizenship—Joint Defendants—Jurisdiction—Defenses.

Where a complaint in an action by a carrier alleges a joint cause of action against two defendants, one of whom was of the same citizenship as plaintiff, whether separate defenses alleged by such defendants will defeat plaintiff's cause of action, as alleged, is a question involving the merits of the action, and cannot be considered in determining whether the cause was removable to the federal court.

Same—Complaint—Construction—Joint Tort.

Plaintiff alleged that defendant railroad company and defendant palace car company were engaged in running a passenger train, on which plaintiff was accepted as a passenger; that the palace car was operated and controlled jointly by both defendants, and that the servants of the car company were also the servants of the railroad company; and that these servants so operated the train and palace car in which plaintiff was riding, that, by the violent movement of the cars,

and the negligence of the employees of the defendant in putting plaintiff in a place of danger, he was thrown from the train and injured: *held*, that the complaint alleged a joint cause of action against both defendants, and hence the palace car company was not entitled to remove the cause to the federal courts, where the railroad company was a citizen of the state where the action was brought.

In Error to the Circuit Court of the United States for the Southern District of Mississippi.

This action was brought by John C. Dougherty, the plaintiff in error, in the state circuit court of Jefferson county, Miss., against the Yazoo & Mississippi Valley Railroad Company and the Pullman Palace Car Company, jointly, for personal injuries sustained by him by being thrown from a rapidly moving train of the defendant railroad company, through the alleged joint negligence of the defendants and their servants. In due time the Pullman Company presented its petition to the state court for removal of the suit to the United States Circuit Court, alleging that "this is a suit wherein the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and in which there is a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid; that this is a suit in which there is a controversy which is wholly between citizens of different states, and which can be fully determined as between them, and petitioner is one of the defendants actually interested in said controversy." Thereupon the suit was removed to the Circuit Court. The plaintiff moved to remand on the grounds, first, that the suit was not removable to the Circuit Court; second, that this suit, embracing the same cause of action, was first instituted by the plaintiff against the defendants in the Circuit Court of the United States for the Eastern District of Louisiana, and was dismissed by that court for the want of jurisdiction, based upon citizenship, on the motion of the defendant Pullman Palace Car Company, on the —— day of ——, 1899. This motion, having been duly heard, was refused by the Circuit Court. The learned judge who sat in the Circuit Court, in passing on this motion, announced the following views:

"Whenever it appears on the petition and from all the pleadings that the controversy is wholly between citizens of different states, as it does here, one of several defendants, being actually interested therein, a nonresident, and a 'citizen' of another state, may remove it to a federal court, irrespective of whether the suit involved separate controversies, or only one. See Hunter v. Conrad et al. (C. C.) 85 Fed. 803. In Garner v. Second National Bank of Providence et al. (C. C.) 66 Fed. 309, it is held that, 'where an action is brought in a state court by a citizen of one state, any one of such defendants, without the others, may remove the cause to a federal court, though it contains but a single controversy.' In Boston Safe Deposit & Trust Company v.

Mackay et al. (C. C.) 70 Fed. 801, it is held that where a citizen of one state commences an action in the state court of another state against three persons, two of whom are citizens of the state where the suit is brought, and one of whom is a citizen of a third state, such citizen of the third state may remove the case to the federal court. The Pullman Palace Car Company, a citizen of Illinois, sued by a citizen of Tennessee in a United States court of Louisiana, had a right to plead to the jurisdiction of that court, and move to dismiss the suit for want of jurisdiction, and demand that it be sued in a federal court in its own district of Illinois. But the plaintiff sues in a state court, and unquestionably the defendant, on showing that it is a citizen of the state of Illinois, and the plaintiff a citizen of the state of Tennessee, and its codefendant a citizen of Mississippi, and the amount in controversy exceeding, exclusive of interest and costs, the sum of two thousand dollars, and filing a bond as required by law, is entitled to be heard in the Circuit Court of the United States for the Southern District of Mississippi, notwithstanding its motion to dismiss in the United States Circuit Court for the Eastern District of Louisiana. The motion to remand must be denied."

The Circuit Court having thus retained the case, such proceedings were thereinafter had as resulted in a verdict and judgment for the defendants, to review and reverse which the plaintiff sued out this writ of error.

L. W. Magruder and J. C. Bryson, for plaintiff in error.

Edward Mayes, J. B. Harris, and Thomas A. McWillie, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge (after stating the facts as above). The first error assigned is the overruling and denying plaintiff's motion to remand this suit. Counsel for the Pullman Company urge that the jurisdiction of the Circuit Court in this case can be safely rested on the diversity of citizenship alone, and that the petition for removal need not have contained the additional averment that there was a separable controversy. In reference, however, to the averment of a separable controversy in the suit, they urge that the sufficiency of the roadbed and the proper handling of the train are matters of defense with which the Pullman Company has no concern, and, moreover, that, not being a common carrier, it is under no duty to exercise the same high degree of care required of the railroad company; that the complaint involves quite different lines of defense on the part of the two defendants.

As to these contentions:

Counsel for the plaintiff in error relies with well-placed confidence on the cases of Chicago, Rock Island & Pacific

Railway Company v. Martin, 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055, and Chesapeake & Ohio Railway Company v. Dixon, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121. In the first of these cases it appears that Lissa Martin, as administratrix of William Martin, deceased, brought her action for damages against the Chicago, Rock Island & Pacific Railway Company, and against Clark and others, receivers of the Union Pacific Railway Company, in the state court in Kansas. The receivers presented their petition and bond, praying for removal of the cause to the United States Circuit Court on the ground that the case arose under the Constitution and laws of the United States. Their application was overruled. The case was tried. Judgment was rendered in favor of the plaintiff against all of the defendants. This judgment was affirmed on writ of error by the Supreme Court of Kansas. 59 Kan. 437, 53 Pac. 461. The refusal of the state court to remove the cause to the Circuit Court on the application of the receivers was relied on as error throughout the proceedings; and the Supreme Court of Kansas held that the application for removal was properly denied, because all of the defendants were charged with jointly causing the death of plaintiff's intestate, and all did not join in the petition for removal. The case was brought by writ of error to the United States Supreme Court. In delivering the opinion of that court, the Chief Justice, after reciting the language of the act of August 13, 1888, 25 Stat. 433, c. 866 [U. S. Comp. St. 1901, p. 509], bearing upon the subject, says:

"It thus appears on the face of the statute that if a suit arises under the Constitution or laws of the United States, or if it is a suit between citizens of different states, the defendant, if there be but one, may remove, or the defendants, if there be more than one; but where the suit is between citizens of different states, and there is a separable controversy, then either one or more of the defendants may remove.

"Under the first clause of section 2 of the act of 1875 (18 Stat. 470, c. 137), which applied to 'either party,' but in its re-enactment in the second clause of section 2 of the act of 1887 [24 Stat. 552, c. 373], above quoted, is confined to the defendant or defendants, it was well settled that a removal could not be effected unless all the parties on the same side of the controversy united in the petition; and so as to the second clause of the second section of the act of 1875, which corresponds with the third clause of the second section of the act of 1887, it was held that that clause only applied where there were two or more controversies in the same suit, one of which was wholly between citizens of different states. Hanrick v. Hanrick, 153 U. S. 192 [14 Sup. Ct. 835, 38 L. Ed. 685], and cases cited; Torrence v. Shedd, 144 U. S. 527 [12 Sup. Ct. 726, 36 L. Ed. 528], and cases cited. In the latter case Justice Gray

said: 'As this court has repeatedly affirmed, not only in cases of joint contracts, but in actions for torts, which might have been brought against all or against any one of the defendants, separate answers by the several defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'"

In the concluding paragraph of the opinion, the Chief Justice says:

"Whatever the rights of the receivers to remove the cause if they had been sued alone, the controversy was not a separable controversy, within the intent and meaning of the act. This being so, the case came solely within the first clause of the section, and we are of the opinion that it was not intended by Congress that under such circumstances there should be any difference between the rule applied under the first and the second clauses of section 2 of the act of 1887–88."

In the case before us, does a separable controversy appear on the face of the plaintiff's declaration? In the case of Chesapeake & Ohio Railway Company v. Dixon, supra, the action was by the administratrix of the deceased to recover damages against the railway company and against the engineer and fireman who were handling the train at the time the intestate was killed. It was alleged in the petition that the engineer and fireman of the train were guilty of the negligence causing the death, and that the corporate defendant, through its employees, was also guilty of that negligence, and therefore they were jointly liable for the destruction of the life of the deceased, caused thereby. The plaintiff was a citizen of Kentucky. The engineer and fireman were also citizens of Kentucky. The railway company was a citizen of Virginia. It filed its petition for the removal of the cause to the Circuit Court of the United States for the District of Kentucky, and tendered therewith a bond as required by law. The ground on which the removal was asked was that there is in the suit a controversy which is wholly between citizens of different states, and which can be fully determined as between them, to wit, a controversy between the petitioner and the plaintiff, who are citizens of different states; stating the controversy to be whether the petitioner is liable to the plaintiff for damages on account of the death of the intestate, and alleged to have been caused by the negligence of certain of its servants, therein named, and made defendants thereto, and other of its servants, then and there in its employment,

and who are not named; it being claimed by the plaintiff that because thereof the petitioner is liable in damages to her, and that the petitioner and the plaintiff are both actually interested in that controversy. The petition further avers that the engineer and fireman are neither necessary nor proper parties defendant to the cause, and that they were made parties defendant for the sole purpose to prevent a removal by petitioner of the cause to the Circuit Court of the United States for the District of Kentucky, and thereby unlawfully to deprive petitioner of the right conferred upon it by the Constitution and laws of the United States. The state trial court adjudged the bond sufficient, but overruled the application. A trial on the merits was had, resulting in a verdict and judgment in favor of the plaintiff, which judgment was affirmed on appeal by the Court of Appeals—the court of last resort in the state of Kentucky. 47 S. W. 615. To review this judgment of the Court of Appeals, the case was carried on writ of error to the United States Supreme Court. In the opinion of that court it is said that if the liability of the defendants, as set forth in the pleadings of the plaintiff, was joint, and the cause of action entire, then the controversy was not separable, as a matter of law. The railway company contended that the averment that the negligence complained of was the joint negligence of all of the defendants merely stated the conclusion of law that the company and its employees were jointly liable in the action for the injury inflicted through the negligence of the latter in the course and within the scope of their employment. This conclusion it denied, on the ground that the liability of the company, as alleged, rested on a wholly different basis from that of the liability of its servants. After considering briefly this contention, and citing the case of Warax v. Cincinnati, N. O. & T. P. Railway Company (C. C.) 72 Fed. 637, 3 Am. & Eng. R. Cas., N. S., 650, and the text of Mr. Pollock in his work on Torts (Am. Ed.) 89, 90, and the language of Lord Brougham in Duncan v. Findlater, 6 Clark & Fin. 894, 910, and of Lord Cranworth in Bartonshill Coal Company v. Reid, 3 Macq. H. L. Cas. 266, 283, and of Chief Justice Shaw, in Farwell v. Boston & Worcester Railroad Company, 4 Metc. (Mass.) 49, 38 Am. Dec. 339, the Chief Justice used this language:

"Whatever its sources, or the principles on which it rests, the rule itself is firmly established; and many courts have held the identification of master and servant to be so complete that the liability of both may be enforced in the same action, although other courts have reached the opposite conclusion. As remarked by Mr. Justice Gray, then Chief Justice of Massachusetts, in Mulchey v. Methodist Religious Society, 125 Mass. 487, the question is a somewhat nice one, the determination of which by the highest court of Kentucky we are not called upon to revise, as the disposition of this case turns on other considerations. In respect tc the removal of

actions of tort on the ground of separable controversy, certain matters must be regarded as not open to dispute."

Citing Powers v. Chesapeake & Ohio Railway Company, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673. In this case it is declared to be—

"Settled that an action of tort which might have been brought against many persons, or against any one or more of them, and which is brought in a state court against all jointly, contains no separable controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers, and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one. * * * The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings. [Citing numerous cases.] In Railroad Company v. Wangelin [132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 473] it was said to be equally well settled that in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court."

In the Dixon Case the plaintiff did not set forth the specific acts of negligence of which she complained. The allegation was general—that the negligence of the corporate defendant was done by and through its said servants, and other of its servants then and there in its employment, and said negligence was the joint negligence of all the defendants. It was not material that the charge of negligence was not more specific.

"The negligence [of the corporate defendant] may have consisted in that the train was run at too great speed, and in that proper signals of its approach were not given; and if the speed was permitted by the company's rules, or not forbidden, though dangerous, the negligence in that particular and in the omission of signals would be concurrent. Other grounds of concurring negligence may be imagined, and, where concurrent negligence is charged, the controversy is not separable."

When the pleadings of the plaintiff in a suit present such a state of parties and such a cause of action as make a case which may be removed from the state court to the Circuit Court under one or more of the first three clauses of the second section of the act of August 13, 1888, 25 Stat. 433, c. 866 [U. S. Comp. St. 1901, p. 509], and a petition for removal is duly made by the party entitled to remove, and proper bond is

tendered, it becomes the duty of the state court, whose jurisdiction is thereby ousted, to order the removal. And its refusal to do so is error, and ground for reversal of its judgment by the court of last resort in the state, or, in case that court affirms the action of the trial court, the case may be reviewed on writ of error by the Supreme Court, and will be reversed. On the other hand, when the state court orders the removal of a case which it should retain, because, under the provision of the act applicable to the petition for removal, the case is not one which should be removed, then, on a motion to remand, duly made, or without a motion, if essential jurisdiction is involved, it is the duty of the Circuit Court to remand the cause; and its refusal to do so in such cases is error requiring the reversal of its judgment. The plaintiff's pleadings in this case aver, in substance, that both of the defendant corporations were engaged in running a passenger train of cars from New Orleans to Vicksburg, Miss.; that there was attached to this train a car commonly called a "Pullman car," which belonged to the Pullman Company; that this car was operated and controlled jointly by the Pullman Company and the defendant railroad company; that the officers, agents, and servants under whose management and control the Pullman car was operated were the officers, agents, and servants both of the Pullman Company and of the Yazoo & Mississippi Valley Railroad Company; that these officers and employees of the defendants so handled the train and the plaintiff, who was a passenger thereon, and under their direction and subject to their control, that he was, by the violent movement of the cars, and the negligence of the employees of the defendants in putting him in a place of danger, thrown therefrom, and thereby was greatly bruised and hurt, for which he claims damages; that he had secured the right to be transported to Vicksburg, and to occupy a seat in the sleeping car as far as Harriston, at which point the train was due to stop at 10:50 p. m., when the plaintiff was to be notified to go forward into the ordinary coach for a seat; that the train did stop at Harriston, but plaintiff, who was asleep, was not notified that the train had reached that point until after it had moved on, and was running at a dangerous rate of speed over, a defective and crooked track, when the plaintiff was aroused from sleep, and, while yet in a somnolent and semiconscious condition, was escorted at this midnight hour out of the sleeping car, and towards the coach in which he now had a right to a seat; that by this negligence of those who were the servants of both of the defendants, and by the direct negligence of the defendant railway company in using a defective track, and in requiring or permitting the driving of its train over this defective track at a dangerous rate of speed, plaintiff received the injuries, to recover damages for which this suit is brought. Whether the allegations as to the relation of the employees to the respective defendants, and as to the conduct of these employees, shall or

shall not ultimately be sustained by competent proof, and whether either defendant may be able to maintain such a defense as will exempt it without exempting the other, or whether each of the defendants may have and may be able to maintain such a defense as will, either in whole or in part, defeat the recovery which the plaintiff seeks, present questions on the merits, not affecting the question of jurisdiction here involved. Powers v. Chesapeake & Ohio Railroad Company, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673; Railroad Company v. Wangelin, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 473; Whitcomb v. Smithson, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. Ed. 303. It seems clear to us that if the liability of the defendants, as set forth in the pleadings of the plaintiff in the case of Chesapeake & Ohio Railroad Company v. Dixon, supra, was joint, and the cause of action entire, and did not present a controversy which was separable, as a matter of law, within the meaning of the removal acts, the pleadings of the plaintiff in this case present only one cause of action against the defendants jointly, and present no controversy separable as a matter of law, and that the Circuit Court erred in refusing to remand. The Pullman Company, having wrongfully removed the case into the Circuit Court, must pay the costs in that court, as well as the costs in this court. Hanrick v. Hanrick, 153 U. S. 192, 14 Sup. Ct. 835, 38 L. Ed. 685.

It follows that the judgment of the Circuit Court is reversed, and the case is remanded to that court, with directions to render judgment against the Pullman Palace Car Company for costs in that court, and to remand the case to the state court.

LENOIX v. DOVER, S. & R. ST. RY. *et al.*

(*Supreme Court of New Hampshire, Strafford, Feb. 5, 1903.*)

[54 Atl. Rep. 1022.]

Street Railways—Routes—Establishment—Rights in Streets.

A street railway company's charter required that its route over the streets of the city should be determined by the selectmen thereof in like manner as highways are laid out. Pub. St. 1901, c. 45, providing for the establishment of highways, section 4, requires that the selectmen shall make their decisions in writing, and cause the petition and their decision to be filed in the town clerk's office and recorded at length on the town records, and declares that their decision shall be of no effect until such section is complied with: *held*, that where the selectmen voted a general location to such street railway company in accordance with a plan, but the hearing of the petition for the laying out of the railway was continued from time to time while the road was being built, such general location, without record thereof, conferred no authority on the company to occupy the streets.

Same—Same—Same—Same—Special Charter Provision—Repeal.

Laws 1889, p. 161, c. 178, § 2, granting a special charter to a street railway company, and requiring that its route should be laid out and selected by the selectmen of a town in like manner as highways are laid out, was not repealed by Laws 1895, p. 367, c. 27, providing for the organization of street railway corporations by general law, and declaring that previous charters granted were altered or amended so far as they were inconsistent with such general law.

Transferred from Superior Court.

Action by Thomas Lenoix, as administrator, etc., against the Dover, Somersworth & Rochester Street Railway and others. A nonsuit was entered, subject to exceptions, and the case was transferred from the superior court. Nonsuit stricken off.

June 22, 1901, as the plaintiff's intestate was driving along a highway in Rochester, the horse became frightened at a reel of wire which had been left beside and within the highway by one Kendall, who had the contract for constructing certain overhead work which the Massachusetts Construction Company was building for the defendant street railway. Kendall and the construction company were made parties defendant.

The street railway was incorporated by the Legislature (Laws 1889, p. 160, c. 178) and duly organized. The records of the city of Rochester show that the following steps were taken toward the laying out of the road: A petition asking that the tracks, poles, lines, wires, etc., of the railway "be located, and the grade of said tracks be determined and fixed, as required by the charter of said company and the statutes of said state," was presented to the mayor and city council. The required notice was given, and on the return day of the petition the mayor and city council took a view of the proposed route. The hearing was continued until February 11, 1901, when action was taken, as appears by the following record of the council meeting: "The hearing on the petition of the Rochester Street Railway Company being in order, L. P. Snow, in behalf of the company, made a brief statement as to the proposed route and side of the street to be occupied, and called Engineer Springfield and President Lovell, who were sworn and testified as to the proposed route, material to be used, etc. On motion of Councilman Wallace, voted a general location, as shown by engineer's plan, be granted the street railway company. On motion of Councilman Meader, voted the committee on roads, bridges, and drains have general supervision of the layout of the road, and report to the council at the regular meeting in March." The hearing on the petition for the layout of the railway was continued from time to time while the road was being built, until December 10, 1901, when a layout, giving a detailed description of the tracks and poles of the company as they then existed on the ground, was duly drawn, signed, filed, and recorded in the city records. Subject to exception, the court ordered a nonsuit as to the street railway and the Massachusetts Construction Company. If the location of the street railway was sufficient against the plaintiff to authorize the work to be done in the highway, including the erection of poles and the stringing of wires, as Kendall was doing, there is to be judgment for those defendants; otherwise the nonsuit is to be stricken off.

Felker & Gunnison and George E. Cochrane, for plaintiff.
Leslie P. Snow, for defendants.

REMICK, J. Before the defendant railway company could rightfully occupy the street with their works, they were bound to secure a determination by the proper authority of the following questions: (1) Whether the public good required the construction of the proposed railway; (2) whether the public good required its construction over this particular street; and (3) where, upon the street, the public good required the track, poles, wires, and other appliances to be located. Laws 1889, p. 161, c. 178, § 2; Laws 1895, p. 368, c. 27, §§ 3, 5; Petition of Nashua Street Railway, 69 N. H. 275, 276, 278, 41 Atl. 858.

That the public good required the construction of the railway "was decided by the Legislature when the corporation's charter was granted." Petition of Nashua Street Railway, 69 N. H. 275, 278, 41 Atl. 858, 860. Whether the public good required the construction of the railway upon the street in question, rather than over some other route, and, if so, where, upon the street, were questions which the charter of the defendant railway company in express terms referred to the selectmen of Rochester, to be by them inquired of and determined, "in like manner as highways are laid out." Laws 1889, p. 161, c. 178, § 2; Petition of Nashua Street Railway, 69 N. H. 275, 41 Atl. 858.

Had the selectmen or corresponding municipal authority of Rochester, at the time of the plaintiff's injury, determined, "in like manner as highways are laid out," that the public good required the construction of the railway upon the street in question, and where therein it should be located? Section 1, c. 45, Pub. St. 1901, provides: "On petition to the selectmen for the laying out or altering of highways, or for laying out lands for any public use, and generally for the purpose of deciding any question affecting the conflicting rights or claims of different persons, their proceedings shall be governed by the following rules." Sections 2 and 3 relate to notice, and, as the notice in the present case is not questioned, they are immaterial. Section 4 provides: "They [the selectmen] shall make their decision in writing, and cause the petition, order of notice, evidence of service, and their decision to be filed in the town clerk's office and recorded at length upon the town records; and their decision shall be of no force or effect until the same is done." At the time of the plaintiff's injury the foregoing provision had not been complied with. If it could be said, upon the findings, that the vote of February 11, 1901, was a "decision in writing" that the public good required the construction of the railroad over the street in question, and that the minutes of the meeting of the city council were a record thereof sufficient to answer the requirements of the statute, by no stretch could it be said that the vote of that date was a determination of the

question of particular location. The vote in terms grants nothing more than a "general location," while the subsequent votes and conduct of the city council show conclusively that there was no location or record thereof, within the meaning of the statute, until December 10, 1901, long after the plaintiff was injured. The action of February 11, 1901, did not, therefore, authorize occupation of the street by the defendants for the purpose alleged.

It is urged that the charter provision requiring that the "railroad shall be laid out by the selectmen of said Rochester in like manner as highways are laid out" was repealed by chapter 27, p. 367, Laws 1895. By the express terms of that act, charters theretofore granted were altered and amended only so far as inconsistent therewith. Petition of Nashua Street Railway, 69 N. H. 275, 41 Atl. 858; Petition of Keene Electric Railway, 68 N. H. 434, 41 Atl. 775. What ever inconsistency there may be between the provisions of that chapter and other provisions relating to the laying out of highways, we discover no inconsistency between anything in that chapter and the particular provision of the highway law—that until a decision and record, in accordance with section 4, c. 45, Pub. St. 1901, all steps in the laying out of a highway are without force or effect. If there had been nothing in the charter making the proceedings for location subject to that provision, and the proceedings had been under section 5, c. 27, p. 368, Laws 1895, exclusively, still they would have been subject to that provision by virtue of section 1, c. 45, Pub. St. 1901.

The sweeping terms of the statute leave the court no liberty to regard the general considerations urged by the defendants. The statute compels the conclusion that at the time of the plaintiff's injury the defendants' occupation of the street for the purpose alleged was unauthorized.

Nonsuit stricken off.

CHASE, J., was absent. The others concurred.

HAST *et al.* v. PIEDMONT & C. R. CO.

(*Supreme Court of Appeals of West Virginia, March 14, 1903.*)

[44 S. E. Rep. 155.]

Highways—Dedication.

The owner may dedicate his land to the public for use as a highway by acts and declarations, without deed or other writing; but such acts and declarations must be deliberate, unequivocal, and decided, manifesting a positive and unmistakable intention to permanently abandon his property and devote it to public use.

Same—Same—By Railroad Corporation.

A dedication by a railroad corporation, to bind the corporation beyond revocation, must be made by the directors, or recognized by them in some way, or be expressly ratified by them, or by such public use for such time and under such circumstances as to justify the inference of

such ratification. The mere act of officers and agents making such dedication without authority from the directors will not make a valid dedication, unless by such express or implied ratification.

Same—Same—Same.

Where a railroad company occupies a street which is a public highway in an unincorporated village, and acquires a lot with intent to open through it a way in place of the street, but does nothing more to evince a dedication than to tear down the fence around the lot and allow its use by the public for a way, this does not constitute an irrevocable dedication.

Same—Same—Same.

A corporation may dedicate some of its land to public use for a highway, if it do not materially interfere with the accomplishment of the purposes of its incorporation.

Same—Same.

To render a dedication of land for a highway valid to create a highway as to a county, so as to charge it with maintenance and repair, there must be an acceptance of the dedication by the proper public authority.

Same—Same—Acceptance—Revocation.

If a landowner dedicate a highway over his land for public use by a valid dedication binding on him, and it is accepted by the public by general use of the way, it becomes a highway, as between the dedicator and public, beyond his revocation of the dedication, though the dedication is not accepted by the county court; but this does not charge the county with maintenance or repair of the highway.

Same—Same—Evidence.

Oral evidence of a general manager of a railroad company that the company purchased a lot of land for the purpose of dedicating it to public use as a street, and tore down the fences around it, and threw it open to public use, does not prove such dedication of it as to render the dedication irrevocable.

Railroads in Streets—Abutters—Mitigation of Damages.

In an action by the owner of a village lot against a railroad company for damage to the lot resulting from the taking of a street near the lot by the company for its track, the company gave oral evidence to show, in defense or mitigation of damages, that the company had dedicated a street or way over a lot owned by it in lieu of the street taken for its track, and thus took the position that such dedication had been made. This did not constitute an estoppel against the company afterwards, in other suits, denying a dedication, so as to defeat or mitigate a recovery of damages.

Highways—Dedication by Railroad Corporation—Evidence.

In such action, an attorney of the railroad company, in adducing evidence to prove such dedication, and making such defense of dedication, does not bind the company, against its denial in another suit of such dedication.

(Syllabus by the Court.)

Error to Circuit Court, Mineral County. R. W. Dailey, Judge.

Action by Viola G. Hast and another against the Piedmont & Cumberland Railroad Company. Judgment for plaintiffs. Defendant brings error. Affirmed.

F. M. Reynolds, for plaintiff in error.
C. W. Dailey, for defendants in error.

BRANNON, J. The owner of land in Mineral county, across the river from the city of Cumberland, laid out a village by platting his land into lots and streets. The village is

called "Ridgely," but it is not incorporated. In the village are two streets, which we will call "A" and "B." Viola G. Hast and Henrietta Hast own a house and lot on A street, near the corner of A and B streets. The Piedmont & Cumberland Railroad Company made an embankment for its tracks, taking part of B street, and also part of A street, and laid its tracks on the embankment; and the said Hasts sued the company for damages resulting to their property from the embankment, by rendering access to it less easy, and from inconvenience and detriment from the operation of the railroad, and recovered a judgment in the circuit court of Mineral county for $300 damages, from which judgment the railway company has taken this writ of error.

On the trial the company sought to defend itself upon the theory that when it so occupied those streets it acquired a lot in the village, and tore down the fences inclosing it, and threw a part of it open to the public use, in lieu of the parts of the streets which it had occupied, and thus exchanged part of that lot for the parts of the streets which it thus occupied, and thus dedicated a part of the lot to public use for a public way, giving access from A to B street. The company gave evidence to prove by its general manager that, about the time of laying the tracks in the streets, it had purchased a lot for a street or way for the public in the room and stead of the streets so occupied, and that the company, in execution of that purpose, took down the fence from around the said lot, and threw it open to the public to use in lieu of the streets, though no street was actually constructed upon it, and that the public had so used it ever since, in the same condition in which it was when it was so thrown open. It was otherwise proven that the public had so used the way over said lot. The company asks the court to instruct the jury that if they found from the evidence that the company acquired the lot with intent to dedicate it to the public use for such way, and did throw it open in execution of such intent, and that the public had since used it as a way, then such action amounted to a dedication of the ground as a public way, which could not be revoked by the company, and that the company could not thereafter close up the said way. The defendant thereby sought to show that the plaintiffs, having thus a way from street to street by reason of such dedication, either suffered no damage, or that such damage would be mitigated by the presence of the way under such dedication.

This presents to us the question whether there was a dedication binding upon the company, beyond its power of revocation. Is this substituted way a public highway? Can the company hereafter disavow the dedication, and close up this substituted way? A way may be a highway for some purposes, and not for others. It is very certain that under our statute (Code, c. 43, § 31) declaring that every road, street, or alley used and occupied as a public road,

street, or alley shall be deemed to be a public one, mere user by the public, however long continued, will not make it a highway, as regards the county or municipality; that is, to charge such county or municipality with the burden of maintenance, or of liability for injuries arising from nonrepair or defects. To make it a highway for those purposes, our decisions are distinct that there must be shown action by the county court establishing or in some way recognizing the road as a highway, or it must be shown that it has been worked by a public surveyor of roads. An individual may lay out a way upon his land for public use, and do all in his power to dedicate it to the public use, and it may be accepted by the public by using it as such; but it does not thereby become a public highway, so as to charge the county with the burdens above stated. It is true, we find much law to show that by common law a dedication may be made by an owner of property, which, if accepted by the public by long user, makes the way a public highway for all purposes—even to charge the public with its maintenance and with liability for its defects. Elliott on Roads & Streets, § 154; 2 Dill. Munic. Corp. § 642. But in this state our decisions do not allow the public use of a way to operate as an acceptance of a dedication so as to bind the county. Sampson v. Goochland Justices, 5 Grat. 241; Talbott v. King, 32 W. Va. 6, 9 S. E. 48; Ball v. Cox, 29 W. Va. 407, 1 S. E. 673; Yates v. West Grafton, 33 W. Va. 507, 11 S. E. 8; Dicken v. Salt Co., 41 W. Va. 511, 23 S. E. 582; Kelly's Case, 8 Grat. 632. If an owner of land lays it out into streets, lots, and alleys, and sells lots with reference to such streets and alleys, by plat or otherwise, it is a dedication of such streets and alleys irrevocable by him, and makes them public as to all lot owners, and consequently as to the general public. He is estopped to deny them that character. Riddle v. Charlestown, 43 W. Va. 796, 28 S. E. 831; Skeen v. Lynch, 1 Rob. 186; 9 Am. & Eng. Ency. L. (2d Ed.) 34. To make a dedication valid, there must be a dedication and an acceptance; there must be two parties—the dedicator and an acceptor. 9 Am. & Eng. Ency. L. (2d Ed.) 43; Elliott on Roads & S. § 150; Angell on Highways, § 157.

In the present case the county court or surveyor in no wise accepted the dedication, and the question comes up, not whether the way is a public way as regards the county, but whether it is a highway as regards the plaintiffs and the general public. In other words, has the railroad company bound itself against a recantation of its dedication? Can it close this dedicated way against the plaintiffs and the general public? Under this head, the first question is, was there a real act of dedication? It is not to be denied that, as between the public and the dedicator, there may, under circumstances, be created a highway binding on the dedicator in favor of the public. This

seems to be the case not only where people have expended money on the faith of such dedication, but also where there is no such expenditure; but the act of dedication must be shown by acts and declarations deliberate, unequivocal, and decided, manifesting a positive and unmistakable intention to permanently abandon his property to the public use. Pierpoint v. Harrisville, 9 W. Va. 215; 9 Am. & Eng. Ency. L. (2d Ed.) 38. Now, the mere opening of this lot to the public use is not adequate to evince an irrevocable purpose to dedicate, for we may attribute that use to a mere license, rather than an intent to dedicate. It is so common for railroad companies to let their lots lie open, that we attribute it to license—mere permissive use—not to an intent to dedicate. Nor does the fact that the company purchased this lot with an intent to dedicate it bind the company, as it might change its notion. There is not such an unequivocal act as speaks unalterably as an intention to dedicate. No writing is necessary to make a valid declaration of dedication. 9 Am. & Eng. Ency. L. (2d Ed.) 34; Pierpoint v. Harrisville, 9 W. Va. 215. There is no act to tie the company to this dedication. Who made this dedication? I interpret the evidence to mean that the general manager of the company threw open this street, or some agent of the company when constructing the road. There is no action by the directors, and the president or general manager would have no power, unless authorized by the directors, to dedicate this lot away. 1 Elliott on Railroads, § 285. "A general business and financial agent, though he is also the president, has no authority to sell or mortgage the property of the corporation." 1 Rorer, Railroads, 667. "A general agent of a corporation has no power to convey the real estate of the corporation. To effect such an object, a specific authority is indispensable." Stow v. Wyse, 18 Am. Dec. 99. Some of the authorities hold that, in order to bind the dedicator, other persons must have expended money or acquired rights on the faith of the dedication; and, in the absence of some such circumstances it seems difficult to see how a dedicator can be bound irrevocably, he receiving no consideration, perhaps, and other parties not having made any expenditure on the faith of the dedication. I should have stated a few lines back that we cannot say that an act of dedication binds the company when there is not a shadow of evidence competent to bind it, that is, action of its directors, the only competent and authorized agents of the corporation. Nothing has been shown to bar the company in future from repudiating its dedication. If time enough had elapsed to bar the company by reason of the adverse, continuous, open user by the public, then this way would be a highway valid against the company in favor of the public. Then the public right would rest on the statute of limitations, not on dedication and acceptance. 9 Am. & Eng. Ency. L. (2d Ed.) 67. But it is not shown that the period required to thus give title

has expired. Thus I see no error in the refusal to give defendant's instructions.

Another point of error in that after a witness had given his opinion that the plaintiffs' property had been damaged one-half, and stated that that opinion was based considerably upon the fact that the railroad company might close up the lot which had been opened, counsel for the defendant asked the witness the question, "If the company cannot close up its lot, and assuming that it will be left open for use, what would you say would be the decrease in value then?" and the court refused to allow the witness to answer the question. This question is based on the assumption that there was a valid, binding dedication, when none was shown; it assumed, also, that the company would not and could not close the way, when nothing was shown to debar it, adequate to debar it from so doing; and therefore the court did not err in refusing to allow the question to be answered.

The point is made by a second brief filed by counsel for the plaintiffs that a corporation cannot make a valid dedication, for the reason that it can perform only certain functions, is incorporated to do only certain things, and cannot do other things not contemplated by its charter; in other words, that such an act would be ultra vires. Some English cases are cited to this effect, but, in the immense conflicting and confusing cases, we can find authority for almost any proposition. It is very well settled by modern authority that corporations may dedicate land to the public use. Elliott on Roads & S. (2d Ed.) § 146; Elliott on Railroads, § 425. So if it do not interfere with the purposes for which it was incorporated, a private corporation may make a dedication. 9 Am. & Eng. Ency. L. (2d Ed.) 33.

The point is made that two of the plaintiffs' instructions assume that the plaintiffs were entitled to damages, by the language that "the jury, in estimating the amount of damages, may take into consideration," etc. I do not think this language assumes the right of recovery. Surely the jury would understand that the question of damages depended on evidence, and that it was with the jury to pass on such evidence, and that the court did not intend to express an opinion upon that point. We must not so lightly assume that a jury does not understand its functions, and will so easily be misled in the performance of its duty. Besides, I think the language is very common in instructions telling the jury how to estimate damages, and is not inapt or improper. And still further, if these instructions, taken alone, were objectionable on that account, the objection would be obviated by the fact that another instruction for the plaintiffs reads, "The court instructs the jury that if they believe from the evidence that the property of the plaintiffs has been permanently injured and its value depreciated by the laying and constructing of the embankment and railroad track, and that the defendant constructed and laid,

or had constructed and laid by its agents, the said embankment and track, then the plaintiffs are entitled to recover damages;" thus plainly telling the jury that they could only find damages on proof of the facts supposed in the instructions.

Plaintiffs' instruction No. 3, as to the mode of assessment of damages, is supported by principles contained in Stewart v. Railroad Co., 38 W. Va. 438, 18 S. E. 604; Blair v. City of Charleston, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852, 64 Am. St. Rep. 837; Guinn v. Railroad Co., 46 W. Va. 151, 33 S. E. 87, 13 Am. & Eng. R. Cas., N. S., 437, 76 Am. St. Rep. 806.

I should have noticed in its proper place the position taken by defendant's counsel that what it did in occupying the streets, and in their place dedicating a passage over its lot, was an exchange justified by section 48, c. 54, Code 1899, providing that a corporation may take and hold "under any grant or ordinance made by a municipal corporation any interest or right such municipal corporation may have in any street, alley or public ground, and may in exchange therefor, in whole or in part, dedicate or otherwise secure to public use another street, alley or parcel of ground out of real estate owned by such railroad corporation." Now, it is apparent that there is no justification under this section, because there is no warrant for a railroad company to take a street and make such exchange, unless a statute allows it, and this statute does not allow it, because it, in terms, applies to incorporated municipal corporations, and contemplates a treaty of exchange between the two corporations, evidenced by proper memorials of the consent of the municipality, if not of the actual dedication, also. Moreover, under that section, what the company did was not of such a character as to constitute such a dedication in such exchange, even if the statute applied. Under that statute, there must be an organized town, in order to become a party to the exchange. It should be affirmatively shown that the exchange was declared by the directors of the company. It does not appear that the company did any acts or made any declarations expressive of such dedication at the time, and constituting a valid dedication. There was no express dedication—at best, only an implied dedication; and the mere tearing down the fences on the lot, and the passage of people over it, are not enough. There was no consent of the county court.

Therefore we affirm the judgment.

On Rehearing.

Upon rehearing, it is argued that the above opinion does not correctly interpret the evidence of the general manager. That evidence reads: "C. L. Bretz, general manager of the West Virginia Central & Pittsburg Railway Company, operating the railroad of the defendant company ever since its construction, in 1886 or 1887, being introduced as a witness on behalf of the

defendant, testified that, about the time of the laying of the tracks in the streets aforesaid, the defendant company purchased said lot No. 55 for a street or way for the public across it, in the room and stead of the streets occupied by the company's tracks, and that the defendant, in pursuance of that purpose, took down the fence from around said lot, and threw it open to the public, to be used in lieu of said streets, though no street or roadway was actually constructed or thrown up, and that the public had so used it ever since in the condition so thrown open, and other witnesses, both on behalf of the plaintiffs and defendant, testified that since the construction of said tracks in the street aforesaid the public had used said lot No. 55 as said streets had been used before that time. It is admitted that the defendant introduced no writing purporting to be a formal dedication of said lot No. 55 to the use of the public." It is said that this evidence does not warrant the inference that the acts claimed as effecting a dedication were done only by the general manager or some agent. As no action of the company was shown or suggested, I still think the interpretation given this evidence is a fair one. But let us take this evidence for all it is worth on the line argued by counsel, which is that the witness said that "the defendant company" purchased the lot for a street, and that "the defendant," in pursuance of the purpose to make a street upon it, took down the fences. Counsel argues that this language imports, not the acts of a mere agent, but the action of the very company itself, and that, though this is not the primary evidence to show dedication, it was not objected to, and no objection can be made to it in the Court of Appeals. B. & O. R. Co. v. Skeels, 3 W. Va. 556. Our question is not one of the admissibility of this oral evidence. The evidence not having been objected to, its admissibility for want of the better evidence is not before us, but its effect is. It is sought to use it for two purposes—one to prove the fact of dedication; the other how, in what manner, by what act, it was made, or rather, that it was made in an all-sufficient mode to bind the company. It must answer for these purposes, else it is not adequate to establish dedication; for it is, beyond question, not sufficient to say, in a general way, that dedication was made, but it must be shown to have been made by some acts that are "deliberate, unequivocal, and decisive, manifesting a positive and unmistakable intention to permanently abandon his property for that specific public use." Miller v. Aracoma, 30 W. Va. 606, 5 S. E. 148. Does the evidence of the manager meet this demand? He does not state the fact of dedication, but say that he meant that. Then, when we ask how, he does not say that there was any deed, any written declaration in any form by resolution or declaration by the company, nor that there was any open, deliberate declaration of dedication—nothing to irrevocably bind the

corporation. How did the corporation dedicate? He says it purchased a lot for a street for public use. A purchase only is not enough. This is a mere intent, and this purchase is of doubtful import to manifest even such intent, because the company occupied part of the lot with its track. We may more readily attribute the purpose of the purchase as one for its own use. What else did it do? Threw down the fence and left the lot open. It would do that for its own convenience. Do these acts show an enequivocal, deliberate, final intent to abandon ownership, so that in future the company would be clearly barred from otherwise using the lot to its own purposes? Are the plaintiffs to be in peril of the company's so doing in future, and be compelled to rely on such frail evidence of dedication? To hold the plaintiffs to a dedication, we must be able to say that they are full-handed with evidence of facts incontrovertibly showing in all the future that there was such conclusive dedication, and this we cannot say. Taking this oral evidence for all that it is worth, it is not enough to prove this. By so holding, would we leave them safe? We are called upon to say now, in this present suit, that a future suit involving the dedication cannot but be decided against the company in favor of the plaintiffs. To do this, we should have very clear evidence of acts of the company from which it cannot in future escape, and this evidence does not furnish them. Is there a deed— a resolution of the directors making or ratifying a dedication? We do not know. The court "certifies that the defendant introduced no writing purporting to be a formal dedication of said lot No. 55 to the use of the public." If in truth there was any writing, the company should produce it, and that oral evidence does not tell its contents. "Generally, parol evidence, though not accepted to when offered or afterwards, is not competent to prove the contents or effect of a deed." Warren v. Syme, 7 W. Va. 474 (syl., point 11). The evidence relied upon to fix dedication, disregarding its secondary character, is too short. It does not prove acts of dedication, settling it beyond question. To cite an instance of the danger of relying upon it, take the case of Williams v. New York & N. H. R. Co., 39 Conn. 509. A railroad company had a passenger station, and later bought an adjoining piece, making a large space in front of the station, which piece was connected with a public street at one end, and the city made a street to its other end; and the public constantly and freely used the ground, not merely to go to the station, but from the one street to the other. A party, thinking the space was a public highway, bought land adjoining, and built buildings fronting on it, and, in connection with the company, laid a stone walk along the front, of great benefit to his premises. Years afterwards the company undertook to remove the walk, for more room for carriages in front of its station; and upon an injunction it was held that the company had not dedicated the land as a

highway, and that it was not estopped to deny a dedication. So, in this case, does the mere purchase of the lot involved in this case when the company needed and used a portion of it for its track, and left it open, which it would prefer to do for its own purposes as long as it chose, without doing a bit of work to make a street, stop the company from reclaiming it to meet future want? We hold that it does not. In fact, is it not more plausible to say that, if the manager did not merely mean that he or some other agent made the dedication, he was giving his own mere opinion that what the company had done constituted a dedication? If so, he may be mistaken. As we are asked to say in advance that for all future suits there was a final dedication, we must demand evidence beyond all controversy; otherwise we imperil the plaintiffs. Mere user for a short time is the strongest element shown, but that is frail reliance, especially as there is no municipal acceptance. "Mere use of a road by the public, for however long a time, will not make a public road. On the contrary, the mere permission by the owner of the land to the public to pass over the road is, without more, to be regarded as a license revocable at pleasure." Dicken v. Salt Co., 41 W. Va. 511, 23 S. E. 582; Harris Case, 20 Grat. 833.

But it is argued that, even if this oral evidence does not show dedication, the fact that on the trial the railroad company took the position that it had dedicated was an admission of that dedication, and constituted ever after an estoppel against its denying such dedication; and this on the principle that, when a party once takes a position in a suit, he cannot afterwards change and take an inconsistent position; that the company could not say on the trial that it had dedicated a way over the lot, and in future deny it. It is very material to see whether the position so taken would be an estoppel absolutely forbidding the company from afterwards contesting dedication, or only an admission going in evidence, to have only such weight as a jury might thereafter give it; for, if it be not an estoppel, we cannot bind the plaintiffs by it, as they must be left free from danger of revocation of the dedication. I do not regard it such estoppel, though as evidence it might be strong in another contest. Wilson v. Phœnix, 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890. In Beatty v. Randall, 5 Allen, 441, it was held that a party in an action of tort for conversion of personal property was not estopped by the fact that, in a bill in equity by himself and wife, they asserted a joint property in himself and wife. "The pleadings of a party to one suit may be used in evidence against him in another, not as an estoppel, but as proof open to rebuttal and explanation. But in order to bring such admission home to him, the pleadings must either be signed by him, or it must appear that it was within the scope of the attorney's authority to admit such

facts." Buzard v. McAnulty, 77 Tex. 438, 14 S. W. 138. On one trial between the same parties, counsel admitted incorporation of his client, and it was held that it did not estop a denial of incorporation on a second trial, but that it was evidence as an admission. Perry v. Simpson Co., 40 Conn. 313. A party in an answer made a statement, and it was held that parties claiming under her were not estopped to contest the statement, but it had only the effect of an admission as evidence. Tabb's Curator v. Cabell, 17 Grat. 160. See Penn's Ex'r v. Penn, 88 Va. 361, 13 S. E. 707; 11 Am. & Eng. Ency. L. 446, 449. We have cited two cases in the Supreme Court of the United States to sustain the contention that the position of the defendant is an estoppel: Davis v. Wakelee, 156 U S. 680, 15 Sup. Ct. 555, 39 L. Ed. 578, and Michels v. Olmstead, 157 U. S. 198, 15 Sup. Ct. 580, 39 L. Ed. 671. In the former, D. had a proceeding for discharge as a bankrupt, and W. had notes against him, and got judgment on them in a California court on publication. When D. moved for a discharge, W. opposed it, and D. said that as W. had got judgment by leave of the bankrupt court, which would still stand good, he could not resist a discharge; and the court so held, and granted a discharge. In a subsequent suit in New York by W. against D. to enforce an estoppel, to prevent D. from asserting in any suit that might be brought on that it was void, the Supreme Court held that D. could not say that the judgment was void for want of jurisdiction. This was going far; but, when thought of, it is the ordinary case of estoppel by conduct—where one party takes a position, and succeeds in it, and gets the benefit of it, to another's harm, he is estopped to recant it. In the second case, a party, sued at law upon a written contract, offered evidence to show that it was not intended to be binding, which, on motion of the plaintiff, was rejected, as incompetent to destroy a writing. Afterwards, on a bill to enjoin the prosecution of the action at law, the plaintiff in the action was held estopped from saying that the evidence was admissible in the law action. Here, too, the party got the benefit of the position which he assumed. Where a party takes a position, and gains its fruit, and thus detriments another, he cannot go back on it.

There is another objection to holding that the plaintiffs can securely rely upon the defense made by the company as their protection in future against its denial of a dedication. There was no plea of such dedication—nothing of record to signally and explicitly manifest that the company admitted, as a binding fact, the fact of dedication. It simply gave some evidence to show it, and asked instructions upon the theory of dedication. The estoppel is inferential—not so plainly manifested as if in an answer or plea. "Certainty is essential to all estoppels." Bigelow on Estop. 578. The door is left too plainly open to the company hereafter to dispute dedication.

But even if there had been a pleading explicitly stating the fact of dedication filed by an attorney, I do not think it would be an estoppel, further than for that particular suit. "They [admissions in pleadings] are admissible, also, against him in another suit in behalf of either the adverse party or a stranger, provided they were sworn to by the client personally, or were drawn under his special instruction." 1 Am. & Eng. Ency. L. (2d Ed.) 720.

Another consideration detracting from the argument that the position of dedication taken by the company works an estoppel is that it was taken by an attorney. The company was a corporation not physically present, but was represented by an attorney. No resolution of the directory empowering him to admit a past dedication, or then make a new one at the trial, appears. An attorney is a special agent, of limited authority. He may make admissions in matters relating to the progress of the particular trial or case, but do they bind clients elsewhere and for other purposes? Can an attorney, in defending a suit, by taking a position or pleading, admit a dedication, to take away, not merely for the purposes of that suit, but for other suits, the land of a corporation? "Pleadings of a party in one suit may be used in evidence in another, not as an estoppel, but as proof, open to rebuttal and explanation, that he admitted certain facts." 1 Whar. Ev. § 838. "Statements in pleadings, signed by an attorney only, not sworn to by the client, are not competent evidence against the latter in another suit, when the statements are made without his knowledge or consent." Note 1 in 1 Am. & Eng. Ency. L. (2d Ed.) 720. It seems to me that there is a difference between an attorney of a corporate and a natural person. Acts of the attorney outside the scope of his authority are not binding on his client. Even in the case of a natural person, the power of an attorney is only to do those acts necessary or incidental to the prosecution and management of the suit, which affects the remedy only, and not the cause of action. Weeks on Attorneys, 382. Hence he cannot waive the essential rights of his client without his consent. He cannot enter a retraxit, commute or compromise his demand, receive pay in any thing but money, and the like. Crotty v. Eagle's Adm'r, 35 W. Va. 143, 13 S. E. 59; Wiley v. Mahood, 10 W. Va. 206. As nobody but the directory can pass right to the corporate realty, it seems to me there ought to be shown express authority. I cannot see that the attorney in this case can admit away the right of the company to its land, so as to deprive it forever of that land. I cannot see that his acts would go beyond that suit as a conclusive estoppel—not even as an admission.

We see no reason why we should not repeat our affirmance of the judgment.

VINING *v.* DETROIT, Y., A. A. & J. RY.

(Supreme Court of Michigan, June 23, 1903.)

[95 N. W. Rep. 542.]

Street Railways—Franchise—Rate of Fare.

A street railway operating its line through a village under a franchise from such village, which provides for a certain rate of fare per mile between certain points, is bound by such rate, even though the points specified are beyond the limits of the village.

Error to Circuit court, Wayne County; William L. Carpenter, Judge.

Action by Edward M. Vining against the Detroit, Ypsilanti, Ann Arbor & Jackson Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

Corliss, Andrus, Leete & Joslyn (Ray B. Morgan of counsel), for appellant.

Thomas Kissane, for appellee.

MONTGOMERY, J. This suit was commenced in the justice court to recover damages for an alleged unlawful ejection from defendant's car. Plaintiff had judgment, and an appeal was taken to the circuit court, where a verdict was rendered by a jury for the sum of $75, and, upon a motion being made by defendant to set aside such verdict as unwarranted by the evidence, judgment was entered for the sum of $40.

Defendant is a street railway company operating cars between the cities of Detroit and Jackson, through numerous townships, villages, and cities, among others the village of Wayne, situated in the township of Nankin. On the day in question the plaintiff, a lawyer residing in Wayne, boarded a west-bound car, and tendered six cents as his fare to a point in Canton township called Artley's Corners, about 3½ miles west of Wayne. In order to ride this distance, plaintiff must pass through parts of the village of Wayne and of the townships of Nankin and Canton. The conductor demanded ten cents as fare—five cents as fare through Nankin and five cents as fare through Canton. Plaintiff refused to pay more than six cents, and the conductor returned one cent, and retained five as fare to the Nankin-Canton town line, where plaintiff was ejected from the car.

The only question for consideration here is the amount of fare to which defendant was entitled. The controversy arises over the apparently conflicting provisions relative to fare in the franchises of the townships and villages. Plaintiff claimed the right to ride through portions of the townships of Nankin and Canton upon the payment of fare at the rate of 1½ cents per mile by virtue of the franchise of the village of Wayne, which provides that the company "shall be entitled to charge at the rate of one and one-half cents per mile * * * be-

tween any two points on its line between the city of Detroit and the city of Ann Arbor." On the other hand, defendant claimed the right to charge five cents for the ride in Nankin township, and five cents for the ride in Canton township, basing its claim upon the provisions of the franchises of these townships, which are identical as far as they relate to fare. The Nankin franchise provides that "the rate of fare for any distance on the line of said railway within the said township of Nankin shall not exceed five cents and the rate of fare for any distance on the line of said railway outside of the said township of Nankin shall not exceed two cents per mile."

It is contended by the defendant that to permit the plaintiff to rely upon the franchise of the village of Wayne is to give to that franchise extraterritorial effect, and that this cannot be done, and that such construction ought not to be given as to extend the force of the ordinance or franchise beyond the limits of the village. It would seem that we have been unsuccessful in the effort to express ourselves with sufficient clearness in the various judgments rendered against this defendant, although the language employed in our decisions has not been obscure. In the case of Rice v. Same Defendant, 122 Mich. 677, 81 N. W. 927, 48 L. R. A. 84, we had under consideration a franchise granted by the village of Dearborn, which provided the rates of fare which defendant company might charge from any point in the village of Dearborn to Woodward avenue in the city of Detroit, and providing that tickets should be kept for sale upon each car operated by the company. We said in that case: "The franchise is in the nature of a contract, and imposes obligations upon the company which those having occasion to ride from Dearborn to Detroit have a right to enforce." It was further said in that case: "The plaintiff's right under this franchise is not different than it would have been had the franchise in Springwells been silent upon the subject of fares. The defendant saw fit to contract with the village of Dearborn for a rate outside the limits of the village, and to agree that tickets should be sold on its cars. This contract it cannot repudiate." Applying that language to the present case, it would seem to decide the case for the plaintiff. To the same effect was the holding in Coy v. Detroit, Ypsilanti & Ann Arbor Railway, 125 Mich. 616, 85 N. W. 6. That the defendant has obligated itself to accept, as compensation, from any passenger to or from the village of Wayne to or from any point on its road, the rate of 1½ cents per mile, is too clear for argument, and, moreover, has been ruled by the foregoing cases.

Judgment is affirmed, with costs.

CARPENTER, J., did not sit. The other Justices concurred.

BOARD OF COMMISSIONERS OF WILKES COUNTY and John H. Johnson, Sheriff and Ex Officio Treasurer of Wilkes County, Petitioners, *v.* W. N. COLER & COMPANY.

(*Argued April 17, 20, 1903. Decided May 18, 1903.*)

[23 Sup. Ct. Rep. 738.]

Railway Aid—Authority of County to Subscribe to Capital Stock.

Any county near or through which a railroad running via Salem and Winston, North Carolina, in the direction of some point in the northwestern boundary line of that state, might pass, was authorized to take, and pay for in county bonds, capital stock of the Northwestern North Carolina Railroad Company, by the North Carolina Ordinance of March 8, 1868, incorporating such company for the purpose of constructing a line via Salem and Winston "to some point in the northwestern boundary line of the state, to be hereafter determined," and providing that counties subscribing stock to such company should do so in the same manner and subject to the same restrictions as were prescribed by N. C. Laws 1852, chap. 136, which empowered any county near or through which the railroad incorporated by that act should pass to subscribe for its stock, payable in county bonds.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Western District of North Carolina establishing the validity of certain county bonds issued in aid of railway construction. Affirmed.

See same case below, 51 C. C. A. 399, 113 Fed. 725.

The facts are stated in the opinion.

Mr. A. C. Avery for petitioners.

Messrs. John F. Dillon, Harry Hubbard, John M. Dillon, and Charles Price for respondents.

MR. JUSTICE HARLAN delivered the opinion of the court:

This is an action against Wilkes county, North Carolina, upon certain bonds, each reciting that it was issued in payment of the subscription by that county to the capital stock of the Northwestern North Carolina Railroad Company, "by authority of an act of the general assembly of North Carolina, ratified the 20th day of February A. D. 1879, entitled 'An Act to Amend the Charter of the Northwestern North Carolina Railroad for the Construction of a Second Division from the Towns of Winston and Salem, in Forsyth County, up the Yadkin Valley, by Wilkesboro, to Patterson's Factory, Caldwell County,' and authorized by vote of a majority of the qualified voters of Wilkes county, by an election regularly held for that purpose on the 6th day of November A. D. 1888, and by an order of the board of commissioners of Wilkes county made on the 1st day of April A. D. 1889."

Coler & Co., holders of some of the bonds, obtained a judgment against the county in the circuit court. The case was then carried to the circuit court of appeals, which certified certain questions to this court under the judiciary act of March 3d, 1891, chap. 517 (26 Stat. at L. 826, U. S. Comp. Stat. p.

547). Those questions were answered, and, the answers having been certified to the court below, the case was finally tried, resulting in the affirmance of the judgment against the county. Wilkes County v. Coler, 180 U. S. 506, 45 L. Ed. 642, 21 Sup. Ct. Rep. 458, 51 C. C. A. 399, 113 Fed. 725. It is now here on writ of certiorari sued out by Wilkes county.

The facts out of which this litigation arose are fully set forth in the former opinion. It is necessary to restate some of them as well as to recall the points heretofore decided.

It appears that the principal question in the case, when formerly here, was as to the effect of the recitals in the bonds.

The plaintiffs contended that, being bona fide holders, they were entitled to assume that there had been a compliance with all the provisions of the act of February 20th, 1879, upon the authority of which the bonds purported to have been issued.

The defendant contended that, as the journals of the respective houses of the legislature did not show that the yeas and nays were entered on the second and third readings of the bill subsequently published as the act of February 20th, 1879, that act was void under § 14 of article 2 of the State Constitution, providing that "no law shall be passed . . . to impose any tax upon the people of the state, or to allow the counties, cities, or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the general assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal."

This contention of the county was supported by several decisions of the supreme court of North Carolina that are referred to in our former opinion; and one of the questions propounded to this court was whether the circuit court should accept those decisions as controlling in respect of the alleged invalidity of the act of 1879. That question was answered in the affirmative, this court being of opinion that, as matter of propriety and right, the decision of the state court on the question as to what is a law of the state was binding upon the courts of the United States. 180 U. S. 506, 526, 45 L. Ed. 642, 653, 21 Sup. Ct. Rep. 458.

That answer, of course, eliminated from the case the act of 1879 as giving authority to issue the bonds in suit; and it, therefore, became necessary to inquire whether such authority could be found elsewhere in the legislation of the state,—this court being of opinion that the invalidity of the act of 1879, as conferring power to issue the bonds, did not estop holders of bonds from showing that there was in fact ample authority to issue them.

It was insisted that sufficient authority was to be found in the ordinance of March 8th, 1868, passed by the convention

that assembled at Raleigh, North Carolina, on January 14th, 1868, for the purpose of framing a constitution for that state.

By that ordinance, which took effect from its passage, it was provided: "That for the purpose of constructing a railroad of one or more tracks, from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, with a capital stock of two millions of dollars, which shall have a corporate existence as a body politic for the space of ninety-nine years. . . . § 1. . . . That the capital stock of said company may be created by subscriptions on the part of individuals, corporations, and counties, in shares of $100. § 2. . . . That, after the organization of said company and the election of the president and other necessary officers, the officers so elected shall proceed, under the advice of the directors, to locate the eastern terminus of the Northwestern North Carolina Railroad, and shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections of 5 miles each, to the towns of Winston and Salem in Forsyth county, which portion of said railroad, when completed, shall constitute its first division: Provided, That if the distance from the nearest section to the towns of Winston and Salem be less than 5 miles, the same shall be considered a section. § 5. . . . That the stockholders of said company may pay the stock subscribed by them either in money, labor, or material for constructing said road, as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations, and restrictions as are set forth and prescribed in the act incorporating the North Carolina & Atlantic Railroad Company [Atlantic & North Carolina Railroad Company], for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company. § 12. . . . That the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the state of Virginia." § 13.

The act incorporating the Atlantic & North Carolina Railroad Company, referred to in the ordinance of 1868, was passed in 1852. N. C. Laws 1852, pp. 484, 499. By § 33 of that act it was made "lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in manner and form as hereinafter provided." By § 35 it was provided "that if, upon the return of

such constable, . . . it shall appear that a majority of the qualified voters of such town, and by the return of the sheriff that a majority of the qualified voters of such county, voting upon the question, are in favor of the subscription, the corporate authorities of such town, and the justices of such county, shall appoint an agent to make the subscriptions in behalf of such town and county, to be paid for in the bonds of such town and county and on such time as shall be agreed on by said town officers and the justices of such county." N. C. Laws 1852, chap. 136.

After referring to certain decisions of the supreme court of North Carolina, relating to the ordinance of 1868,—particularly Hill v. Forsythe County, 67 N. C. 367, and Belo v. Forsythe County, 76 N. C. 489,—we said: "It results that when the bonds here in question were issued in 1889, it was the law of North Carolina that the ordinances of 1868, constituting the charter of the Northwestern North Carolina Railroad Company, was not superseded by the Constitution of 1868, but was in force and therefore gave power to counties embraced by its provisions to take stock in that company and pay for it in county bonds just as Forsyth county had done." 180 U. S. 529, 45 L. Ed. 654, 21 Sup. Ct. Rep. 467.

Another principle announced in our former opinion was that the rights of the parties were to be determined by the law of the state as it was declared by the state court to be at the time the bonds were issued in the name of the county and put upon the market.

As indicating some of the points left undecided, we make this extract from our opinion:

"We have referred fully to the Hill and Belo Cases because of the earnest contention of learned counsel that under the law of North Carolina, as declared in those cases before the bonds in question were made, the ordinance of 1868, without the aid of subsequent legislation, gave full power to Wilkes county to issue such bonds. This view suggests various questions as to the scope and effect of that ordinance. Assuming, as we must, that the Belo and Hill Cases held that the ordinance of 1868 remained in force after the adoption of the Constitution, did the general power given by that ordinance to the Northwestern Railway Company to construct a railroad from its eastern terminus, 'running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state, to be hereafter determined,' invest Wilkes county with authority to subscribe to the stock of the company and to issue bonds in payment of such subscription? Was Wilkes county in the same category with Forsyth county? Was the route of the road northwest of Salem and Winston to some point in the northwestern boundary line of the state to be determined by the legislature or by the company? If by the legislature, was that route ever determined otherwise than by the act of 1879, which has been ad-

judged never to have become a law of the state? Did Wilkes county have authority, under the ordinance of 1868 alone, to aid, by a subscription of stock and bonds, the construction of the second division of the road referred to in the act of 1879, extending from the towns of Winston and Salem, up the valley of the Yadkin by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's Factory, in the county of Caldwell? These are matters about which we do not feel disposed to express an opinion under the very general and indefinite questions certified from the circuit court of appeals. Nor do we deem it proper to express any opinion as to the scope and the effect upon the rights of the parties of §§ 1996, 1997, 1998, and 1999 of the Code of North Carolina. The certified questions do not directly or explicitly relate to any question arising under those sections of the Code; and it is not appropriate that this court should, under the questions certified, consider and determine the entire merits of the case." 180 U. S. 532, 45 L. Ed. 655, 21 Sup. Ct. Rep. 468.

That the qualified voters of Wilkes county gave their sanction to a subscription to the capital stock of the Northwestern North Carolina Railroad Company; that the bonds in suit are part of those issued in payment of such subscription; that stock was issued to the county to the full amount subscribed; that the road desired by the people of the county was constructed and is in operation; that for many years the county paid interest upon the bonds; and that the plaintiff purchased the bonds in suit for value and in good faith; these propositions are not disputed. However strongly these facts appeal to every one's sense of right and justice, they do not estop the county from raising the question of its power to have made the subscription and issued the bonds in question. We repeat what was said in the former opinion,—indeed, what has been held in many previous decisions, —that, if there was an absolute want of power to issue the bonds in question, every purchaser of them was charged, in law, with notice of that fact, and could not look to the county in whose name they were issued. Such power could not be created by mere recitals in the bonds.

Did the county of Wilkes have power to issue these bonds? The plaintiff insists that the county had double legislative authority for issuing them;—first, under the ordinance of 1868 incorporating the Northwestern North Carolina Railroad Company; second, under the above sections of the Code of North Carolina of 1883.

We have seen that the time the bonds were issued the ordinance of 1868 was in force and gave power to counties embraced by its provisions to take stock in the Northwestern North Carolina Railroad Company and pay for it in county bonds. This was held, in our former opinion, to be taken as the law of North Carolina, because so declared by the supreme court of that state when the bonds were issued, and

therefore as the law by which the rights of the parties were to be determined. So that the vital inquiry, on this part of the case, is whether the road in question was embraced by the provisions of the ordinance of 1868, and therefore one that could be aided under that ordinance by county subscriptions and bonds. If so, Wilkes county was plainly in the same category as Forsyth county, and its bonds (issued in payment of the subscription made by it) must be sustained as valid upon the same grounds as the supreme court of North Carolina approved in reference to the bonds issued by Forsyth county.

Turning now to the ordinance of 1868, we find that the Northwestern North Carolina Railroad Company was incorporated to construct a railroad of one or more tracks "from some point on the North Carolina Railroad between the towns of Greensboro and Lexington, running by way of Salem and Winston in Forsyth county to some point in the northwestern boundary line of the state, to be hereafter determined." No question arises in the present case as to the route adopted for the road that was constructed from its beginning point or eastern terminus to Salem and Winston, two towns near each other. It was mandatory under the ordinance that the road should run by the way of Salem and Winston. The road that Wilkes county desired to be built was from Salem and Winston to Wilkesboro. That was the road in aid of the construction of which its bonds were issued. If a road from Salem and Winston to Wilkesboro was substantially in the direction of "the northwestern boundary line of the state," then it would be one authorized by the ordinance of 1868. The ordinance did not fix the particular point in the northwestern boundary at which the northwestern terminus of the road should be established. It was some point, on that boundary, to be thereafter determined. Unless the legislature interfered and itself fixed the northwestern terminus of the road, the railroad company had the power to establish it at its convenience or as the necessities of the situation required, taking care that whatever route was adopted the road as constructed from time to time was to be, substantially, in the direction of some point in what was reasonably to be deemed the northwestern boundary line of the state. Undoubtedly those interested in the enterprise, as well as the convention, contemplated that the road would be built mainly by money derived from municipal subscriptions and bonds. The railroad company was, therefore, left free to adopt a general route that would take the road "near or through" such counties as would aid the enterprise—no condition as to route being imposed except that the road should be in the direction of some point on the northwestern boundary line of the state. The authority of counties, by subscription of stock and bonds, to aid in the construction of a part of the

road, did not depend upon the northwestern terminus being first established. If a county had authority, under any circumstances, to subscribe stock and issue bonds, that authority could be exercised with reference to that part of the road in which, by reason of its location, it was immediately concerned. We are of opinion that the part of the Northwestern North Carolina Railroad which is here in question was, in a substantial sense, in the direction of some points in the northwestern boundary line of the state,—due regard being had to the physical nature of the country through which it was to pass. The contention to the contrary cannot be sustained.

Looking further into the ordinance of 1868, we find that it contemplated and authorized subscriptions by counties. It provided that all counties and towns subscribing stock to said company should do so in the same manner and under the same rules, regulations, and restrictions as were set forth and prescribed in the charter of the Atlantic & North Carolina Railroad Company for the government of such towns and cities as were then allowed to subscribe to the capital stock of that company. Reading those provisions of the charter of the Atlantic & North Carolina Railroad Company into the ordinance of 1868, it is, we think, clear that any county near or through which the Northwestern North Carolina Railroad might pass (in the direction of some point in the northwestern boundary line of the state) could subscribe stock to be paid for by its bonds, provided, always, that the subscription was first approved by a majority of the qualified electors of the county voting upon the question of subscription. All these conditions were met in the case of Wilkes county. The qualified voters sustained the proposition to subscribe, and there is no substantial ground upon which to rest the contention that the county was without power, under the ordinance of 1868, to make the subscription in question and to issue its bonds in payment therefor.

Other questions relating to the ordinance of 1868 were discussed by counsel, but in the view we take as to its scope and meaning those questions need not be noticed in this opinion.

The appellees further insist that ample authority to issue the bonds in suit is also found in §§ 1996, 1997, 1998, 1999, and 2000 of the Civil Code of North Carolina.

We do not deem it necessary to determine the scope of those sections, for, as we have seen, Wilkes county, independently of those sections, had authority under the ordinance of 1868 to make the subscription and issue the bonds here in question. And this conclusion rests upon the law of North Carolina as declared by the supreme court of the state to have been at the time Wilkes county made its subscription and issued its bonds. This is sufficient to dispose of the case.

The judgment is affirmed.

CHICAGO & S. E. RY. CO. *v.* WITT.

(Supreme Court of Indiana, May 26, 1903.)

[67 N. E. Rep. 519.]

Railroads—Judgment—Payment—Garnishment of Agent—Nature of Proceeding—Judgment against Agent.

Burns' Rev. St. 1901, § 834a, provides that, when a judgment against a railroad company operating a line through the state shall remain unpaid for a year, the creditor may file a complaint alleging such facts, and cause summons to be served on the railroad company, whereupon the court shall order the issuance of a writ for any employee of the road to appear and answer as to the amount of money in his hands belonging to the company, and the probable amount of money receivable by him, and, if such agent shall answer that he had been in constant receipt of money as such agent, the court shall order him to pay into the clerk's office such portions thereof, not exceeding one-half, as the court may deem just, until the judgment is paid: *held*, that such proceeding was quasi in rem in the nature of garnishment, and where no writ was issued against an agent, and he did not answer concerning funds in his hands, or which would probably come into his hands, there was no res within the court's jurisdiction to sustain a judgment ordering such agent to pay a certain amount out of funds coming into his hands as such, until plaintiff's judgment was satisfied.

Appeal from Circuit Court, Tipton County; W. W. Mount, Judge.

Action by Solomon Witt against the Chicago & Southeastern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Transferred from appellate court under Burns' Rev. St. 1901, § 1337u. Reversed.

W. R. Crawford, U. C. Stover, and Oglebay & Oglebay, for appellant.

L. S. Baldwin, for appellee.

GILLETT, J. This action was commenced by appellee in Hamilton county on the 6th day of June, 1899. His complaint charges that appellant is a railroad corporation organized under the laws of the state of Indiana; that it owns and operates a railroad through said county of Hamilton; that on the 2d day of June, 1898, appellee duly recovered a judgment against appellant in the circuit court of said county in the sum of $943.35, with costs, which judgment is in full force, unappealed from, and wholly unpaid, and that thereafter an execution was duly issued on said judgment, directed to the sheriff of said county, who made a return thereon of no property found. Prayer, that a writ issue, directed to the sheriff of said county, for the agents, conductors, and employees of appellant, commanding each to appear and answer as to the amount of money in his hands belonging to it, and also as to the probable amount that would come into his hands as such agent, and for all other proper relief. Process was duly served upon appellant, and, after unsuccessfully demurring, it filed answer in general denial to the complaint. The venue was changed to the court below, where the cause was submitted, and, pursuant to request, the court afterwards filed its special findings of facts,

together with its conclusions of law. Judgment was rendered that appellee recover of appellant the sum of $1,102.25, together with his costs, and that one G. N. Horton, as agent of appellant, pay into the office of the clerk of the Tipton circuit court the sum of $50 per month, out of the funds coming into his hands as such agent, until said judgment should be fully paid.

It is evident that the court below erred in its conclusions of law. The complaint is founded on the act of April 27, 1899, p. 120 (section 834a, Burns' Rev. St. 1901). The proceeding is to a considerable extent analogous to a proceeding in garnishment. It is quasi in rem. Brown on Jurisdiction, § 71; 14 Amer. and Eng. Ency. of Law, 742. The statute does not, however, contemplate that a judgment shall be taken against the debtor beyond the enforcement of the writ; and in a case of this kind, where no writ has issued against the agent, and where he has not answered concerning funds in his hands, or as to the amount that will probably come into his hands, it is clear that there has been no sequestration, and that, therefore, there was no res on which to base an effective order in aid of the judgment plaintiff. See 2 Shinn on Attachment and Garnishment, § 610; Drake on Attachment, §§ 89a, 452a; Waples on Attachment and Garnishment, § 645. It is true that the debtor appeared to the action, but, as long as there was no subject-matter before the court on which it could base a judgment—the debtor not being personally liable—any attempted adjudication that the court might make was necessarily void. The further questions in this case need not be decided.

Judgment reversed, and trial set aside, with an order to dismiss the proceedings unless appellee files an intervening motion that a writ issue requiring some agent of appellant to answer, as provided by statute.

DOLAN *et al.* v. NEW YORK & H. R. CO. *et al.*

(*Court of Appeals of New York, June 9, 1903.*)

[67 N. E. Rep. 612.]

Eminent Domain—Railroads—Erection of Viaduct—Station Grounds. Though the owners of land abutting on Park avenue, in the city of New York, cannot maintain a suit to restrain the operation of the New York & Harlem Railroad Company on the viaduct erected by it under Laws 1892, p. 694, c. 337, and to recover damages to the fee and rental value of the property, they can recover such damages where the station houses of the company occupy more of the street than the viaduct, and deprive the owners of their easements of light and air.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Nora Dolan and others against the New York & Harlem Railroad Company and others. From a judgment of

the Appellate Division (77 N. Y. Supp. 815) affirming a judgment for plaintiffs, defendants appeal. Reversed.

Ira A. Place and Thomas Emery, for appellants.

George C. Lay and William A. Keener, for respondents.

HAIGHT, J. This is one of a group of actions brought by the abutting owners on Park avenue in the city of New York to restrain the maintenance and operation of the defendants' railroads upon the viaduct structure through that street, or, as an alternative, to recover damages resulting to the fee and rental value of the premises. The plaintiff's premises are situated on Park avenue, between 124th and 125th streets, abutting upon the defendant's railroad stations at 125th street. The station is upon the viaduct structure, widened out so as to provide a suitable platform on which passengers may enter or alight from trains, and is reached by stairways from the street.

The complaint in this action demands judgment that the defendants be enjoined from maintaining a station, platform, and appurtenance thereto, in front of the plaintiffs' premises, as well as that of the elevated railroad structure. The trial court awarded judgment in favor of the plaintiffs for fee and rental damages, which included the damages suffered by reason of the operation of the defendants' trains upon the viaduct. For this reason the judgment must be reversed, upon the authority of Muhlker v. New York & Harlem Railroad Co., 173 N. Y. 549, 66 N. E. 558, and Fries v. New York & Harlem Railroad Co., 169 N. Y. 270, 62 N. E. 358. The only question remaining to be determined upon this review is as to whether the complaint should be dismissed, or a new trial granted, and the determination of that question involves an inquiry as to whether the plaintiffs can recover damages by reason of the construction and maintenance of the defendants' depot at that place.

Prior to 1892 the defendants had acquired the right to maintain and operate their railroad through Park avenue in a subway or cut bounded on either side by walls of masonry. This not only prevented the use of a large portion of the street for municipal purposes, but it also seriously interfered with the passage of teams between those portions of the city lying on opposite sides of Park avenue. Under these circumstances, the Legislature enacted chapter 339, p. 694, of the Laws of 1892. By this act a board was created to erect a steel viaduct through Park avenue from 111th street to the Harlem river, and after its completion the defendants were required to run their trains over the viaduct. The cut in the street was then required to be filled, and the surface paved.

The evident purpose of this legislation was to open up Park avenue as a street through its entire width, and to facilitate travel across the same between the portions of the city lying on either side of the street. This was a public improvement effected through a governmental agency, over which the

defendants were given no voice or power to control the operations of the board. It was consequently held in the cases to which we have referred that the defendants were not liable for the damages resulting to abutting property owners from the operation of their trains on the viaduct. The same statute further "authorized and permitted" the defendants, at their election, to erect station houses on both sides of the railroad at 125th street, with platforms extending from the north line of 124th street to the south line of 125th street. This statute was amended by chapter 594, p. 715, of the Laws of 1896, in which the defendants were not only authorized, but directed, to erect and maintain such stations; specifically specifying the size, place, and character of the structure.

It is contended on behalf of the defendants that inasmuch as they were compelled to construct the stations, under the amendment of the act, they are relieved from liability for damages to abutting owners of property, upon the same theory and for the same reasons that they have been relieved from liability for the construction of the viaduct. But we think there is a controlling distinction between this and the former cases, and that our decisions in the Fries and Muhlker Cases have no application. In those cases, as we have seen, the government built the structure for the purpose of effecting a great public improvement. In this case the government requires the defendants to provide suitable and proper facilities to enable their patrons to safely and conveniently enter and alight from their trains. A railroad corporation, in accepting a charter from the state, impliedly undertakes to afford reasonable and proper facilities for the transportation of passengers and freight; and, if it neglects, it may be compelled to discharge its duty in this regard. Under the general railroad law the construction and maintenance of depots are committed to the judgment of the railroad commissioners, who are empowered to direct as to the station houses and terminal facilities that shall be provided. Under the amendment of 1896, the Legislature, so far as these defendants are concerned, in Park avenue, has superseded the railroad commissioners, and has by act specified the character, size, and location of the stations, and that is all. To our minds, the situation is not different from that which would be presented if the railroad commissioners had required a depot and terminal facilities at any other point upon the defendants' lines. If, in complying with such requirements, additional lands should be required, it would become the duty of the railroad company to acquire the same and pay therefor. So in the case under consideration. If the station houses occupy more of the street than the viaduct, and tend to deprive the plaintiffs of their easements of light, air, and access, we think the defendants should pay therefor. The station houses are not constructed by the government for the purpose of accomplishing a public improvement, but are required by the gov-

ernment to be constructed by the railroad companies, under their implied contract with the state, to afford suitable and proper facilities for the accommodation of their own patrons.

While no damages could be awarded by reason of the construction of the viaduct, or of the operation of the trains of the defendants thereon, both fee and rental damages may be awarded, if suffered in consequence of the station houses. We consequently conclude that a new trial should be ordered.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

PARKER, C. J., and O'BRIEN, MARTIN, CULLEN, and WERNER, JJ., concur. GRAY, J., not sitting.

Judgment reversed.

DOLAN v. CHICAGO, M. & ST. P. RY. CO.

(*Supreme Court of Wisconsin, June 18, 1903.*)

[95 N. W. Rep. 385.]

Railroads—Maintenance of Stockyards—Nuisance—Evidence.

Under Rev. St. 1898, § 1898, requiring every railroad company to receive and transport freight tendered for shipment, and to provide suitable facilities for receiving the same, at any of its stations, and sections 1801 and 1799a, requiring such company to maintain a station at every village through which the road passes, and to receive for carriage all live stock offered from February 1st to September 30th, and properly transport the same, the maintenance of stockyards near railroad stations is necessary, and no recovery can be had against a railroad company on the ground that such a stockyard is a nuisance, without showing that the location of the yard was not a reasonably proper one, or that the company did not use reasonable diligence in preventing unhealthy conditions and unpleasant noises therein.

Same—Same—Same—Same.

On an issue as to whether railroad stockyards are a nuisance, evidence that there is no other reasonably convenient and practicable location for the yards is admissible.

Appeal from Circuit Court, Monroe County; J. J. Fruit, Judge.

Action by P. Dolan against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

This is an action to recover damages for an alleged nuisance, and to procure the abatement thereof. The action was tried before the court and a jury. The evidence showed that for more than 20 years the defendant has owned and occupied a railway passing through the village of Cashton, Monroe county, and has maintained and used at said village, upon its grounds, stockyards for the receiving and shipping of live stock over its road; that the stockyards consist of pens and covered sheds; that the plaintiff owns and occupies a dwelling house across a 66-foot street from the stockyards, which he acquired a considerable time after the establishment of the yards. The plaintiff's claim is that the stockyards were so

used as to constitute a nuisance to himself and his family, by reason of offensive odors and noises therefrom. The following special verdict was rendered by the jury: "Question 1. Has the defendant railway company frequently, between October 1, 1898, and August 14, 1901, bv the maintenance and use of its stockyards, sent over, or permitted to be sent over, upon the premises of the plaintiff, disagreeable and offensive odors, to such an extent as to materially interfere with the physical comfort of the plaintiff and his family in the occupancy of said premises? Answer. Yes. Question 2. Did disagreeable and offensive noises frequently come from the stock, when in such stockyards, to the plaintiff's premises, between October 1, 1898, and August 14, 1901, to such an extent as to materially interfere with the physical comfort of the plaintiff and his family in the occupancy of said premises? Answer. Yes. Question 3. Were there any acts of copulation among the stock when in such stockyards, between October 1, 1898, and August 14, 1901; and, if so, were such acts of such frequent occurrence, and so open to the view of the plaintiff and his family, as to materially cause physical discomfort to the plaintiff and his family in the occupancy of his said premises? Answer, No. Question 4. Was the illness of the plaintiff's wife in the fall and winter of 1898 and 1900 caused by any of the odors or noises which may have at any time come from such stockyards, or from any other cause or causes occurring in or in connection with the use and maintenance of such stockyards? Answer. (Answered by the Court.) No. Question 5. If the court shall finally determine that the plaintiff shall recover in this action, at what sum do you assess his damages? Answer. $144.75." A motion for a new trial by the defendant was overruled, and judgment rendered for the plaintiff, and the defendant appeals.

Masters & Graves and H. H. Field, for appellant.
F. V. McManamy, for respondent.

WINSLOW, J. (after stating the facts). This is an action at law, under section 3180, Rev. St. 1898, to recover damages for, and secure the abatement of, a nuisance. The alleged nuisance consists of stockyards maintained by the defendant upon its depot ground at the village of Cashton, from which offensive and injurious odors and noises are said to proceed, to the great discomfort of the plaintiff and his family. The evidence was entirely sufficient to sustain the findings of the jury, and the questions presented are purely questions of law.

The defendant is a railway company duly chartered and operating a railroad. It is bound by positive requirement of law to receive and transport freight tendered to it for shipment, and provide suitable facilities for receiving and handling the same at any of its stations. Rev. St. 1898, § 1798. It is also required to maintain a station at every village through which it passes which has a post office and a population of 200 people or more. Id. § 1801. It must receive for carriage

all live stock offered to it from February 1st to September 30th, inclusive, and properly transport the same over its road. Id. § 1799a. In order to discharge the statutory duty of receiving and transporting live stock, it must have facilities for the purpose at its stations, or in some convenient place within a reasonable distance. Inasmuch as it cannot have a train ready at all times to immediately receive and transport the stock offered, it must necessarily have yards or inclosures in which the animals may be kept until they can be taken away in the regular course of the operation of the road. That offensive smells and unpleasant noises will inevitably come from such yards, when in use, is matter of common knowledge. The skill of man has not yet devised means, within the bounds of reasonable expense and diligence, by which these disagreeable results can be wholly avoided. It must follow that, if a railway company exercises reasonable and proper diligence and care in the location of its yards and in their management, it has performed its whole duty. Impossibilities cannot be required. Duties cannot be imposed, and punishments inflicted, simply because the duties have been performed. If injury results to others, it must in such case be damnum absque injuria. The same rule must apply which applies to noise and smoke and steam resulting from the operation of the railroad. If these annoyances result simply from the necessary and proper operation of the road, they must be borne. If the company use the best and most improved devices to prevent injury to others, it is protected by its franchises. If it is negligent in this regard, it must respond in damages, if a nuisance is thereby created. 2 Wood on Nuisances (3d Ed.) § 755. So, in the case of stockyards, the railway company must use all reasonable diligence in the location of its yards, to avoid injury to others, and must manage them with approved methods, using all reasonable skill to prevent their becoming a nuisance. It cannot unnecessarily or unreasonably locate its yards in close proximity to dwellings or business houses, to their injury, without incurring liability. It must, doubtless, in order to perform its duty, place the yards in a reasonably practicable and convenient location in the vicinity of its station, for the reception and shipping of cattle, but it must at the same time place them where they will do the least possible injury to others. If these requirements be fulfilled, and if the yards be operated without negligence, and with that skill and diligence to avoid noise and noxious smells therefrom which the importance of the duty demands, there can be no liability, even though injury may result to others. Such injury, like many others, is simply one of the penalties we have to pay for the conveniences of modern methods of transportation.

Much reliance was placed by the plaintiff upon B. & P. Ry. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739, and Anderson v. C., M. & St. P. Ry. Co., 85 Minn. 337, 88 N. W. 1001. In the first of these cases a rail-

road company had constructed a roundhouse and machine shop next to a church, and the noise seriously disturbed the religious exercises. This was held to be an actionable nuisance, but the fact plainly appeared in the case that the location was unreasonable, and that there were many other places in the city where the shop could have been placed, and answer all railroad purposes fully as well. These being the facts, it was held that the shop so situated was a nuisance, and that, whatever rights were conferred on the railroad company by its charter, they were subject to the qualification that their works should not be so placed as by their use to unreasonably interfere with and disturb the comfort of others. The case goes no further, and, when rightly understood, it does not antagonize the propositions already laid down in this opinion. The second case cited is a stockyards case, and contains language tending to justify plaintiff's position here. In that case, however, the evidence established the fact that the yards were kept in an absolutely filthy condition, to the extent that dead animals were allowed to remain in them and become putrid. In view of these facts, the opinion must be read. The court said, in substance, that defendant's claim was that it had a right to select any place on its right of way for the reception and shipment of stock, but that it could not be conceded that a railroad company could rightfully create noxious conditions on its own property so near the private dwellings of others as unnecessarily to interfere with the health of the inmates. Here the element of necessity, which must mean reasonable necessity in the proper conduct of its business, is plainly recognized. This is not the case of a manufacturing company, which may purchase property and locate its works wherever it may choose. The stockyards must be adjacent to the railroad line, the location of which is fixed, and they must be at or in convenient proximity to a station. It will not do to say that the company must go out into unsettled districts in the country for its stockyards, for this is to say that, as soon as people begin to reside in the vicinity, the yards must be again removed to some more secluded spot, and so on ad infinitum.

The defendant attempted to introduce evidence showing that there was no other reasonably convenient and practicable location at Cashton for the yards, but the evidence was excluded. This was plainly error. I. C. R. Co. v. Grabill, 50 Ill. 241; Dunsmore v. Ry. Co., 72 Iowa, 182, 33 N. W. 456; Shirely v. Ry. Co., 74 Iowa, 169, 37 N. W. 133, 7 Am. St. Rep. 471. The verdict fails entirely to determine the fact whether the location was a reasonably proper one, and also fails to find whether the company operated the yard upon approved methods, and used reasonable skill and diligence in preventing unhealthy conditions and unpleasant noises therein. In the absence of findings on these questions, the judgment cannot be sustained.

Judgment reversed and action remanded for a new trial.

JOHNSON *et al.* *v.* TOLEDO, S. & M. RY. CO.

(*Supreme Court of Michigan, June 30, 1903.*)

[95 N. W. Rep. 724.]

Perishable Shipments—Liability for Failure to Ice Car—Negligence of Connecting Carrier.*

Where a carrier gave a bill of lading for a car of perishable fruit for shipment beyond its own line, reciting the receipt of the goods in apparent good order, consigned from Michigan to another state, subject to the carrier's liability under the common law and statutes in force in the various states through which the goods might pass, and that the car was to be iced at G. and re-iced as often as necessary, the carrier issuing such bill was liable for damage to the fruit by reason of its failure or the failure of a connecting carrier to keep the car properly iced,

Same—Same—Place of Injury—Question for Jury.

Where, in an action against a carrier for injuries to fruit shipped under a contract requiring that the cars should be properly iced when delivered, there was some evidence that the cars furnished were inadequately iced, and that plaintiffs were not aware of the fact until they were loaded, when it was too late to remedy the difficulty, and there was other evidence that the cars were delayed in transit on defendant's line, whether the injury occurred while the cars were on defendant's line was for the jury.

Same—Same.

Where a bill of lading for the shipment of fruit provided that the cars should be iced at G. and re-iced as often as necessary thereafter, the fact that plaintiffs discovered that the cars were insufficiently iced before their departure did not impose a responsibility on plaintiffs or relieve defendant, if plaintiffs had no opportunity to remedy the situation, and believed that the fruit would reach G. without injury.

Error to Circuit Court, Kent County; Willis B. Perkins, Judge.

Action by Charles A. Johnson and others against the Toledo, Saginaw & Muskegon Railway Company. From a judgment in favor of defendant, plaintiffs bring error. Reversed.

Burlingame, Belden & Orton, for appellants.

E. W. Meddaugh (Geer & Williams, of counsel), for appellee.

HOOKER, C. J. The plaintiffs have appealed from a verdict directed in favor of the defendant. They were copartners engaged in the business of buying and shipping fruit at Sparta. On September 25th the defendant sent to Sparta two refrigerator cars for their use, each car being furnished with 2,000 lbs. of ice, at Greenville, 26 miles distant. Plaintiffs began loading these cars the same afternoon, and finished the next morning by 9 o'clock. After the loading, and before the cars left Sparta, they accepted from the defendant's agent at Sparta the bills of lading which are claimed to constitute the contract between the parties. One of these cars was billed to Colum-

*As to whether initial carrier is liable for negligence of connecting carrier, see generally, foot-note appended to Hartley *v.* St. Louis, etc., R. Co. (Iowa), 1 R. R. R. 569. 24 Am. & Eng. R. Cas., N. S., 569.

bus, Ohio, the other to Indianapolis, Ind. When the cars reached their respective destinations, it was found that the fruit had become heated and injured, and this action was brought to recover damages resulting therefrom. The following is a copy of the bill of lading for one of the cars, and the other is similar, except as to destination:

"Grand Trunk Railway System Bill of Lading.
"Chas. M. Hays, General Manager.
"Sparta, Mich., Station, Sept. 26, 1900.

"Received from C. A. Johnson & Co., by the T. S. & M. Ry., in apparent good order (or as noted) the property described below (contents and value of package unknown) marked and consigned as per margin, and subject to carriers' liability under the common law and statutes in force in the various States, Territories, provinces or foreign countries through which the goods may pass.

"This bill of lading to be presented by consignee without alteration or erasure. If the property is not removed by the consignee within twenty-four (24) hours after reaching destination, it will be retained in car or otherwise stored at owner's risk subject to charge for use of said car or other storage; same, together with transportation charges, shall be a lien on the property.

"Any overcharge occurring on this bill of lading will be promptly adjusted.

"This Bill of Lading contracts rates from Sparta to Columbus Ohio, via ——, at —— per —— and charges advanced at $——.

Marks, Consignee, etc.	Articles	Weight
C. A. Johnson & Co. Indianapolis Ind.	300 Bu. Peaches	Subject to Correction
N. Y. D. R. L. No. 13,520 Via Big 4.	O. R. Chgs. Gtd.	15,000 pounds.

"Ice at Greenville and re-ice as often as necessary to keep car thoroughly iced.

"R. D. Bancroft, Agent."

The evidence shows that the cars left Sparta the day that the loading was finished, and within an hour thereafter, and at that time the plaintiffs claim to have been dissatisfied with the condition of the cars, and thought that the initial icing at Greenville had not been properly done. The cars arrived at Greenville somewhat late, owing to delays, and at half past 1 p. m. the defendant's employees commenced putting ice in them, and finished at 3:45 p. m. They put three tons of ice in each car. The cars arrived at Durand at 11:30 p. m., 165 miles from Greenville. Here they were separated. One proceeded at once over the Detroit, Grand Haven & Milwaukee Division of the Grand Trunk Railway to Detroit, arriving

there at 10 minutes past 7 a. m., and was delivered to the Lake Shore Company at 10 minutes past 10 a. m. of the 27th. Defendant's witnesses claim that the car was then found provided with sufficient ice. The car reached the Lake Shore icing station at Toledo at 2 a. m., September 28th, when 4,000 pounds of ice was supplied, and at 2:40 a. m. it left for Columbus, Ohio, over the Hocking Valley Road. The evidence indicated that there were two tons of ice in the car when it reached Toledo, according to plaintiffs' interpretation of it. The car reached Columbus before 3 a. m., September 29th. The ice boxes were then full of ice, but the temperature of the car is said to have been found high, and the peaches injured by overheating. The peaches were sold for $122.65 gross. They cost $295. The other car left Durand on September 27th, over the Grand Trunk Road, and reached Nicholas, near Battle Creek, at 1:20 p. m. Plaintiffs say that defendant claims, but did not prove by competent testimony, that it was re-iced there. It left at 8:40 p. m., September 27th, and arrived at Grangers, Ind., about 1 o'clock a. m., September 28th. It was then transferred to the Big Four Road at a quarter of 7 a. m. of the 28th, the ice tanks being half full of ice. It left for Indianapolis, where it arrived early on September 29th. At 7 a. m. it was found to contain about 600 pounds of ice. The peaches were badly decayed, and the car was re-iced at once. The fruit was sold, and brought $94.70 gross, and the cost was $170.

It was admitted by defendant that the contract bound it to take these cars to Detroit and Grangers respectively. The plaintiffs claimed that defendant was liable for the loss, because (1) it was due to its negligence, the cars not being properly iced at Greenville before being sent to Sparta, and a delay occurring between Greenville and Grangers. (2) "If any part of the loss was due to negligence of connecting roads, the defendant is liable therefor under the terms of the contract made, i. e., the bills of lading used, and the attending circumstances."

We are of the opinion that the learned circuit judge was incorrect in saying that a through contract to transport to Columbus was not made by the defendant. If the provisions of the bill of lading ought not to be construed as showing such an intention, in view of the statement that the property was received "subject to carriers' liability, under the common law and statutes," etc. We should not overlook the fact that it contained some other provisions giving rights to and imposing obligations upon both parties. Among these there are some which should be given little weight as evidence showing a through contract, though all may be consistent with such a contract. The provision regarding re-icing, however, is a significant one. There is nothing in the bill of lading, or proof, to show authority on the part of the agent or defendant

company to bind connecting lines to "re-ice the car, as often as necessary to keep the car thoroughly iced," yet it is evidently intended as a stipulation. It is contained in a receipt given to one shipping to a designated point by various lines stipulated. It is said that it only states a common-law liability of all roads. But does it not do more than state such a liability? The common law undoubtedly requires care in transporting perishable goods, and, under modern methods, we have no doubt that it would be held to extend to proper refrigeration, according to established custom. Was not the shipper given to understand that his car would at all times be kept thoroughly iced, whether essential to the preservation of the fruit or not, thus providing additional assurance of safety? If this was not the intention, the provision was superfluous.

To whom did the plaintiffs have a right to look for the performance of this engagement? There is nothing on the face of the record to establish privity between plaintiffs and connecting lines as to this provision. There might be privity under another construction of this writing, but only to the extent of the ordinary obligations arising out of the reception of the car as a common carrier. This defendant, if any one, made this promise, and against it, only, could it be enforced according to its terms.

Again, the court held that there was no question for the jury as to injury while the cars were upon defendant's road. Some correspondence, to be found in the files, relating to a proposed amendment of the record, indicates a misunderstanding between court and counsel, which explains the action of the court in this regard. As finally settled, the record contains some evidence tending to show that the cars were inadequately iced when furnished, and that plaintiffs were not aware of the fact until they were loaded, and too late to remedy the difficulty. It also appeared that the cars were delayed from two to three hours on their trip to Greenville; also that there was a delay, at Nicholas, of one of the cars.

We do not overlook defendant's contention that plaintiffs accepted the bill of lading and are precluded from questioning what occurred before, but we think that they were entitled to a properly iced car under that instrument. Moreover, we are of the opinion that the alleged discovery that the cars were warm and insufficiently iced, before their departure, did not impose upon plaintiffs the responsibility, and relieve defendant from its obligation, if they had no opportunity to relieve the situation, or honestly believed the fruit would reach Greenville without injury. These were all proper questions for the jury.

The judgment is reversed, and a new trial ordered.

MOORE, J., did not sit. The other Justices concurred.

WILLETT *v.* SOUTHERN RY. CO.

(*Supreme Court of South Carolina, June 30, 1903.*)

[45 S. E. Rep. 93.]

Connecting Carriers—Damage to Freight—Liability—Presumptions.*

Under Civ. Code, § 2176, providing that, under a contract for shipment of freight between two or more common carriers, the responsibility of each shall cease on delivery to the connecting line in good order, on obtaining a receipt to that effect from such connecting carrier, and that the last carrier, on failure on notice to inform shipper where freight delivered was damaged, shall be liable therefor, the rule that the presumption is that the terminal carrier damaged goods delivered in bad order is not changed.

Same—Delivery to Carrier—Presumptions.

Delivery of freight to a city expressman in good condition raises the presumption of delivery to the initial railroad in such condition.

Appeal from Common Pleas Circuit Court of Aiken County; Gage, Judge.

Action by Thomas Willett against the Southern Railway Company. From circuit order affirming magistrate's judgment, defendant appeals. Affirmed.

B. L. Abney and Hendersons, for appellant.

Sawyer & Owens, for respondent.

WOODS, J. The plaintiff, Thomas Willett, delivered an ornamental camphor wood chest to an expressman at Port Chester, N. Y., marked, "Thomas Willett, Aiken, S. C., via Clyde Line." The chest was delivered to the plaintiff at Aiken, S. C., by the Southern Railway Company, in a damaged condition, with the crate shattered. This action to recover for the value of the chest was brought against Southern Railway Company as the last carrier having it in charge; the plaintiff alleging that the damages was so great as to make the chest valueless. No evidence was offered on either side as to where the damage was done. The plaintiff recovered judgment in a magistrate's court, which was affirmed by the circuit court. The defendant appeals, and its exceptions involve two inquiries.

1. First, where goods are delivered to the consignee by the last carrier of connecting lines in a damaged condition, is there any presumption that they were damaged while in charge of the last carrier, or has such presumption been entirely removed and transferred to the initial carrier by section 2176 of the Civil Code, which was in force when this action was commenced, and which makes the initial carrier liable in every case for loss or damage to goods, allowing it, however, to discharge itself by the production of a written receipt from the next carrier to which it properly delivered the goods? The general rule is that the burden is on the carrier which delivers the goods to consignee to respond to any dam-

*See foot-note appended to Cote *v.* New York, N. H. & H. R. Co, (Mass.), 5 R. R. R. 270, 28 Am. & Eng. R. Cas., N. S., 270.

age which occurs in transit, or show that it was done while in the hands of some other carrier. This rule has never been under judicial discussion in this state, but it is supported by the great weight of authority elsewhere. 6 Cyc. 491; Moore v. R. R. Co., 173 Mass. 335, 53 N. E. 816, 73 Am. St. Rep. 298; Laughlin v. Ry. Co., 28 Wis. 204, 9 Am. Rep. 493. Hale on Bailments and Carriers thus states the rule, quoting numerous authorities in support of it: "In an action against the last carrier, if it is shown that the goods were delivered to the first carrier in good order, this condition, in the absence of a contrary showing, will be presumed to continue until the goods come into the possession of the last carrier, and that the injury occurred on that line. This is on the principle that things once proved to have existed in a certain condition are presumed to have continued in that condition until the contrary is established by evidence." We think this doctrine is supported by public policy so important as to amount to necessity. With the immense traffic and the resulting complicated business methods of modern American railroads, and the connection of these roads with one another, to impose upon the owner of property passing over connecting lines the burden of making affirmative proof that the loss occurred on a certain one of these lines would be practically relieving of liability railroads handling freight as connecting lines; for the owner could rarely make the required proof, and, when he could make it, in most instances the expense of doing so would be greater than the value of the goods. The rule works no hardship to the railroads as common carriers, because they receipt to one another, and can easily trace loss or damage.

Prior to the enactment of the statute above referred to, the initial carrier was not liable, except upon actual proof of damage or loss while the goods were in its possession, unless it expressly contracted to deliver the goods at their destination. Kyle v. R. R. Co., 10 Rich. 382, 70 Am. Dec. 231; Hill v. R. R. Co., 43 S. C. 471, 21 S. E. 337. This statute makes no reference to the liability of the last carrier, which we have seen existed before it was passed; and certainly a law imposing a similar liability on the initial carrier cannot be held by implication to relieve the last carrier of its liability. The statute was intended to further protect the public in dealing with connecting carriers, and not to remove any obligation existing at the time of its passage. After the enactment of the statute, the owner might demand satisfaction either to the initial carrier, under the statute, or of the last carrier, under the legal presumption above stated; but either could discharge itself by showing that the damage did not occur while the goods were in its charge. We do not think the act of 1895 (21 St. at Large, p. 822), which was in force when this loss occurred, affects the conclusion above stated. It provides "that when under contract for shipment of freight or express over two or more common carriers, the responsibility

of each or any of them shall cease upon delivery to the connecting line 'in good order,' and if such freight or express has been lost, damaged or destroyed, it shall be the duty of the initial, delivering or terminal road, upon notice of such loss, damage or destruction being given to it by the shippers, consignee, or their assigns, to adjust such loss or damage with the owners of said goods within forty days, and upon failure to discharge such duty within forty days after such notice, or to trace such freight or express and inform the said party so notifying when, where and by which carrier the said freight or express was lost, damaged or destroyed, within said forty days, then said carrier shall be liable for all such loss, damage or destruction in the same manner and to the same extent as if such loss, damage or destruction occurred on its lines: provided, that if such initial, terminal or delivering road can prove that, by the exercise of due diligence, it has been unable to trace the line upon which such loss, damage or destruction occurred, shall thereupon be excused from liability under this act."

It was held in Cave v. Ry. Co., 53 S. C. 496, 31 S. E. 359, that this act applies only when the shipments are made and received by the connecting carriers under a contract that the responsibility of each shall cease upon delivery to the connecting line "in good order," and that such contract must be alleged in the complaint. There is no allegation in the complaint in the case now under consideration that the chest was carried by the railroads under a contract of the kind mentioned in this statute. It is manifest from the record that the circuit court and both parties to the cause did not regard this suit as an action brought under the statute of 1895. Considering this the correct view, we do not think there is anything in the statute which destroys the plaintiff's right of recovery, under the presumption of the liability of the last carrier, which has already been discussed. The statute does not expressly or by implication remove the general presumption of liability which we have seen exists against the terminal carrier. If, on the other hand, this be regarded an action under the statute of 1895, no objection was made in the pleadings or exceptions to the insufficiency, under the statute, of the allegations of the complaint or the evidence offered in support of it.

2. The next question is, was the expressman to whom the chest was delivered a connecting common carrier, in such sense that delivery to him of the chest in good condition raises the presumption that it was delivered to the railroad at Port Chester in good condition? It is a matter of common knowledge that, when one speaks of an expressman in a city, he usually means an agent of one of the local express companies, whose business is to transport goods for all persons who offer them. Such companies are common carriers (Piedmont Co. v. R. R. Co., 19 S. C. 365; Jackson Works v.

Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432); and when railroad companies receive freight from one of these express companies for shipment, as in this case, just as they received it from other railroads, we are unable to see the force of the position that it is not to be regarded as a connecting carrier. But, aside from all this, the presumption is that, when the chest was received by the railroad at Port Chester, the crate was not in the shattered condition in which it was delivered to the consignee, and the damage was probably done to the chest by the same negligence which shattered the crate. When damaged goods are received by a consignee with the cases unbroken, and with no damage disclosed bv external inspection, there is no presumption that they were received by the first carrier in good condition, because the carrier is not supposed to open the cases in which the goods are concealed from view; but there is a presumption that the railroad company at Port Chester would not have received from the expressman a valuable chest to be shipped in a shattered crate. Note to R. R. Co. v. Kirkwood, 40 Am. Rep. 457; 66 Cyc. 518. We hold, therefore, that the presumption is that the chest was delivered to the railroad company at Port Chester in good condition, and the presumption that it was damaged by the last carrier stands, in the absence of any proof to the contrary.

The judgment of this court is that the judgment of the circuit court be affirmed.

LOUISVILLE & N. R. CO. v. DUNCAN & ORR.

(*Supreme Court of Alabama, April 21, 1903.*)

[34 So. Rep. 988.]

Carriers of Live Stock—Negligence—Whether Through Shipment—Alternative Allegations—Sufficiency.

Where the complaint in an action against a carrier for injuries to live stock charged alternatively that it was either the duty of defendant, the initial carrier, to transport the stock to destination on its own lines, or to deliver the stock at some unidentified point to a connecting carrier having a direct route from the junction point to destination, and that the loss resulted from defendant's failure to perform the carriage itself, or from its failure to forward the consignment by a connecting carrier having a direct route, such alternative averments did not constitute a statement of either cause of action, and the complaint was demurrable.

Same—Connecting Carrier—Refusal to Accept—Duty of Initial Carrier.

Where a connecting carrier, over whose line a shipment of live stock was routed, refused to accept the same, it was the duty of the initial carrier to notify the consignor of such fact, and obtain further shipping directions, unless the property was of such a perishable nature that the delay would be calculated to injure or destroy it.

Same—Connecting Carrier Not Shown by Bill of Lading—Parol Evidence.

Where a bill of lading for live stock did not specify the route over which the shipment was to be conveyed, parol evidence of directions by the consignor that the shipment should be delivered by the initial

carrier to a particular connecting carrier, was not objectionable as tending to contradict the bill of lading.

Same—Selection of Connecting Carrier.*

Where a connecting carrier, over whose line a shipment was routed, refused to receive and transport the same, in the absence of notice of such refusal to the consignor, the initial carrier was liable for the exercise of ordinary care and prudence in selecting another carrier to transport the consignment, and was liable for injuries to the consignment caused by delay resulting from the selection of a carrier having a circuitous route, which might have been avoided.

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action by James C. Duncan and another against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

On the trial of the case the following facts were shown: Plaintiffs delivered the live stock to defendant at Birmingham Sunday, November 5, 1899, at noon. Before delivery one of the plaintiffs and defendant's agent executed the contract which was attached as Exhibit A. to the bill of exceptions. Against defendant's objection and exception, the court admitted evidence of a conversation between one of the plaintiffs and said agent to the effect that the agent said to plaintiff, in response to his inquiry, that the stock ought to arrive at Thomasville, Ga., a station near Greenville, Fla., on the Plant System, at 9 or 10 o'clock Monday night; that plaintiff objected because the written contract failed to shew that the shipment was routed by the Plant System; that in reply to this objection the agent said that the shipment would go that way, and the waybill would show the routing, and that it was unnecessary for the written contract to show it. The testimony of plaintiffs also tended to show that another of defendant's agents issued free transportation to one of the plaintiffs on the contract of shipment to Montgomery, and told him that on presentation of his contract to the Plant System at Montgomery free transportation would be issued him to Thomasville, Ga., and that said plaintiff went from Birmingham on a passenger train to Thomasville, Ga., on the day of the shipment, and there first learned that the shipment had not been routed by the Plant System. The evidence showed that the shortest route from Birmingham to Greenville was by way of the Plant System from Montgomery; that the next shortest route was by way of the Georgia & Alabama Railroad from Montgomery to Cordele, Ga., where connection was made with the Georgia Southern & Florida Railroad; thence on that railroad to Lake City, Fla., where it connected with the Florida Central & Peninsular Railroad; and thence on the latter railroad to Greenville, Fla. The evidence showed that each of said railroads formed connections with, and received shipments of similar character from, the other at

*See notes at end of case.

the time plaintiffs' stock was being transported, forming a through route between Montgomery and Greenville via Cordele and Lake City, 382 miles long. The evidence showed that there was another route by way of the defendant's railroad to River Junction, Fla., and thence over the Florida Central & Peninsular Railroad to Greenville, which was 408 miles long, 26 miles longer than the previous route. The other route (which plaintiffs contended the shipment in fact took) was via the Georgia & Alabama Railroad from Montgomery eastward by way of Cordele to Savannah, thence southward over the Seaboard Air Line to Baldwin, Fla., and thence westward over the Florida Central & Peninsular to Greenville. Taking this latter route, it was necessary to transport the stock, in order to reach Savannah, 168 miles east of and beyond Cordele on the Georgia & Alabama Railroad, and westward practically the same distance from Baldwin to Lake City, which is about south of Cordele. The route via Savannah and Baldwin was thus about 325 miles longer than that via Cordele and Lake City. Each of these routes left Montgomery eastward over the Georgia & Alabama Railroad, one diverging south at Cordele and the other 168 miles further east at Savannah. The evidence showed that the Georgia & Alabama Railroad Company received the shipment from defendant at Montgomery unhampered by any instructions as to its routing beyond Montgomery, other than that its ultimate destination was Greenville, Fla. The evidence also showed that the connections of the Georgia & Alabama Railroad at Cordele and Lake City were such at the time of shipment that it could have routed the shipment that way.

The evidence showed that plaintiffs' stock reached Montgomery about 6 p. m. Sunday; that upon arrival there the waybill on which the stock was billed was delivered to one Walton, who had charge of the distribution of cars arriving on defendant's road and destined to points beyond it to the proper connecting carrier: that upon receipt of the waybill said Walton tendered said car of stock by telephone message to the office of the Alabama Midland Railroad or Plant System; that this was the proper office to which to make such tender, and that it was usual to make such tenders of shipments over the telephone to connecting lines, including the Plant System; that the person in the office of the Plant System who responded to Walton's telephone message declined to accept the shipment tendered it, stating that his company had a rule prohibiting it from handling shipments for points on the Florida Central & Peninsular Railroad, on which Greenville was located; that said Walton then explained that the shipment was of live stock, and that the person at the telephone replied that this made no difference, as the rule was arbitrary not to accept shipments of any character for points on that road. The evidence shows that Walton then called up defendant's yard office, and ascertained that neither plaintiffs nor

their agent accompanied the car of stock, and that said Walton then called up the Georgia & Alabama Railroad Company's local office at Montgomery, and tendered the stock to it; that, according to the usual course of business, shipments for Greenville, when refused by the Plant System, were next tendered to the Georgia & Alabama Railroad Company; that the car was accepted by that company; that said Walton then ordered the car to be placed on the receiving track of said railroad company, and that the stock, after having been unloaded and fed, was reloaded in the same car, and so placed; that this was the usual way of delivering shipments to the Georgia & Alabama Railroad Company; that a waybill was delivered to said railroad company by defendant as its authority for transporting said shipment to point of destination. The evidence shows that after the arrival of the shipment at Montgomery it was delivered, with shipping directions, to the Georgia Alabama Railroad Company in time to take the first train on that road going east from Montgomery, and which left Montgomery about 4 a. m. Monday. The evidence also showed that the defendant did not notify plaintiffs before routing the shipment over the Georgia & Alabama Railroad, and that the only effort made to communicate with plaintiffs after the shipment was refused by the Plant System was to ascertain that no one accompanied the stock to Montgomery. The evidence showed that the car of stock left Montgomery on the first train going east on the Georgia & Alabama Railroad after the shipment arrived in Montgomery, and was next seen, so far as disclosed by the evidence, coming into Greenville from the direction of both Lake City and Savannah on a freight train of the Florida Central & Peninsular Railroad. The only other evidence tending to show that the shipment had gone by way of Savannah were certain bills purporting to be for feeding the stock en route between Savannah and Greenville, which were forwarded to the agent at Greenville by the connecting carriers for collection, and which were by him collected from plaintiffs. The evidence also showed that the stock on arrival at Greenville was damaged, and further tended to show that the amount of damage done was the usual amount done by a railroad journey of five days' duration without rough handling. The stock in fact was in transit from Sunday noon to Thursday afternoon—about four days. The shipment arrived in the same car it left Birmingham in, and consisted of 20 horses and 6 mules. The evidence showed that the directions for shipping the stock meant they were to go via Montgomery, and that according to the custom on all railroads shipments is routed by way of a certain station on the initial carrier's line were to be carried on its line only to such station, and there delivered for further transportation to some other connecting line.

J. M. Falkner and W. I. Grubb, for appellants.
Bowman & Harsh, for appellee.

McCLELLAN, C. J. The action is prosecuted by Duncan & Orr against the Louisville & Nashville Railroad Company. The complaint is as follows: "The plaintiffs claim of the defendant one thousand dollars damages for that heretofore, to wit, on the 5th day of November, 1899, defendant was engaged in the business of a common carrier of freight from Birmingham, Alabama, with connections at various points, several of which connections reached Greenville, Florida; that on said day plaintiffs delivered to defendant at said Birmingham a large lot of horses and mules, to wit, twenty-six head, to be carried to said Greenville, Florida; that defendant accepted said stock, and it became and was the duty of defendant to carry said stock with reasonable speed to said Greenville, or with reasonable speed to deliver said stock to the one of its connections which could carry said stock with all reasonable speed to said Greenville, but, notwithstanding said duty, defendant delivered said stock to that one of its said connections which had a long and circuitous route to said Greenville, Florida, instead of that one of its said connections which had a shorter and more direct route to said Greenville, or instead of carrying said stock itself to said Greenville; and by reason of said delivery as aforesaid said stock did not reach said Greenville for a long time, to wit, for three days longer than it should have taken for them to have been delivered at Greenville, and, as a proximate consequence thereof, said stock were subjected to a great deal of jolting and jostling, and were greatly bruised and otherwise injured, and said stock were kept closely crowded together in said car, and said stock, or a part thereof, were made sick, and suffered a long time for lack of food and water, and plaintiffs had to pay a large amount for feed bills, and the said stock were rendered greatly less valuable to plaintiffs—all to plaintiffs' damage one thousand dollars, wherefore they sue." We have had some difficulty in making out precisely what this complaint means, but, resolving its involvements against the pleader, we have come to the conclusion that it charges alternatively that it was either defendant's duty itself and upon its own lines to transport the stock from Birmingham, Ala., to Greenville, Fla., or to deliver it at some unidentified point—whether at Birmingham, or Montgomery, or what not, is not stated—on its own line to some connecting carrier having a direct route of transportation from such point to the Florida town, and that the loss resulted either from defendant's failure to perform the carriage itself or from its failure to forward the consignment by a carrier having such direct route by its connections or otherwise from the point of connection to the destination of the shipment. So construed, we are of opinion that the complaint does not state any cause of action. Its alternative averments of the existence of one, or, if not that one, then the other, and vice versa, of two entirely distinct and different causes of action against the defendant in

distinct and different capacities, is not the affirmative averment of either of the causes of action referred to, and it cannot be said to aver any cause of action whatever. Southern Railway Co. v. Bunt, 131 Ala. 591, 32 South. 507; Central of Georgia Railway Co. v. Freeman (Ala.) 32 South. 778; Tiney v. Central of Georgia Ry. Co., 129 Ala. 523, 30 South. 623; Southern Railway Co. v. Shelton (Ala.) 34 South. 194. No cause of action being averred, the judgment must be reversed. Code 1896, § 3333.

On the state of facts existing with reference to this consignment after the car had reached Montgomery and the Plant System had refused to accept it for carriage to Greenville, if that company did so refuse—and on this issue it seems to us that the evidence was all with the defendant—it was defendant's duty to give notice of that fact to the consignors to the end that they might give further directions as to routing the consignment, unless the property was of such perishable nature as that the time necessary to give such notice and to receive such instructions would have caused a delay in forwarding calculated to injure or destroy it. We do not find, on the evidence in this record, that any such delay would have been entailed by taking the time necessary to these ends, or at least we may say that, with this issue properly in the case, it would be open to the jury to find that the defendant was remiss of its duty in this connection. Live stock is, of course, perishable in a general sense; but we apprehend that horses and mules released from the car and in a pen in Montgomery, as these were, were in no danger of perishing while the defendant was communicating with the consignors at Birmingham and receiving their reply.

It seems clear to us, also, that parol evidence as to the consignors having given direction for the consignment to go from Montgomery by the Plant System did not tend to vary or contradict the stipulations of the bill of lading, and that the evidence received on this subject, if believed by the jury, established the fact that the consignors directed the transportation to be over the Plant System.

Other questions aside, it was the duty of the defendant, as the forwarding agent of plaintiffs from Montgomery—the Plant System having declined the consignment—to exercise the same care in selecting a carrier or a succession of carriers from Montgomery to Greenville as the owner, being a man of ordinary care and prudence, would have exercised had he been present and as fully acquainted with all the lines and connections as the defendant was. And it was a question for the jury whether such a man would have delivered this car load of live stock to the Georgia & Alabama Company, whose manifest interest it was to carry it over their whole line to Savannah, and send it thence to Greenville (this route being very long and very circuitous,) without directing that company to deliver it to a connecting line at Cordele, Ga., whereby the

distance and time from Montgomery to Greenville would have been reduced about one-half. If the jury should find that a man of ordinary prudence and care would have directed the carriage by the Cordele connection, they should further conclude that defendant was negligent in delivering the car to the Georgia & Alabama Road without such direction.

We deem it unnecessary to refer to the rulings of the trial court in detail, since the judgment must be reversed on the insufficiency of the complaint, and what we have said will serve to indicate our views for the purpose of another trial, should there be one.

Reversed and remanded.

NOTES.

CARRIERS OF GOODS—SELECTION OF CONNECTING CARRIER.

A. Contract to Carry to Point of Transhipment, No Connecting Carrier Being Designated.
  1. General Rule.
  2. Where No Connecting Carrier at Point of Transhipment.
B. Contract to Carry to Point of Transhipment, Connecting Carrier Being Designated.
  1. General Rule.
  2. Instructions to Deliver to Order at Point of Transhipment.
  3. Connecting Carrier Indicated by Marks on Goods.
  4. Designated Connecting Carrier Refusing to Receive Goods.
  5. Same—Where Circumstances Urgent—Goods Perishable, etc.
C. Rights and Liabilities of Connecting Carrier.
  1. Whether Contract for His Benefit.
  2. Receiving Goods Not Intended for Him.
D. Through Shipment—Right of First Carrier to Choose Connecting Lines.

A. CONTRACT TO CARRY TO POINT OF TRANSHIPMENT, NO CONNECTING CARRIER BEING DESIGNATED.

1. General Rule.

Where a first carrier receives freight destined to a point beyond the terminus of his line, without any special agreement to carry the same to its destination, or any contract or directions as to its delivery to any particular connecting carrier, he is not only bound to carry safely to the end of his route, but the law implies an undertaking to deliver to a safe and responsible connecting carrier, in the usual course of business, for transmission to its destination. Having done this, his responsibility is at an end. Mich. Cent. R. Co. *v.* Manfg. Co., 16 Wall. 318, 21 L. Ed. 297; Railroad Co. *v.* Pratt, 22 Wall. 123, 22 L. Ed. 827; St. Louis Ins. Co. *v.* St. Louis, etc., R. Co., 104 U. S. 146, 26 L. Ed. 679; Mich. Cent. R. Co. *v.* Myrick, 107 U. S. 102, 1 Sup. Ct. 425; Dixon *v.* Columbus, etc., R. Co., 4 Biss. 137, Fed. Cas. No. 3,929; Deming *v.* Norfolk, etc., R. Co., 21 Fed. 31; Rome R. Co. *v.* Sullivan, 25 Ga. 228; Snow *v.* Ind., etc., R. Co., 109 Ind. 422, 28 Am. & Eng. R. Cas. 77, 9 N. E. 702; Hewett *v.* Chicago, etc, R. Co., 63 Iowa 611, 19 N. W. 790; Simpkins *v.* Steamboat Co., 11 Cush. 102; Ackley *v.* Kellogg, 8 Cow. (N. Y.) 223; Brown *v.* Denison, 2 Wend. 593; Van Santvoord *v.* St. John, 6 Hill (N. Y.) 158; Johnson *v.* New York Cent. Transp. Co., 33 N. Y. 610, 88 Am. Dec. 416; Root *v.* Great Western R. Co., 45 N. Y. 525; White *v.* Ashton, 51 N. Y. 280; Hinckley *v.* New York, etc., R. Co., 56 N. Y. 429; Rawson *v.* Holland, 59 N. Y. 611, 17 Am. Rep. 394; Brown *v.* Mott, 22 Ohio St. 149; Knight *v.* Providence, etc., R. Co., 13 R. I. 572, 43 Am. Rep. 46; Harris *v.* Grand Trunk Ry. Co., 15 R. I. 371, 5 Atl. 305; Louisville, etc., R. Co. *v.* Campbell, 7

Heisk. (Tenn.) 253, 12 Am. Ry. Rep. 490; Brintnall *v.* Saratoga, etc., R. Co., 32 Vt. 665; Hadd *v.* United States, etc., Exp. Co., 52 Vt. 335, 36 Am. Rep. 757; McConnell *v.* Norfolk & W. R. Co., 86 Va. 248, 40 Am. & Eng. R. Cas. 155, 9 S. E. 1006.

Thus, in Snow *v.* Indiana, etc., R. Co., 109 Ind. 422, 28 Am. & Eng. R. Cas. 77, 9 N. E. 702, it was said: "A shipper who receives a bill of lading for goods consigned to a point beyond the terminus of the initial carrier's line, authorizes the initial carrier to select any usual or reasonably direct and safe route by which to forward, after the goods reach the end of his line, unless the particular line by which the goods consigned, are to be forwarded, is designated in the bill of lading. In such a case, the bill of lading being silent in respect to the line by which the goods are to be forwarded, its effect is the same as if a provision were therein inserted that the carrier should have the right to select, at his discretion, any customary or usual route which was regarded as safe and responsible. This provision, being thus imported into the contract by law, is as unassailable by parol as are any of the other express terms of the contract."

And in a leading case, the defendants, who were engaged in the carrying business on the Hudson river, by means of a line of boats between New York and Albany, received of the plaintiffs a box marked "J. Petrie, Little Falls, Herkimer County"—a point beyond the terminus of their route—and gave a receipt which merely stated that they had received from the plaintiffs a box so marked. There were no special directions, nor any contract as to the place or mode of its delivery. It was held that they discharged their full duty by carrying it safely to Albany, and delivering it safely on board a canal boat belonging to a safe and responsible line, whose route lay through Little Falls, this being in accordance with the usual course of business in similar cases; and hence they were not liable for the loss of the contents of the box by theft or robbery before it reached Little Falls. Van Santfoord *v.* St. John, 6 Hill (N. Y.) 158.

And so in a similar case, where the consignor gave directions that the goods be forwarded by a canal boat, but named no particular boat, it was held that the initial carrier, having used due care in the selection of a safe boat. was not liable for their loss by the upsetting of the boat. Ackley *v.* Kellogg, 8 Cow. (N. Y.) 223.

Of course where it is expressly stipulated in the bill of lading that the goods may be sent forward from the end of the initial carrier's route by any carrier or freightman willing to receive them unconditionally for transportation, the first carrier performs his full duty by sending the goods forward in the usual course of business by any carrier known to be safe and responsible, and who will accept the same unconditionally. Hinckley *v.* New York, etc., R. Co., 56 N. Y. 429.

2. Where No Connecting Carrier at Point of Transhipment.

Should it happen that there is no connecting carrier at the point of transhipment, then in the due order of things it is not likely that any question of negligence in the selection of another carrier will arise, since in the absence of contract, either express or implied from established usage, the first carrier is under no obligation to transport the goods over any link, however short, in order to reach another carrier. His duty in such case is to retain the goods and notify the owner, and await his instructions. St. Louis, etc., R. Co. *v.* Marrs, 60 Ark. 637, 2 Am. & Eng. R. Cas., N. S., 647, 31 S. W. 42; Louisville, etc., R. Co. *v.* Campbell, 54 Tenn. (7 Heisk.) 253.

B. CONTRACT TO CARRY TO POINT OF TRANSHIPMENT, CONNECTING CARRIER BEING DESIGNATED.

1. General Rule.

Where there is a contract, or where the owner has given instructions, in which case the law creates the contract, that the goods be forwarded by a particular connecting carrier from the point of transhipment, it is the duty of the initial carrier to forward by the carrier designated; and if he fail to do so, and forward by some other, his liability as carrier continues, and he becomes, in effect, an insurer of the safe delivery

of the goods, on the same principle that a first carrier assumes the risk where he himself deviates from the agreed route. Strong *v.* Certain Quantity of Wheat, 3 Wall. 225, 18 L. Ed. 194, affirming (circuit court unreported) Strong *v.* Certain Quantity of Wheat (D. C.), Fed. Cas. No. 13,541; Georgia R. Co. *v.* Cole, 68 Ga. 623; Michigan, etc., R. Co. *v.* Day, 20 Ill. 375, 71 Am. Dec. 278; McEwan *v.* Jeffersonville, etc., R. Co., 33 Ind. 376; Brown *v.* Pennsylvania Co., 63 Minn. 546, 2 Am. & Eng. R. Cas., N. S., 640, 65 N. W. 961; Ackley *v.* Kellogg, 8 Cow. (N. Y.) 225; Wilcox *v.* Parmelee, 5 N. Y. Super. Ct. (3 Sandf.) 610; Johnson *v.* New York Cent. R. Co., 39 How. Prac. (N. Y.) 127; Dana *v.* New York Cent. R. Co., 51 How. Prac. 430; Erie Ry. Co. *v.* Steiger, 5 Hun 346; Johnson *v.* Transportation Co., 33 N. Y. 610, 88 Am. Dec. 416; Goodrich *v.* Thompson, 44 N. Y. 324; Maghee *v.* Camden & Amboy R. Co., 45 N Y. 514, 6 Am. Rep. 124; Bostwick *v.* Balto. & Ohio R. Co., 45 N. Y. 712; Rawson *v.* Holland, 59 N. Y. 611, 17 Am. Rep. 394; Missouri Pac. R. Co. *v.* Young, 25 Neb. 651, 41 N. W. 646; Philadelphia, etc., R. Co. *v.* Beck, 125 Pa. St. 620, 40 Am. & Eng. R. Cas. 140, 17 Atl. 505, 11 Am. St. Rep. 924; Louisville, etc., R. Co. *v.* Odill, 96 Tenn. 61, 2 Am. & Eng. R. Cas., N. S., 647, 33 S. W. 611; Hooper *v.* Chicago, etc., R. Co., 27 Wis. 81, 9 Am. Rep. 439.

The first carrier may also be held liable as for a conversion where he delivers the goods to other than the designated carrier. Georgia R. Co. *v.* Cole, 68 Ga. 623.

In Brown & Haywood Co. *v.* Pennsylvania Co., 63 Minn. 546, 2 Am. & Eng. R. Cas., N. S., 640, 65 N. W. 961, a carrier received a shipment of goods, to be carried to a point beyond its own line, with directions to deliver them to certain connecting carriers to be carried to their destination. At the same time the shipper made an agreement with the last connecting carrier to have the car containing the goods stopped at two intermediate points on its line, and certain portions of the goods delivered at each point; the balance to be carried to the point of destination, to which the goods were billed by the initial carrier. The initial carrier had no knowledge of this agreement, and wrongfully sent the goods by a different connecting carrier, whose lines did not reach the place of destination, but did reach one of said intermediate points, to which it brought the goods, and was proceeding to forward the whole of them to the place to which they were so billed, when plaintiff disclosed to it his contract to have the goods distributed to the three points, and demanded that it be complied with. Before complying with the same, this carrier compelled him then and there to pay the whole freight for the whole route, and thereupon delivered him the goods destined to that point, and undertook at its own cost to carry to each of the other points the portion of the goods destined to such point. In doing so, one package of the goods was broken and destroyed. In a suit by the shipper against the initial carrier for the loss, *held*, the initial carrier became, by its wrongful act of diverting the goods from the designated route, an insurer of their safe delivery at the three places of destination, though two of those places were never disclosed to it.

And so where the carrier undertook to carry a piano to a certain point upon its line and there deliver to a connecting carrier, with whose track its own track was joined by means of a mechanical contrivance known as a Y, it did not fulfill its obligation by delivering to a couple of draymen who styled themselves a "transfer company," to be carried by them to the depot of the connecting carrier for further transportation. The draymen were simply agents of the first carrier, and it was liable as carrier for injuries received by the goods while in their custody. Missouri Pac. R. Co. *v.* Young, 25 Neb. 651, 41 N. W. 646. See also, Hooper *v.* Chicago, etc., R. Co., 27 Wis. 81, 9 Am. Rep. 439.

See, however, Cramer *v.* American, etc., Exp. Co., 56 Mo. 524, where the first carrier undertook to carry goods from New York to St. Louis, and there deliver them to a certain steam packet company for further transportation, to the consignees at Vicksburg, Miss., and there being no packet company of that name with an office in St. Louis, it was held that the first carrier acted in the exercise of a sound discretion and as a

prudent man would have done with his own goods in sending them forward by the first convenient first-class steamboat, without notifying the owners, and that he was not liable for the loss of goods by the sinking of the boat.

2. Instructions to Deliver to Order at Point of Transhipment.

And so, though the carrier receiving the goods may know from marks thereon, or otherwise, that they are destined to a point beyond his means of transportation, yet, if his instructions be to carry to the point of transhipment and there deliver to a particular consignee, or hold subject to the shipper's orders, he will become liable as insurer if any loss result from his undertaking to forward them to their ultimate destination. Selma, etc., R. Co. *v.* Butts, 43 Ala. 385; North *v.* Merchants', etc., Transp. Co., 146 Mass. 315, 15 N. E. 779.

In the case last cited, the defendant, a transportation company, contracted to transport the plaintiff's goods from Boston to Norfolk, Va., there to be delivered to the plaintiff or his order. Certain memoranda on the bill of lading showed that their ultimate destination was Windsor, N. C., and contained the words, "Notify A. B., Windsor, N. C." The goods themselves were marked for a point beyond defendant's line, and the defendant, as was its custom, forwarded them to Windsor, and the connecting carrier delivered them to A. B. at that place without requiring him to produce an order from the plaintiff. Upon A. B.'s refusing to pay for the goods, it was held that plaintiff was entitled to recover their value of the defendant company.

3. Connecting Carrier Indicated by Marks on Goods.

If there are marks or directions on the goods indicating the route by which they are to go, it is the duty of the initial carrier, in the absence of contract or other instructions, to forward by the route so indicated, regardless of what the customary practice may be. Georgia R. Co. *v.* Cole, 68 Ga. 623; Congar *v.* Galena, etc., R. Co., 17 Wis. 492; Congar *v.* Chicago, etc., R. Co., 24 Wis. 157.

Thus where a Massachusetts firm consigned goods to a firm in Baltimore, with the cases marked, "Railroad Line," and the carrier at New York, instead of forwarding by rail, sent them by boat, it was held, the boat having been lost at sea, that the words, "Railroad Line," plainly indicated that the goods were to be forwarded by rail, and that the defendant was liable for their loss, notwithstanding it was customary to forward goods by boat. Ingalls *v.* Brooks, 1 Edm. Sel. Cas. 104.

So where the goods were being shipped from Detroit to Dryden, and were marked, "via Ridgway," Ridgway being a connecting point for two lines between Dryden and the point of transhipment on the line of the first carrier, it was held that they should have been forwarded over the route which went by way of Ridgway. Rawson *v.* Holland, 59 N. Y. 611, 17 Am. Rep. 394.

No markings on the goods, however, can be allowed to overcome an express contract, or the positive instructions of the shipper. North *v.* Merchants', etc., Transp. Co., 146 Mass. 315, 15 N. E. 779. Nor are such marks sufficient to relieve the first carrier from the duty of transmitting to his connecting carrier the special instructions of the shipper, shown on the shipping bills, in regard to the subsequent routing of the goods, unless it is shown that such marks came to the actual knowledge of the connecting carrier, or his agent charged with the duty of forwarding the goods. Little Miami R. Co. *v.* Washburn, 22 Ohio St. 324. See also, Hempstead *v.* New York Cent. R. Co., 28 Barb. (N. Y.) 485.

4. Designated Connecting Carrier Refusing to Receive Goods.

Where the connecting carrier designated by the shipper refuses, because of a freight block, or a strike on his line, or for any other reason, to receive the goods, the first carrier still has no implied power, except under the most extraordinary or urgent circumstances, to choose another route and forward the goods over it; but he must communicate with the shipper and await his orders. Lesinsky *v.* Great Western Dispatch, 10 Mo. App. 134; Johnson *v.* New York Cent. Transp. Co., 33

Notes

N. Y. 610, 88 Am. Dec. 416; Johnson *v.* New York Cent. R. Co. 39 How. Pr. 127; Empire Transp. Co. *v.* Wallace, 68 Pa. St. 302; Louisville. etc., R. Co. *v.* Odill, 96 Tenn. 61, 2 Am. & Eng. R. Cas., N. S., 647, 33 S. W. 611; Deming *v.* Norfolk, etc., R. Co., 21 Fed. 25, 16 Am. & Eng. R. Cas. 232.

Thus, where a carrier by water, found that, because of a press of business at the end of his portion of the route, he would be unable to discharge his cargo of wheat for several days, it was held that he had no implied authority to sail to another port and there discharge his cargo to be forwarded over a different route to the consignees, but that he should have notified the owners. Strong *v.* Certain Quantity of Wheat, 3 Wall. 225, 18 L. Ed. 194, affirming (circuit court unreported) Strong *v.* Certain Quantity of Wheat (D. C.), Fed. Cas. No. 13,541.

5. Same—Where Circumstances Urgent—Goods Perishable, etc.

As just intimated, however, where the circumstances of the case are so urgent as to admit of no delay, the first carrier discharges his full duty if he forward by the best means at hand, using such care and diligence as a prudent man would exercise in regard to his own goods. Regan *v.* Grand Trunk Ry., 61 N. H. 579; Johnson *v.* New York Cent. Transp. Co., 33 N. Y. 610, 88 Am. Dec. 416; Louisville, etc., R. Co. *v.* Odill, 96 Tenn. 61, 2 Am. & Eng. R. Cas., N. S., 647, 33 S. W. 611.

Naturally, this exception finds its most frequent illustration in the case of perishable goods. Thus in Regan *v.* Grand Trunk Railway Co., 61 N. H. 579, perishable goods were shipped by the defendant's railway to its terminus at Portsmouth, to be sent thence by boat to Boston. But the goods, although arriving without delay on the part of the defendant, did not reach Portsmouth until after the Saturday boat had gone. There was no Sunday boat, and on Monday when the goods were tendered to the agent of the boat line, defendant was informed that no boat would run that day on account of the storm, and that as the indications were that the storm would last some time, there would probably be no boat for several days. Thereupon, the defendant forwarded them immediately by rail to Boston, and they were greatly injured owing to the train itself being derailed and delayed by the storm. It was held that the defendant had exercised due care and diligence under the circumstances, and was not liable for the loss.

This exception, however, is strictly applied, even in the case of perishable goods, and a carrier forwarding, by a route other than that specified, goods, concerning the perishable quality of which there may be a difference of opinion, is liable to find himself held for their value upon their loss or destruction. Thus, in one case, a shipment of potatoes was ordered to be sent forward by a particular connecting carrier from the terminus of the first carrier's line, but was refused by the connecting carrier designated, because of a strike prevailing on its line. The first carrier then undertook to forward by another route; but the strike having spread, an intermediate carrier, farther on, refused to receive the potatoes. Thereupon, the first connecting carrier warehoused them and sold them at a loss, believing that they were perishable, and that it was the best for all parties. No attempt had been made to communicate with the consignors. It was held that the first carrier was liable for the loss sustained. Louisville, etc., R. Co. *v.* Odill, 96 Tenn 61, 2 Am. & Eng. R. Cas., N. S., 647, 33 S. W. 611.

C. RIGHTS AND LIABILITIES OF CONNECTING CARRIER.

1. Whether Contract for His Benefit.

A connecting carrier acquires no rights under a contract between a shipper and a first carrier for the transportation of goods to a point on the first carrier's line, and thence to their destination over the line of that particular connecting carrier. It is not such a contract for his benefit that he can maintain an action for the breach thereof. St. Louis, etc., Packet Co. *v.* Missouri Pac. R. Co., 35 Mo. App. 272.

2. Receiving Goods Not Intended for Him.

Where the first carrier, acting as forwarding agent for the shipper, forwards the goods over a connecting line other than the one designated

by the shipper, the connecting carrier over whose route they are actually sent, will have a lien for his freight, provided he has no knowledge of the fact that they were not intended for him; for the mistake was that of the shipper's agent. Bird *v.* Georgia Railroad, 72 Ga. 655, 27 Am. & Eng. R. Cas. 39. But if he receive the goods knowing that they were not intended for him, he is guilty of a conversion if he refuses to give them up on the demand of the owner. Bird *v.* Georgia Railroad, 72 Ga. 655, 27 Am. & Eng. R. Cas. 39. A fortiori is this true where the connecting carrier was expressly instructed not to receive the goods. Knight *v.* Providence, etc., R. Co., 13 R. I. 572, 43 Am. Rep. 46.

That the connecting carrier did have knowledge of the fact that the goods were not intended for him, may be proved by showing that the goods were plainly marked via another route. Bird *v.* Georgia Railroad, 72 Ga. 655, 27 Am. & Eng. R. Cas. 39.

D. THROUGH SHIPMENT—RIGHT OF FIRST CARRIER TO CHOOSE CONNECTING LINES.

Where the goods are received on a through bill of lading, that is, an undertaking to carry the goods to their destination even though it be a point beyond the terminus of the first carrier's route, all connecting carriers employed in furthering and completing the transportation, become his agents, for whose default or neglect he is responsible to the owner of the goods. Ogdensburg, etc., R. Co. *v.* Pratt, 22 Wall. 123, 22 L. Ed. 827; President, etc., of Bank of Ky. *v* Adams Express Co., 93 U. S. 174, 23 L. Ed 872; Hooper *v.* Wells, Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211; Pereira *v.* Central Pac. R. Co., 18 Am. & Eng. R. Cas. 565, 66 Cal. 92, 4 Pac. 988; Southern Express Co. *v.* Shea, 38 Ga. 519; Ill. Cent. R. R. *v.* Copeland, 24 Ill. 332; Ill. Cent. R. R. *v.* Johnson, 34 Ill. 389; Anchor Line *v.* Dater, 68 Ill. 369; Toledo, etc., R. Co. *v.* Lockhart, 71 Ill. 627; St. Louis, etc., R. R. *v.* Piper, 13 Kan. 505; Williams *v.* Vanderbilt, 28 Kan. 217; Louisville, etc., R. Co. *v.* Farmers' & Drovers' Live-Stock Com. Firm (Ky.), 17 Am. & Eng. R. Cas., N. S., 284; Dunn *v.* Hannibal, etc., R. Co., 68 Mo. 268; Mallory *v.* Burrett, 1 E. D. Smith (N. Y.) 234; Condict *v.* G. T. Railway, 4 Lans. 106; Bryan *v.* M. & P. R. R., 11 Bush 597; Quimby *v.* Vanderbilt, 17 N. Y. 306; Roberts *v.* Van Buskirk, 31 N. Y. 661; Root *v.* G. W. R. R., 45 N. Y. 524; Steamboat Co. *v.* Brown, 54 Pa. St. 77; Penn. R. R. *v.* Berry, 68 Pa. St. 272; E. Tenn., etc., R. R. Co. *v.* Nelson, 1 Cold. 276; Merchants' Dispatch Transp. Co. *v.* Bloch, 86 Tenn. 362, 6 S. W. 881, 6 Am. St. Rep. 847; Noyes *v.* The R. R. Co., 27 Vt. 110; Newell *v.* Smith, 49 Vt. 255; Peet *v.* The Railway, 19 Wis. 118; Wahl *v.* Holt, 26 Wis. 703.

And not only is he liable for the neglect or default of all subsequent carriers in the transportation or delivery of the goods, but he is a surety for their acceptance of the goods when tendered. Bussey *v.* Railroad Co., 13 Fed. 330; Louisville, etc., R. Co. *v.* Farmers' & Drovers' Live-Stock Com. Firm (Ky.), 17 Am. & Eng. R. Cas., N. S., 284; S. W. Southard *v.* Minneapolis, etc., R. Co., 60 Minn. 382, 62 N. W. 442; Memphis, etc., R. Co. *v.* Stockard, 58 Tenn. (11 Heisk.) 568.

In view of this liability attaching to the first carrier upon a contract for through shipment, and in view of the further fact that a common carrier is not compellable to undertake the transportation of goods beyond the terminus of his own route, there can be no doubt of his right to choose his own connecting lines and forwarding agents for the entire route. It is against all reason to say that one shall be held liable for the neglect or default of his agents, and yet deny him the right of choosing those agents. Post *v.* Southern Ry. Co., 103 Tenn. 184, 16 Am. & Eng. R. Cas., N. S., 201, 52 S. W. 301; Galveston, etc., R. Co. *v.* Short (Tex. Civ. App.), 25 S. W. 142; Central Stock Yards Co. *v.* Louisville, etc., R. Co., 118 Fed. 113, 5 R. R. R. 259, 28 Am. & Eng. R. Cas., N. S., 259; State *v.* Wrightsville, etc., R. Co., 104 Ga. 437, 30 S. E. 891, 11 Am. & Eng. R. Cas., N. S., 576, and note.

Aside from these considerations, there are other reasons why a shipper should not be permitted to dictate to a common carrier the route over

which he shall send a through shipment. These reasons were so well stated by a witness in the case of Post v. Southern Ry. Co., 103 Tenn. 184, 16 Am. & Eng. R. Cas., N. S., 201, 52 S. W. 301, that they were reproduced in the opinion of the court as given, and we cannot do better than set out that portion of the opinion here. Said the court: "The reasons why carriers should have this right to designate routes are forcibly stated by the witness Culp, who, it is shown, has an experience of 28 years in the traffic departments of railroads. He says: 'Satisfactory arrangements necessary to be made with all parts of the line for operation of through rates include proportions to be allowed each carrier; the ability of the connecting lines to transport the traffic with the utmost speed; the solvency of different parts of the line; their willingness to and ability to promptly settle claims, either for loss to property, overcharge in rates, or loss of cars or other property of the company; reciprocity on the part of the connecting line in delivering freights to the defendant for transportation over its line in return for freights delivered to such connecting lines by it; participation in salaries and expenses of agencies established for procurement of traffic; compliance with the law, state and national, with respect to rates applying to traffic over such other lines; friendly co-operation of connecting lines, and performance of the duty so as to satisfy patrons, and increase business; that it may not be compelled to send its cars over connecting lines which will not promptly return them; in order to select such connections as are able to furnish it a proportion of cars needed by the through lines; that it may not be required to haul cars to Memphis empty, to meet requirements of shippers in order to load their freight, while it may have a supply of empty cars on hand to be returned by other routes; so to distribute its tonnage as not to congest one or more of the roads, while forwarding so little traffic over other lines as to cause them to form other connections, to the disadvantage of the Southern Railway.' He continues: 'To promptly handle freight, defendant should, from time to time, select some particular carrier as against others. It is necessary at times to send a larger percentage of business than usual via a particular line, in order to return loaded cars which would otherwise return empty, or to furnish loads for steamships which would otherwise be compelled to sail from port without loads.' Illustrating this, he cites cases of steamships plying from the ports of Brunswick, Pinner's Point, and other South Atlantic seaports, to New York, Philadelphia, and other North Atlantic seaports, running in connection with the Southern Railway Company. It may be necessary, in order to load a ship sailing from Brunswick at one particular time to route all, or practically all, of its freight to that port, when the next day the situation may be reversed, and it may have to send all of its freight to Norfolk. The making of arrangements to increase the efficiency of the carriers; the necessity of looking to the solvency of lines over which their business is to be transported and their cars sent; and the willingness and ability of such connecting lines to pay claims for loss of property, and for car mileage, are considerations of great importance in the choice of connecting lines."

R.

UNITED RYS. & ELECTRIC CO. OF BALTIMORE v. WOODBRIDGE.

(Court of Appeals of Maryland, July 1, 1903.)

[55 Atl. Rep. 444.]

Street Railways—Injury to Passenger—Sudden Starting of Car before Passenger Can Alight.*

Testimony of plaintiff which showed that she was a passenger on

*As to the care required in setting down passengers, see foot-note appended to Southern Ry. Co. v. Reeves (Ga.), 6 R. R. R. 870, 29 Am. & Eng. R. Cas., N. S., 870.

defendant's street car and had received from the conductor a transfer to another line, that the conductor notified the passengers to change for that line, that the car stopped, and, while she attempted to alight, started and threw her to the ground, established a prima facie case of negligence on defendant's part.

Same—Same—Same—Car Stopping at Place Other Than That Specified in Warning.

A notice posted in a street car, which states that "cars stop to take on and let off passengers at near side of cross streets," and that those violating the notice do so at their own risk, not meaning that cars will stop only at such places, does not preclude a passenger getting on or off at any other place from recovering for injuries sustained by reason of the company's negligence.

Same—Same—Same—Same—Conductor Calling Transfer Point—Contributory Negligence.

A passenger on a street car had received a transfer to another line. As the car approached the transfer point the conductor called out the place, and directed the passengers to transfer to that line. The car came to a stop, and the passenger attempted to alight, but, while so doing, the car started and threw her to the ground. The car stopped because of a wagon in front of it, and when the wagon moved the car started up. The passenger received no notice to delay the transfer. The rear of the car, when it stopped, was from 50 to 100 feet from the street crossing where it usually stopped: *held*, that the passenger was not guilty of contributory negligence, as a matter of law, in attempting to alight.

Same—Same—Same—Same—Duty to Warn Passengers to Keep Seats.†

Where, after a conductor of a street car had given directions to transfer to another line, the car stopped, but not for the purpose of enabling the passengers desiring to transfer to alight, it was the duty of the conductor to warn the passengers to keep their seats till he should give further directions.

Appeal from Baltimore City Court; J. Upshur Dennis, Judge.

Action by Mary S. Woodbridge against the United Railways & Electric Company of Baltimore. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

John C. Tolson, for appellant.
Forrest Bramble, for appellee.

PEARCE, J. This action was brought by Mary S. Woodbridge in the Baltimore city court against the United Railways & Electric Company to recover for personal injuries sustained while a passenger upon a car of the defendant company. The declaration charges that the plaintiff paid her fare, and thereby became a passenger on the car of defendant, which was a common carrier of passengers for hire; that, when said car reached a point where plaintiff desired to leave the car, it was stopped to allow her and others to alight therefrom; that by reason of the negligence of the defendant when plaintiff was alighting, with her feet on the steps of the

†As to the duty to warn and instruct passengers, see note appended to Southern Pac. Co. v. Tarin (C. C. A.), 21 Am. & Eng. R. Cas., N. S., 928.

car, and in the act of stepping down into the street, the car was prematurely started, whereby she was thrown down in the street and injured. The case was tried before a jury, under instructions from the court, and a verdict was given for the plaintiff for $500. The only exception was to the ruling on the prayers.

The plaintiff testified that, with her son-in-law, Joseph Susco, she boarded the car on Pratt street, near Light; that they paid their fares, and asked and received transfers to the Edmonson Avenue line, the transfer point being at the intersection of Howard and Franklin streets; that, as the car was going up Howard street, when it got to Franklin it stopped, and the conductor called out, "Franklin street; transfer to Edmonson avenue"; that her son-in-law got off, and she got right up and started off right behind him; that as she was in the act of stepping down on the ground, with the handle bar in her right hand, the car started, and she was thrown flat on her back. She subsequently said the car was not up to the corner of Howard and Franklin streets when she fell, and that she guessed it was about 50 or 60 feet off. Joseph Susco testified that he paid the fares and asked for transfers to Edmonson Avenue line; that he was not well acquainted with the city, and did not know where he was, but when the conductor "hollered" to transfer to Edmonson avenue, the car came to a stop, and he got off; that the plaintiff got off right behind him, but "kind of hung on the car," and the car started before she was on the ground. There was full proof of the plaintiff's injuries offered by her.

John B. Falk, for defendant, testified that he was a passenger on the car, and saw the accident; that the car was going slow, following a wagon, and that, when about 60 or 70 feet from Franklin street, a man got off, and a woman followed him and fell in the street; that the conductor was then forward on the footboard, collecting fares; that the passengers called his attention to the plaintiff falling off, and he stopped the car and went back to see if she was hurt, and that the car had only moved up five or seven feet.

William Urban, the conductor, testified that he was in front, collecting fares; that the car was going very slow, following a wagon; that as soon as the wagon got out of the way the car started up, and somebody shouted to him that some one had fallen off, when he looked around, saw plaintiff falling, and stopped the car.

Clarence Ryon, the motorman, testified substantially as Urban did as to the movements of the car.

William A. Decource, a passenger, testified that the car was going very slow, "kept inching up, and stopping (not quite); it had not exactly come to a stop, but it would make a lurch and catch up to the wagon, and then lurch back"; that he saw her rise as if to get off, and he said "the car ain't stopped yet," and she took her seat; that when the car was

about 100 feet from Franklin street she jumped up and tumbled out of the car; that he did not see any one with her or get off just before her, but he saw "several parties making a dive to get off." Dr. Trimble testified that he examined plaintiff and could discover no evidence of any injury, and Dr. Preston testified that he had examined her and did not think she was suffering from locomotor ataxia. There were no other witnesses, but the following notice was admitted to have been posted in the car:

"Warning."

"No one is permitted to ride on the steps or platform, or get on or off when the car is in motion. Persons are warned of the danger. Cars stop to take on and let off passengers at near side of cross streets. Those violating this notice do so at their own risk. No officer or agent of the company has the authority to waive these regulations. Smoking is permitted on the three rear seats.

"Wm. H. House, General Manager."

The plaintiff offered six prayers, all of which were granted, and the defendant offered four, all of which were granted except the first, which asked an instruction that there was no evidence in the case legally sufficient to entitle the plaintiff to recover, and to the rejection of this prayer, and the granting of each of the plaintiff's prayers, the defendant excepted. This rejected prayer will be first considered.

The testimony of the plaintiff which we have recited goes to show that, being a passenger on defendant's car, and desiring to transfer to Edmonson avenue, notice was given by the conductor to change for that line, and the car was stopped, apparently to enable her and others to do so, and that, while attempting to alight, the car was started, and she was injured as alleged in the declaration. In the recent very similar case of United Railways v. Beidelman, 95 Md. 483, 52 Atl. 914, this court said: "That this was evidence going to prove the allegations of the narr., in respect to the negligence of the defendant, needs no argument or authority to establish. Proof of 'the occurrence of an accident and injury to a passenger is prima facie evidence of negligence in the carrier, and throws upon him the onus of rebutting the presumption by proving there was no negligence on his part. Pittsburg & Conn. R. R. v. Andrews, 39 Md. 353 [17 Am. Rep. 568]; Phil. Wil. & Balt. R. R. v. Anderson, 72 Md. 519 [20 Atl. 2, 8 L. R. A. 673, 20 Am. St. Rep. 483].' The proof adverted to, taken by itself, making a prima facie case of negligence against the defendant, it only remains to inquire what appeared in the other facts of the case to rebut, excuse, or relieve the defendant from the consequences of such negligence, and whether, if anything, this was properly submitted to the trying tribunal." In the light of this emphatic language, which we find applicable to the facts of the present case, there can be no doubt that this prayer was properly rejected.

All the plaintiff's prayers are objected to, on the ground

that the plaintiff disregarded the warning posted in the cars, that they stopped to take on and let off passengers at near-side cross streets, and that, as the car had not actually reached the near side of Franklin street, the plaintiff, in getting off before reaching that point, even if the car had stopped, was guilty of such contributory negligence as to preclude recovery; and the fifth prayer was further objected to on the ground that there was no evidence to support the hypothesis that "the defendant's servants and agents might have seen the position of the plaintiff by using ordinary prudence and care, and might have avoided the injury."

As to the last objection, it is sufficient to say that the record does not disclose any special exception on this ground. Albert v. The State, 66 Md. 334, 7 Atl. 697, 59 Am. Rep. 159.

The plaintiff's first, second, and third prayers have been so often approved that they cannot be questioned in this case, unless there was such contributory negligence as required the case to be taken from the jury on that ground. In view of the assertion of such negligence now, in the argument on the granted prayers, it appears singular that a prayer was not offered by the defendant withdrawing the case from the jury on that distinct ground. But we are not to deal with the case as presented by the record.

The fourth prayer instructed the jury that if they found the plaintiff's fare was paid and a transfer was given her for Edmonson avenue; that as the car approached the transfer point the conductor called out, "Franklin street; transfer to Edmonson avenue," and the car came to a stop; and that while the car was standing still, and plaintiff was alighting and using ordinary care, the car was prematurely started, whereby the plaintiff was thrown to the ground and injured—then she was entitled to recover. This instruction does not require the jury to find that the car had reached the near side of Franklin street, at which point alone, the defendant contends, under the regulation of the company posted in the cars, the plaintiff had a right to get off; so that the question involved is, first, whether such is the true construction of the rule, and second, whether the conduct of the defendant's agent, notwithstanding such construction, did not lead her to believe that she had reached the place of transfer, and that she was directed or invited to leave the car when the car stopped, as stated in the prayer. The defendant's contention is that the regulation means that cars will stop only at the near side of crossings to take on or let off passengers, and that any one getting on or off at any other place, and under any circumstances, is precluded from recovery, if injured by reason of the negligence of the company. But we cannot agree that such an inflexible and inexorable rule, fraught with such far-reaching consequences, can be properly deduced from the language employed. It is doubtless true that they can be required to stop for such purpose only at such places, and it is

an entirely reasonable rule that a passenger should not have the right to stop a car in the middle of the block nor at the far side of a crossing, but the passenger's rights are not necessarily controlled by that regulation under all circumstances when the car does actually stop elsewhere. The first and obvious reply to the defendant's contention is that, if this was meant to be the rule, the word "only" should have been inserted, or, what would have been clearer still, to say, "passengers will be received and discharged 'only' when the car stops at the near side of crossings." Whether even that language would afford protection to the company against its own negligence in all cases, and under any circumstances, is a question we are not required to consider. But further, as was said in Cason's Case, 72 Md. 381, 20 Atl. 113, citing with approval Siner v. Great Western R. W. L. R., 4 Exch. 123, "Judges cannot denude themselves of the knowledge of the incidents of railway traveling which is common to us all." We know that the street railways of large cities are used not only by their inhabitants, who may be presumed to be familiar with their habits and customs, as well as with most of their established rules and regulations, but they are used daily by thousands of strangers who have no knowledge of either. We know that in some cities the rule is to stop at the far side of the crossing, while in others, as in Baltimore, the stop is made on the near side, and it is equally important for the convenience and safety of those using the cars, as well as of pedestrians using the street crossings, to know what is the rule in this regard. We think, therefore, it is plain that the primary and principal purpose of this notice posted in the car is to inform the traveling public at which side of the crossing the car will stop, and not to establish an inflexible rule that no one will be received or discharged elsewhere; by virtue of which rule the courts can be called on to declare any attempt to get on or off elsewhere to be negligence per se, precluding recovery. If such contention is to prevail, then, when a car is blocked by a coal cart making delivery, or delayed by reason of an accident, or any other cause, at any other point than directly at the near side of a crossing, a passenger who should attempt to leave a car while standing still, no matter how careful in other respects, and no matter what the necessity for leaving, would have no remedy for the grossest negligence of the company, since there can be, and should be, no comparison of the negligence of the parties. We cannot adopt an inflexible rule leading to such consequences. In Cason's Case, supra, it was said, there is an obligation imposed upon the passenger to observe the reasonable regulations of the company in entering, occupying, and leaving the car, and if a party be injured in consequence of a known violation of such regulations, unless compelled thereto by some existing necessity beyond his control, the company is not responsible. Thus, in Wilkin-

son's Case, 30 Md. 224, the violation of the rule was in entering the car by the front platform; and in Foreman's Case, 94 Md. 226, 51 Atl. 83, the plaintiff was standing on the platform while the car was in motion, thus occupying by his own choice a position forbidden by the rule of the company, and unsafe in itself, and the facts were the same in Cason's Case, except that there the plaintiff stood on the front platform, while in Wilkinson's Case he stood on the rear platform. In all those cases the negligence was shown by an act so prominent and decisive that there was no room for ordinary minds to differ as to its effect and character. In Maugans' Case, 61 Md. 61, 48 Am. Rep. 88, it was said: "Accidents occur and injuries are inflicted under an almost infinite variety of circumstances, and it is quite impossible for the courts to fix the standard of duty and conduct by a general and inflexible rule applicable to all cases, so that a departure from it can be pronounced negligence in law. The rule that requires a party before he crosses a railroad track to stop, look, and listen for approaching trains, which has been generally adopted by the courts, is the only one that approaches universality of application to a particular class of accidents. But there is no such general accord of judicial opinion and precedent in reference to attempts to leave a car while it is in motion. The cases cited on the briefs of counsel on both sides show very clearly that the weight of authority is against the proposition that it is always, as matter of law, negligence and want of ordinary care for a person to attempt to get off from a car when it is in motion." This was the language of Judge Miller in an opinion affirming a ruling of the lower court refusing to take the case from the jury, where the defendant was negligent in not giving reasonable time to the passengers to alight, but where it was claimed the plaintiff was negligent in attempting to alight after the train had started, and while incumbered with a valise in one hand and a basket in the other; and we think the language is directly and strikingly applicable to the facts of the present case.

It must be remembered that upon the hypothesis of this prayer, which is abundantly supported by evidence, the car was "nearing" the crossing, that it had actually come to a stop, and that it is not denied that the conductor had called, "Franklin street; transfer to Edmonson avenue." The car was an open summer car, which from common knowledge may be said to be from 35 to 45 feet in length over all, and we know that the cars rarely run directly up to the crossing before stopping, so that the rear of this car towards which the plaintiff was sitting may be assumed to be about 50 feet from the crossing at its usual stopping place, and in this case the highest estimate of the distance was 100 feet. Under these circumstances, then, was it unreasonable for her to conclude that the car had stopped for the purpose of the transfer, and that the call of the conductor was a direction to her

to get off then and there? We think not. In Anderson's Case, 72 Md. 528, 20 Atl. 4, 8 L. R. A. 673, 20 Am. St. Rep. 483, where the facts were very similar, except that the road was a steam railroad, and that the plaintiff got off on the left, or wrong, side of the train, the court said, "It is difficult to see why, after the speed was slackened, the name of the station was called out and the train stopped, unless it was intended that the passengers for that station should alight. The passenger who should draw this conclusion cannot be considered as forming an opinion which no reasonable man could entertain. The evidence does not inform us why the name was called out, and why the train was stopped, unless this was the purpose, nor does it show why, after a momentary pause, it afterwards slowly proceeded. If the discovery of the approaching train caused any change of purpose on the part of the conductor, it would have been reasonable to communicate this change to passengers whose safety might be affected by it. If any reason had been made known to the plaintiff for the stopping of the train and the announcement of the name of the station, we would have had more light on the nature and character of his act. But without some aid of this kind, we are unable to say that the inference of negligence on his part is certain and uncontrovertible, and consequently we cannot declare it as a question of law." Here, we are now informed from the evidence that the car was stopped because of the wagon in front of it, and that it moved on after the wagon had started up; but we are not informed why the direction to transfer was given when it was, and no communication of any kind was given to passengers to countermand or delay the transfer which had been directed. We find no material difference between that case and the present, and we cannot, therefore, declare the plaintiff negligent in law. The reasoning of Maugans' Case and Anderson's Case is supported by the leading case of Bridges v. North London Railway Company, in the House of Lords, 7 Eng. & Ir. Appeals, 213, in which a number of elaborate and instructive concurring opinions were delivered by the lords and justices, but it is unnecessary to protract this opinion by any citation from them.

The form of the plaintiff's fifth prayer is in accord with the principles laid down in Armstrong's Case, 92 Md. 564, 48 Atl. 1047, 54 L. R. A. 424, and we think there was testimony tending to place the defendant's agent in a situation affording him an opportunity to discover the plaintiff's peril by the exercise of reasonable care, in time to avert it. The conductor had announced the transfer, and if, after this announcement, the car stopped before it was safe to attempt to transfer, his attention should have been attracted thereby, and he should have suspended the collection of fares, in which he was engaged on the forward part of the footboard on the same

side, and should have warned passengers to keep their seats till further direction was given. The plaintiff's son-in-law had gotten off before her. Other passengers saw him get off, and saw her attempting it, and called to the conductor in time for him to see her falling, and we can perceive no reason why he could not have seen her in time to check her attempt, if his attention had been given where, under the existing circumstances, it was needed. The duties of a conductor upon rapid transit cars are numerous and exacting, and it should be said to their credit that they are generally discharged with commendable care and skill, but the safety of the public demands that carriers be held to the rule requiring them to exercise the highest degree of care and diligence practicable under the circumstances.

We think the whole law of the case was fully and fairly put before the jury by the prayers granted by the learned judge, in whose rulings we can discover no error.

Judgment affirmed, with costs above and below.

KELLY v. DURHAM TRACTION CO.

(Supreme Court of North Carolina, April 21, 1903.)

[43 S. E. Rep. 923.]

False Arrest—Malicious Prosecution—Evidence.

In an action for false arrest and malicious prosecution of plaintiff for an attempt to defraud a street railway company of a fare, evidence as to admissions by other parties arrested at the same time that they had paid no fare, and were drunk at the time, was properly excluded, plaintiff not having been charged with conspiracy, nor arrested and tried for drunkenness.

Same—Same—Refusal to Pay Fare—Evidence.

Where, in an action against a street railway for false arrest and malicious prosecution, it was shown that defendant's conductor pointed out plaintiff on the car, and directed the officer to arrest him for refusing to pay his fare, and that the conductor had been advised by some one in the front of the car, where defendant's manager was standing, there was evidence tending to show that defendant caused the arrest.

Absence of Malice—Evidence.

Where an arrest is illegal, proof that defendant acted without malice is no defence to an action for false imprisonment and malicious prosecution.

Evidence.

Where, in an action for false arrest and malicious prosecution, the regularity of the warrant was not questioned, it was not necessary to offer the warrant in evidence.

Same.

In an action for false arrest and malicious prosecution it is not necessary to show who actually swore out the warrant for plaintiff's arrest, provided it is shown that the warrant was sworn out at the instigation or procurement of defendant.

Same.

In an action for malicious prosecution, circumstantial evidence is competent to prove that defendant instigated the prosecution.

Kelly v. Durham Traction Co

Arrest—Malicious Prosecution—Refusal to Pay Fare—Malice.*

Where a conductor of a street car, after an altercation with a passenger, in which he had repeatedly demanded a fare, refused to accept the fare when finally tendered, and ordered the passenger arrested for refusing to pay, the conductor's conduct tends to show malice.

Same—Same—Same—Same.

Malice may be inferred from the want of probable cause for the prosecution.

Instructions.

Where an instruction given at a party's request contains every element of an instruction objected to, the party cannot be heard to except.

Malicious Prosecution—Exemplary Damages.

In an action for malicious prosecution plaintiff may recover exemplary damages.

Same—Damages.

Plaintiff in an action for false arrest is entitled to recover all actual damages suffered, but cannot recover punitive damages, unless the arrest is accompanied with gross negligence, malice, insult, oppression, or other circumstances of legal aggravation.

Appeal from Superior Court, Durham County; Allen, Judge.

Action by R. A. Kelly against the Durham Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action brought to recover damages for false imprisonment and malicious prosecution. The plaintiff was a passenger on one of the street cars owned and operated by the defendant, and had paid his fare to the conductor Eubanks. There seem to have been two conductors upon the car, Eubanks and Brock, and also the general manager, Butler. The conductor Eubanks again demanded the fare from the plaintiff, who refused to pay on the ground that he had already paid. Eubanks then went to the front of the platform, and asked some one whether he should stop. He was answered, "No." When the car reached Five Points, the plaintiff was arrested by a policeman, and taken to the police headquarters, where he was released on bail after a short detention. Before being taken from the car, the plaintiff demanded the cause of his arrest, and, upon being informed that it was because he had not paid his fare, stated that he had paid it, but offered to pay it again to prevent any trouble. The conductor Brock said, "Too late," and the plaintiff was taken off the car. The witness McGuirk testifies that "Eubanks told the policeman, 'There they are, pointing to Kelly [the plaintiff], Ray, and Griffith, saying, 'Take them,' and the policeman arrested them." The defendant does not appear to have introduced any evidence, and offered no objection to the plaintiff's testimony. It is admitted that the plaintiff was tried before the mayor of the city of Durham for violation of section 3, c. 16, of the Ordinances of the said city, which

*As to the liability of the carrier for the false arrest and malicious prosecution of its passenger, see foot-note to Alabama & V. Ry. Co. v. Kuhn (Miss.), 19 Am. & Eng. R. Cas., N. S., 466.

reads as follows: "Any person who shall get upon a street car for the purpose of defrauding the owners thereof of the fare, shall upon conviction be fined ten dollars." It is also admitted that the plaintiff was acquitted and discharged.

The issues and answers thereto are as follows: "(1) Was the plaintiff illegally arrested, as alleged in complaint? Ans. Yes. (2) If so, did the defendant procure the same? Ans. Yes. (3) Was the plaintiff prosecuted by the defendant for the violation of the town ordinance before the mayor of the city of Durham, as alleged in the complaint? Ans. Yes. (4) If so, was the prosecution on the part of the defendant without probable cause? Ans. Yes. (5) If so, was the prosecution with malice? Ans. Yes. (6) What damage, if any, has the plaintiff sustained? Ans. $500."

Manning & Foushee, for appellant.
Boone, Bryant & Biggs, for appellee.

DOUGLAS, J. (after stating the facts). Among the numerous exceptions by the defendant there are none to the admission of testimony, and but two to its exclusion. The defendant proposed to ask the plaintiff: "Did not Griffith admit before the mayor that he did not pay his street car fare? That he was so tight that he did not know much about it? Also did not Griffith say that he and others were in the same fix." Again, the defendant proposed to show by the same witness on cross-examination that "at the trial before the mayor Ray pleaded guilty for being drunk and disorderly at Five Points on this occasion, and Griffith stated before the mayor that he had not paid his fare." Upon objection the proposed evidence was excluded. We can see no ground upon which it could have been admitted. What Ray and Griffith may have said about themselves did not concern the plaintiff, who was not charged with conspiracy, and who was neither arrested nor tried on any charge of drunkenness or disorder. A. & E. Enc. (2d Ed.) 753.

There are 22 exceptions, but, as exception 17 is directed to each and every refusal to give each and every of the 12 special instructions, it practically amounts to 11 additional exceptions. It is needless, as well as impracticable, for us to discuss all the exceptions, especially those relating to the refusal of the court to give special instructions. Five were directed to the refusal of the court to direct a verdict in favor of the defendant upon five different issues. As there was evidence tending to sustain the contentions of the plaintiff, the issues were properly submitted to the jury. As to the remaining exceptions, we will confine ourselves to those apparently relied on by the defendant. It contends that: "There was no evidence as to the following material facts: (1) Who caused the arrest of the plaintiff. (2) The warrant was not offered. (3) Who swore out the warrant. (4) That the defendant caused, procured, or promoted the prosecution."

The witness McGuirk testifies that the conductor Eubanks pointed out Ray, Griffith, and the plaintiff, and directed the policeman to take them, whereupon they were immediately arrested. It therefore appears that their arrest was caused by the defendant, through its servant, acting within the general scope of his authority. Moreover, the plaintiff testified that "Eubanks went to the front of the car, asked some one if he must stop. This person said, 'No.' * * * Butler was on the front of the car." Such is the plaintiff's evidence, which, upon all motions by the defendant for nonsuit or direction of the verdict, must be construed most strongly in favor of the plaintiff. From this the jury might have inferred that the general manager of the company was also a party to the arrest.

Under the circumstances of this case the arrest without a warrant was illegal, and proof that the defendant acted without malice would be no defense. Neal v. Joyner, 89 N. C. 287; State v. McAfee, 107 N. C. 812, 12 S. E. 435, 10 L. R. A. 607; Newell on Malicious Prosecution, 100. It is true the warrant was not offered in evidence, but we do not see how it was material, as its regularity was not questioned. It is not necessary to show who actually swore out the warrant, provided it was at the instigation or procurement of the defendant. Kline v. Shuler, 30 N. C. 484, 49 Am. Dec. 402; 19 A. & E. Enc. Law (2d Ed.) 692.

There was evidence tending to prove that the defendant instigated the prosecution. It is true, it is merely circumstantial; but, if circumstantial evidence is competent on an issue of life or death, we see no reason why it is not equally competent in civil cases. His honor thus correctly stated the contentions of the plaintiff: "The plaintiff relies upon the circumstances that the charge against the plaintiff was for violating an ordinance passed for the protection of the traction company, and that no other person had any interest to prosecute. Second. That the plaintiff was arrested under the direction of the conductor of the defendant company upon a charge of not having paid his fare, and that the warrant was for the same offense. Third. That the plaintiff was arrested, and immediately carried to the guardhouse, and the prosecution followed immediately. The plaintiff contends that the circumstances are sufficient to satisfy you that the plaintiff was prosecuted by the agent of the traction company, and that such agent was acting within the scope of his authority." The defendant excepted to the statement of each of these contentions, but the exceptions cannot be sustained. The court was equally fair and explicit in stating the contentions of the defendant. The ordinance appears upon its face to have been passed for the protection of the defendant, and this would be none the less so had it appeared that there were other street railways in the city of Durham.

The defendant contends that there was no evidence of

malice. That the conductor Eubanks, after an altercation with the plaintiff, in which he had repeatedly demanded the fare, refused to accept the fare when tendered, and ordered the arrest of the plaintiff, tends to show malice. Without this, the jury were at liberty to infer malice from the want of probable cause, and this they seem to have done. This court said in Johnson v. Chambers, 32 N. C. 287: "The dismissal of the state's warrant raised a presumption of the want of probable cause, but it did not also raise a presumption of malice; for the question of malice was not inquired of by the justice of the peace. * * * Malice may in some cases be inferred from the want of probable cause, but the law makes no such presumption. It is a mere inference of fact, which the jury may or may not make; and it should have been left to them, in addition to the question of damages." This court has also said in Brooks v. Jones, 33 N. C. 260: "When there is a total want of probable cause, the jury will infer malice almost of necessity, as a prosecution wholly groundless cannot be accounted for in any other way." Both these cases have been quoted with approval in McGowan v. McGowan, 122 N. C. 145, 29 S. E. 97. In the case at bar his honor properly charged the jury that: "Malice may be inferred by the jury on account of the want of probable cause. They are not, however, obliged to infer malice from the want of probable cause."

On the question of damages the court charged: "Now, as to the sixth issue, the issue of damages—first, for the illegal arrest, you can give plaintiff such actual damages as will compensate him for injury to his feelings, mental suffering, loss of time, and any other actual damage which the plaintiff may have sustained." The defendant excepted to each and every part of this charge. We think it is substantially correct, but, even if the latter part were too indefinite, we do not think that the defendant is in a condition to complain of it, as the court gave the following instructions at the request of the defendant: "If the jury answers the first, second, third, fourth, and the fifth issues 'Yes,' then in ascertaining the damages sustained by the plaintiff they will allow compensation for loss of time, hire, injured credit, decrease of earnings, mental suffering, and all approximate consequences of the wrong." This instruction is much broader than the charge complained of, and contains every element of the exception. This court, in Buie v. Buie, 24 N. C. 87, speaking by Gaston, J., says: "A party cannot except for errors to an instruction which he hath himself prayed." The same principle is reiterated in McLennan v. Chisholm, 66 N. C. 100, and Moore v. Parker, 91 N. C. 275.

His honor properly charged that exemplary damages could be given for malicious prosecution, as in all cases where malice is an essential element in the cause of action. 19 A. & E. Enc. Law (2d Ed.) 704; Ellis v. Hampton, 123 N. C.

194, 31 S. E. 473; Sowers v. Sowers, 87 N. C. 303; and Chappell v. Ellis, 123 N. C. 259, 31 S. E. 709, 68 Am. St. Rep. 822, and cases therein cited.

It is equally well settled that in cases of false arrest or imprisonment the plaintiff is entitled to all actual damage, but cannot recover punitive damages, unless the arrest or detention is accompanied with gross negligence, malice, insult, oppression, or other circumstances of legal aggravation. Lewis v. Clegg, 120 N. C. 292, 26 S. E. 772; Lovick v. Railroad, 129 N. C. 427, 40 S. E. 191. The defendant excepted to the charge defining what was meant by a servant acting within the scope of his employment; but these exceptions were not pressed in the brief of the learned counsel. In any view of the evidence (if believed), the servants of the defendant were acting within the general scope of their authority in procuring the arrest and prosecution of the plaintiff.

The defendant, in its brief, thus alludes to the character of the plaintiff: "The police station and guardhouse of the city were familiar to plaintiff, as he had twice before this occasion been locked up on the admittedly just charge of drunkenness, and once subsequent to this occasion he had been locked up therein for using a street of the city as a place to sleep off a drunken debauch." This is a sad record, especially in one so young; but he does not appear ever to have been charged with crime, and he may yet reform. In any event, he is entitled to the protection of the law, and belongs to a class who need it most. In some cases extremes meet. There are some degraded wretches whose characters are too low to be injured by the tongue of slander, while there are others whose established reputations are beyond its reach. Gen. Houston's stern answer in refusing to accept a challenge from one who threatened to post him as a coward was no empty boast when he said in plain Texan phrase, "When you post me as a coward, you will post yourself as a liar." It is those who are hanging on the ragged edge of respectability whose reputations are most deeply affected by the false accusation of crime, and when they prove their innocence they are entitled to such damages as the law will allow under existing circumstances.

As we see no error in the conduct of the trial, the judgment of the court below is affirmed.

NORTH CHICAGO ST. R. CO. v. POLKEY.

(*Supreme Court of Illinois, June 16, 1903.*)

[67 N. E. Rep. 793.]

Injury to Street Railway Passenger—Instructions.

Where, in an action for death of a passenger while riding on the running board of a street car by his coming in contact with the sides of a tunnel, the declaration contained five counts, and there was no evi-

dence in support of at least one of them, it was error to give a general instruction authorizing the jury to find for plaintiff, if they found he had made out his case as set forth in his declaration, and to refuse proper instructions, asked by defendant, explaining the issues, and that if the jury believed there was no negligence in the management of the train as alleged, or that the negligence alleged in the other counts had not been proved, their verdict should be for defendant.

Same—Negligence—Allowing Passenger to Ride on Running Board.

In an action for the death of a passenger while riding on the running board of a street car by being struck by the sides of a tunnel, the carrier was not guilty of negligence as a matter of law in permitting deceased to ride in such position.

Carriers of Passengers—Degree of Care.*

An instruction that a carrier of passengers is bound to exercise the utmost and highest degree of care, skill, and diligence for the safety of passengers that is consistent with the mode of conveyance employed, was erroneous for failure to limit the care required to such as was consistent with the practical operation of the railroad.

Appeal from Appellate Court, First District.

Action by S. W. Polkey against the North Chicago Street Railroad Company. From a judgment in favor of plaintiff, affirmed by the Appellate Court, defendant appeals. Reversed.

John A. Rose and Louis Boisot (W. W. Gurley, of counsel), for appellant.

J. Warren Pease, for appellee.

CARTWRIGHT, J. Appellee, as administrator of the estate of Gustave Rucks, deceased, brought this suit in the superior court of Cook county, against appellant, to recover damages resulting to the next of kin from the death of said Gustave Rucks, and obtained a judgment for $5,000, which has been affirmed by the Branch Appellate Court for the First District.

Deceased was killed in the afternoon of March 18, 1899, while standing on the footboard of the defendant's grip car, and passing through the La Salle street tunnel, in the city of Chicago. He was in the employ of the American District Telegraph Company, and was between 17 and 18 years of age. He was sent from the office on the south side, together with nine other messenger boys, to the Marquette Club, on the north side. They went to the corner of Randolph and La Salle streets to take a Clark street cable car. There was a parade of soldiers on the street returning from the Spanish war, which stopped travel for a time, and a large crowd gathered. When a train finally came along it was crowded, and the boys boarded the grip car at the street corner on the right-hand side. Rucks and most of the boys with him stationed themselves on the running board at the side of the grip car. He stood opposite the second post from the front and held to the upright bar with his left hand. There were

*As to the degree of care required of carriers of passengers, see monograph appended to West Chicago St. R. Co. v. Tuerk (Ill.), 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1.

one or two others in front of him, and several behind him, on the running board. In passing through the tunnel, the walls, which were of rough stone, were quite near to the car; the witnesses for the plaintiff giving different estimates, varying from 3 to 12 inches from the running board or footboard. There was a large number of witnesses, but none of them knew exactly how the accident occurred, although it appears that he was thrown off in some way by coming in contact with the wall. He was turned around and passed between the wall and the boy who stood next to him, and fell to the floor of the tunnel, suffering the injuries of which he died. He was a large boy, 5 feet 6 inches in height, heavily built, and broad in the shoulders, and weighed about 150 pounds. Plaintiff's witness, who gave the only particular account of the accident, said that the conductor was standing in the center of the car, collecting fares, and reaching out and ringing the bell for the purpose of registering fares collected; that the witness reached in his pocket for his fare, and noticed Rucks' arm go up as though reaching for his fare; that witness could not see where his hand went, but saw his shoulder rise up, and his arm, as though bending at the elbow; and that he suddenly went past the witness against the wall. The evidence tended to prove that Rucks, hearing the bell ring and the conductor gathering fares, attempted to reach down in his pocket for his car ticket or fare, and in that way struck the wall. As soon as the accident happened, a number of passengers called to the gripman to stop the car, and he put on the brakes and stopped it at once within half a car length.

The court, at the request of the plaintiff, gave to the jury the fifth instruction, as follows: "If the jury find, from the evidence herein, that the plaintiff has made out his case, as set forth in his declaration, by a preponderance of the evidence herein, then they should find for the plaintiff herein." By this instruction the court submitted to the jury the general proposition whether the plaintiff had made out his case as set forth in his declaration, and directed them to find for him, if he had so made out his case; but the court refused to give instructions asked by the defendant, which stated and explained the issues formed by the declaration and the plea, and the refusal to give such instructions is assigned as error.

The declaration contained five counts. The first alleged that Rucks became a passenger on the car; that he was unable to find a seat, and took passage on the footboard from Randolph street down into a certain tunnel used by the defendant for the purpose of passing its cars under the Chicago river; and that the defendant so carelessly and negligently managed and controlled the train that Rucks, while in the exercise of all due care, became and was pushed, scraped, thrown, and knocked off said footboard, suffering injuries from which he died. There was no evidence whatever tending to show any careless or negligent management

or control of the train while it was proceeding through the tunnel. It was stopped immediately upon the occurrence of the accident, and it was admitted by counsel for the plaintiff, on the trial, that the car was moving smoothly at the time. The second count, after alleging that Rucks became a passenger, alleged that while he was in close proximity to the walls of the tunnel defendant carelessly and negligently demanded his fare, thus causing him to reach within his pocket for said fare, and that while he did so, in the exercise of due care, his arm or certain portions of his body, because of said movement, struck the wall of said tunnel, causing him to lose his hold and to be thrown to the ground. The fourth count was to the same effect; the negligence charged being that the defendant carelessly and negligently collected, or attempted to collect, fare from Rucks, causing him to reach within his pocket for his fare, and while he did so, in the exercise of ordinary care, his arm and a certain portion of his body, because of such movement, struck or touched the walls of the tunnel, which, together with the forward motion of the car, caused him to lose his hold. The only evidence respecting the collection of fares was the fact, above stated, that the conductor was in the center of the car, taking fares and ringing the bell as they were collected. The third count alleged that the car was crowded, and there were no available seats, and that defendant had provided for the convenience of its passengers a footboard, upon which they could stand; and it charged as negligence that defendant carelessly and negligently permitted certain passengers, among them said Rucks, to stand upon said footboard, whereby he, while in the exercise of due care, became and was caught by the walls of the tunnel and thrown to the ground. The fifth count alleged that the defendant had provided, in addition to the seats on the car, the footboard, on which passengers could stand; that the walls of the tunnel were so near that there was danger to passengers standing on the footboard coming in collision with the walls; that there were passengers standing upon the footboard, among them said Rucks; and that defendant carelessly, negligently, and improperly ran and operated its cars through said tunnel so loaded, whereby he became and was struck or touched by the walls of the tunnel, and his hold or grasp upon the car was broken or lost, and he was thrown to the ground.

One of the instructions asked by the defendant and refused by the court fully and correctly explained to the jury the allegations and charges of the first count, and that the defendant denied there was any negligence in the management or control of the train, and stated that if the jury should believe, from the evidence, there was no negligence in the management and control of the train at the time and place mentioned, the plaintiff could not recover upon said first count. Another instruction so refused explained the issues under the second and fourth counts, and told the jury that if they be-

lieved, from the evidence, that the plaintiff had failed to prove the allegations of those counts, he could not recover upon them. There was a like instruction asked and refused as to the fifth count. The fifth instruction given at the request of the plaintiff submitted to the jury charges in the declaration which there was no evidence tending to prove, and the refused instructions properly and clearly explained the issues between the parties, and gave proper directions as to the requirements of the law concerning proof. No objection is made to any of the instructions as ground for refusing them; but it is said that they were properly refused, because there was an unreasonable number of instructions asked. It may be that more instructions were asked by defendant than were required, but that fact would not justify the court in the refusal of necessary and proper instructions. Those that were given were of a general character, most of them applicable to any case. The fifth, which was given, in effect told the jury that they were to try the issues under the averments of the declaration, while the court refused to explain to the jury what the issues were. It is not error to give an instruction of the character of the one given, authorizing a recovery upon proof of the case stated in the declaration, where the counts each state a cause of action, and there is evidence tending to sustain them. Mt. Olive Coal Co. v. Rademacher, 190 Ill. 538, 60 N. E. 888; Central Railway Co. v. Bannister, 195 Ill. 48, 62 N. E. 864. In this case there was at least one count which there was no evidence tending to prove.

The main contention of counsel is that, if the defendant undertook to carry so heavy a load of passengers, the conductor should have refrained from collecting fares from those who were standing on the footboard close to the walls of the tunnel, and that the question whether the collection of fares should have been deferred until the car got out of the tunnel was one of fact for the jury. It is true that the determination of the facts is for the jury; but it is the duty of the court to instruct them as to the issues, and the law applicable thereto, when requested. Certainly no instructions could be more important in this case than those which explained the issues to the jury. The first office of instructions is to explain the issues. 11 Ency. of Pl. & Pr. 56; Thompson on Trials, § 1027. It was not charged as negligence that the defendant failed to provide a sufficient number of cars or seats, or that it laid its rails or ran its cars so close to the walls as to render a passage dangerous, but only that the train was carelessly run and managed, that defendant allowed passengers to stand on the footboard, and that the conductor demanded fare of the deceased while in that position. It cannot be said to be negligence, as a matter of law, under all circumstances, for a carrier of passengers to permit a passenger to stand upon a

footboard. It has been held that the courts will not declare it negligence, as a matter of law, for a passenger to stand in an exposed position of that kind. North Chicago Street Railroad Co. v. Williams, 140 Ill. 275, 29 N. E. 672; Chicago & Alton Railroad Co. v. Fisher, 141 Ill. 614, 31 N. E. 406; Lake Shore & Michigan Southern Railway Co. v. Kelsey, 180 Ill. 530, 54 N. E. 608. It would seem to follow that it is not negligence per se, under all circumstances, for a carrier to allow a passenger to stand in such a place. Whether it is negligence on the part of either in a particular case is a question of fact; but if no seat is furnished, and the carrier permits a passenger to ride in that way, the carrier assumes the duty of exercising the care demanded by the circumstances.

On the question of the care required by the law from the defendant, the court gave, at the request of the plaintiff, the sixth instructions, as follows: "The court instructs you, as a matter of law, that carriers of passengers are held to the exercise of the utmost or highest degree of care, skill, or diligence for the safety of the passengers that is consistent with the mode of conveyance employed." The court refused to give an instruction asked by the defendant limiting the degree of care required to the highest degree consistent with the practical operation of the railroad. A railroad company, as a carrier of passengers, is held by the law to the use of the highest degree of care consistent with the practical operation of its railroad. It is bound to do all that human care, vigilance, and foresight can reasonably do, consistent with the mode of conveyance, the practical operation of its road, and the exercise of its business as carrier. Tuller v. Talbot, 23 Ill. 357, 76 Am. Dec. 695; Chicago, Burlington & Quincy Railroad Co. v. Dunn, 61 Ill. 385; Chicago & Alton Railroad Co. v. Arnol, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313; Pittsburg, Cincinnati & St. Louis Railway Co. v. Thompson, 56 Ill. 138. In this case it was not inconsistent with the mode of conveyance to operate the car at such a slow rate of speed as to prevent the occurrence of any accident. This case was of such a character as to require accurate instructions concerning the law. In a case where the argument is made, and the jury may believe, that the defendant was bound to insure the safety of the passengers on the footboard by running the car in such manner that they could not be hurt, the instruction, without the qualification, ought not to be given. At any rate, it was error to refuse the instruction which correctly stated this qualification of the rule.

The judgments of the Appellate Court and the superior court are reversed, and the cause is remanded to the superior court.

Reversed and remanded.

CITIZENS' ST. R. CO. *v.* JOLLY.

(*Supreme Court of Indiana, June 16, 1903.*)

[67 N. E. Rep. 935.]

Negligence—Pleading.

A general allegation of negligence in a complaint is sufficient to withstand a demurrer for insufficiency of facts to show negligence.

Carriers of Passengers—Negligence—Pleading.

A complaint in an action against a carrier which alleged that plaintiff's injuries were caused "solely by the fault, carelessness, and negligence of the defendant and its servants" sufficiently averred negligence to withstand attack by demurrer.

Contributory Negligence—Taking Passage on Crowded Car.

The mere fact that the car on which a person attempted to take passage was crowded when he was injured by the sudden starting thereof does not render such person guilty of contributory negligence per se.

Same—Same—Injury Caused by Jolt—Contributory Negligence Question for Jury.

Plaintiff attempted to take passage on a crowded car, which had stopped at a place where cars usually received passengers, but, owing to the crowd, did not secure a firm footing before the car was started with such force as to throw him to the ground. Defendant's servants did not warn plaintiff not to take passage: *held*, that the question of contributory negligence was for the jury.

Who Are Passengers—Prima Facie Evidence.*

The complaint in an action against a street railroad for injuries alleged that plaintiff was in waiting at a point where defendant's cars usually stopped for passengers, with the intention of taking passage; that a car stopped to take on passengers; that plaintiff stepped on the step of the rear platform, and endeavored to get on the car, which was crowded, when he was thrown to the ground and injured by the starting of the car: *held*, that the complaint, prima facie, showed plaintiff to have been a passenger.

Contributory Negligence—Pleading—Constitutional Law.

Act Feb. 17, 1899 (Acts 1899, p. 58), providing that it shall not be necessary for a plaintiff in an action for negligent personal injuries or negligent death to allege and prove want of contributory negligence, is not in conflict with Const. art. 4, § 22, prohibiting the passing of special laws regulating the practice in courts of justice.

Injury to Passenger—Assumption of Risk—Burden of Proof.

In an action by a passenger against a carrier for negligent injuries, defendant has the burden of proving assumption of risk.

Instructions—Harmless Error.

Where a requested instruction was substantially contained in instructions given, the error, if any, in refusing it, was harmless.

Street Railways—Care Due Passengers.†

While a street railroad is required to exercise the highest degree of care, skill, and diligence for the safety of its passengers in operating its cars and in constructing and maintaining its tracks, roadway, and machinery, it is only liable for negligence, and cannot be considered as an insurer of the safety of its passengers.

Injury to Passenger—Jolting of Car—Liability—Questions for Jury.

Where the complaint in an action by a passenger against a street railroad for negligent injuries alleged that plaintiff was thrown off the

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*As to who are passengers, see foot-note appended to Simmons *v.* Oregon R. Co. (Ore.), 4 R. R. R. 896, 27 Am. & Eng. R. Cas., N. S., 896.

†As to the degree of care required of street railways, as carriers of passengers, see foot-note appended to Citizens' Ry. Co *v.* Craig (Tex. Civ. App.), 3 R. R. R. 516, 26 Am. & Eng. R. Cas., N. S., 516.

car and injured by reason of a severe jolt or jerk of the car, caused by its going over a switch or a frog which was old and worn, it was error to instruct the jury that they might inquire not only whether the jolt of the car was caused by the old and worn frog or switch, but also whether the jolt was due to "any other cause, which the defendant could have guarded against by the exercise of the highest degree of skill and foresight."

Instructions—Appeal—Review.

Though the instructions in a suit may appear fair and correct when considered as a whole, an error in a particular part thereof will not be considered harmless unless the appellate court be satisfied that the jury was not misled to the prejudice of the complaining party.

Constitutional Law—Whether Statute Invalid as Infringing Right of Trial by Jury.

Act March 4. 1897 (Acts 1897, p. 128), repealing Civ. Code 1881, § 389, as amended by Acts 1895, p. 248, which provides for special verdicts, and authorizes the submission of special interrogatories, enables each party in a cause triable by jury to have submitted to and determined by the jury every essential fact in the case, and in no manner abridges the right of parties to a trial by jury as authorized by the Constitution.

Appeal from Circuit Court, Hamilton County; John F. Neal, Judge.

Action by John S. Jolly against the Citizens' Street Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Gavin & Davis, W. H. Latta, and Winter & Winter, for appellant.

Joseph B. Kealing, M. M. Hugg, and Kane, Kane & Kane, for appellee.

JORDAN, J. Appellee, by a jury in the lower court, was awarded damages to the amount of $7,000 for personal injuries received through the alleged negligence of appellant. The trial court required him to remit $2,000 of this amount, and, over appellant's motion for a new trial, rendered judgment for the remainder. Overruling a demurrer to each paragraph of the complaint and denying a motion for a new trial are the errors urged for the reversal of the judgment. Constitutional questions being involved, the appeal comes direct to this court.

The complaint is in two paragraphs. The facts alleged in the first show that appellant (defendant below) at the time of the alleged injury was a common carrier, and operated, managed, and controlled a street railroad in the city of Indianapolis, Marion county, Ind., over which cars for the carriage of passengers for hire were propelled by the means of electricity. Among the several lines which it operated is one known as the "College Avenue Line," which passes in part over Pennsylvania street, in said city—a street running north and south. On the 16th day of March, 1899, and for a long time prior to that time, the defendant, for the purpose of receiving and discharging passengers, stopped its cars which ran over the College Avenue Line near the south side of Market street, where the latter street intersects Pennsylvania.

street. This point or corner was and had been a place where many passengers took passage on the defendant's cars running over the aforesaid line. On the said day the plaintiff (appellee herein) and many other persons were standing at said corner or point, to take passage on the cars going north on the College Avenue Line. Plaintiff desired and intended to become a passenger upon one of said cars running over this line. A train of cars running north over said College Avenue Line approached the point where he was standing. This train was composed of two cars; the first being a "motor car," and the second a "trailer," which was attached to and drawn by the motor car. The first or motor car, it is alleged, was "crowded with passengers, even to the rear platform." These cars were stopped at said corner of Market and Pennsylvania streets, where the plaintiff and other passengers were standing in order to take and receive passengers thereon. The persons waiting at said corner or point, as aforesaid stated, began to board the car. At the very time appellee was in the act of boarding it, and just as he had stepped upon the step of the rear platform of the motor car, and as he was standing thereon, holding onto the post attached to said platform, being unable to proceed and move forward any further at the time, and while waiting for those in front of him to move and go forward, the conductor, a servant of the defendant in charge of said car, without waiting for him to obtain or secure a better and safer place on the car, carelessly and negligently pulled the bell cord thereof, and gave the motorman the signal to start the car. Said motorman at once responded to said signal, and suddenly, carelessly, and negligently started the car forward "with a jerk" of such force as to jerk, pull, and break plaintiff's handhold loose from the post to which he was holding, and to throw him to the ground from the step of the platform upon which he was standing. He was thereby, it is alleged, thrown off upon the ground in such a manner as to throw his right foot upon the railroad track, whereby the said trailer or rear car passed over said foot, cutting it off at the ankle, and also inflicting other injuries upon him. It is alleged that the aforesaid injuries were "caused solely by the fault, carelessness, and negligence of the defendant and its servants and employees as aforesaid." The pleading further shows that the defendant's occupation was that of a traveling salesman, and at the time of the alleged accident he was earning the sum of $150 per month. The pleading further discloses the character of the injuries received, and other facts in relation to the damages sustained. The second paragraph is similar to the first, and may be said to embrace all of the facts alleged in the latter, and, in addition thereto, charges that at and near the intersection of Market and Pennsylvania streets there is a curve in the defendant's railroad track, which turns to the east on Market street; that on the day plaintiff was injured the frog and plates supporting the tracks

where the accident occurred were old, loose, and much worn, so that the cars passing thereover would jump and jerk, which condition of the track was well known to the defendant. When the plaintiff was upon the step of the car, as shown in the first paragraph, the conductor, it is averred, in charge of the car, without waiting for him to secure or reach a better and safer place upon said car, "carelessly and negligently signaled the motorman to start the car, and that thereupon said motorman" suddenly, carelessly, and negligently started the car forward, over and along the said frog and plates supporting the tracks as aforesaid stated, thereby causing said car to be started with a jerk, and with such force as to throw the plaintiff from the platform step where he was standing, thereby resulting, as alleged, in the injuries to him charged in the first paragraph. It is further alleged in this second paragraph that the injuries sustained were caused solely by the fault, carelessness, and negligence of the appellant and its servants, who, well knowing the condition of the said track, started the car forward thereover in the manner aforesaid, and started it before plaintiff could reach a place of safety upon the car. It is further averred that the conductor saw and knew the situation of the plaintiff upon the step of the car at the time, but notwithstanding that fact he gave the signal as aforesaid alleged to the motorman to start the car, etc.

It may be said that both the paragraphs in question are specimens of loose pleading, and to this extent, at least, are open to criticism. Counsel for appellant contend, however, that each is insufficient as against a demurrer for the following reasons: First, it does not appear therein that the injuries sustained by appellee were the result of the alleged negligence of the appellant; second, that the facts disclose that appellee was guilty of contributory negligence; third, neither paragraph shows that appellee intended to become a passenger for hire, or that he was able or willing to pay his fare; fourth, it does not appear that appellee, in getting upon the step of the car and taking hold of the post as alleged, was making an effort to become a passenger upon the car for hire, or with such purpose or intent; fifth, each paragraph of complaint is said to be bad because the absence of contributory negligence on the part of the plaintiff is not shown.

The rule is well settled by repeated decisions of this court that a general allegation of negligence in a complaint or other pleading is sufficient to withstand a demurrer for insufficiency of facts. The Ohio, etc., Ry. Co. v. Walker, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638; Louisville, etc., R. Co. v. Bates, 146 Ind. 564, 45 N. E. 108, and cases there cited. In each of the paragraphs in question it is alleged and shown that the injury of which the plaintiff complains was caused "solely by the fault, carelessness, and negligence of the defendant and its servants and employees as aforesaid." This

cannot be said to be a mere recital of a fact, but it is a direct averment thereof, and is sufficient to disclose that the injury sustained was the direct result of the negligence imputed to appellant. Brinkman v. Bender, 92 Ind. 234, and cases there cited; Louisville, etc., R. Co. v. Kendall, 138 Ind. 313, 36 N. E. 415. We conclude that the first objection urged against each of the paragraphs is not sustained.

The contention of appellant that the facts alleged in both paragraphs of the complaint establish that appellee, in boarding the car at the time he did, was guilty, per se, of contributory negligence, is not tenable. The mere fact that the car was "crowded" with passengers when he attempted to take passage thereon would not alone constitute negligence per se, or as a matter of law. Marion St. R. Co. v. Shaffer, 9 Ind. App. 487, 36 N. E. 861; Booth, Street Railways, § 355; Beach on Contributory Negligence (3d Ed.) § 293; Dudley v. Front St., etc., R. Co. (C. C.) 73 Fed. 128.

It appears that, for the purpose of receiving and discharging passengers, it was the custom of appellant to stop its cars at the point where appellee on the day of the accident in question was, along with others, waiting and intending to take passage on a north-bound car over the College Avenue Line. The car in question, although crowded at the time, was nevertheless stopped by the servants of appellant in charge thereof at this point to take passengers aboard. Stopping the car or cars at this place as was customary was at least impliedly an invitation to those there in waiting to take passage thereon if they so desired. Connor v. Citizens' St. R. Co., 105 Ind. 62, 4 N. E. 441, 55 Am. Rep. 177; Citizens' St. R. Co. v. Twiname, 111 Ind. 587, 13 N. E. 55; Booth, Street Railways, § 342.

If appellant, under the circumstances, by stopping its cars at the time and place as was done, did not thereby intend or desire, by reason of the fact that the car or cars were already crowded, to invite persons waiting at that point to take passage thereon, it ought to have given some warning or notice to that effect. It is disclosed that appellee, in boarding the car, got upon the step leading up to the rear platform, but could not move further forward, because of persons in front of him, and that while standing on the step, holding by his hand to a post, endeavoring to reach a safer place on the car, and before being afforded by appellant an opportunity to do so, he was injured by reason of its alleged negligence. As to whether he was or was not guilty of contributory negligence in boarding the car in its crowded condition, and in exercising the care which he did, was a question of fact to be determined by the jury, under and in the light of all of the attending circumstances in the case, after being properly advised through the instructions of the trial court. Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E. 874; Maher v. The Central, etc., R. Co., 67 N. Y. 52; Eppendorf v. Brook-

lyn, etc., R. Co., 69 N. Y. 195, 25 Am. Rep. 127; Chicago, etc., R. Co. v. Fisher, 141 Ill. 614, 31 N. E. 406; Beach, Contributory Neg. 163.

Appellant, under the circumstances, having impliedly invited appellee to become a passenger on its cars, he had the right to assume that its servants in charge thereof would afford him at least a reasonable opportunity to secure a place of safety upon the car before it was started or put in motion. As to whether the relation of passenger and carrier exists, under certain circumstances, is frequently a mixed question of law and fact. Such issue, where there is conflict of evidence in respect thereto, is one for the determination of the jury, under proper instructions, and is not to be decided by the court as a matter of law. Sherman & Redfield on Negligence, § 262; Highley v. Gilmer, 3 Mont. 90, 35 Am. Rep. 450. This relation, in the absence of an express contract or agreement, may be implied from the attending circumstances in the case. The circumstances, however, must be such as will justify an implication that the person desiring passage has offered himself to be carried, and that such offer has been accepted by the carrier. Or, in other words, the person desiring passage must in some manner indicate his intention of becoming a passenger, and place himself in the charge or care of the carrier. Citizens' St. R. Co. v. Twiname, 111 Ind. 587, 13 N. E. 55; 4 Elliott on Railroads, §§ 1578, 1579; Ganiard v. Rochester, etc., R. Co., 50 Hun, 22, 2 N. Y. Supp. 470, affirmed in 121 N. Y. 661, 24 N. E. 1092; Spannagle v. Chicago, etc., R. Co., 31 Ill. App. 460; Higley v. Gilmer, 3 Mont. 90, 35 Am. Rep. 450; Webster v. Fitchburg, etc., R. Co., 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; 5 Am. & Eng. Ency. of Law (2d Ed.) pp. 488, 489; Booth, Street Railways, § 326. In Ganiard v. Rochester, etc., R. Co., supra, the court held that where a person desiring to take passage on a street car signals the person in charge thereof to stop the car, which is accordingly done, the instant such person steps upon the step of the car, he, under the circumstances, becomes a passenger thereon. Where it appeared that a street car was stopped for one to take passage, it was held that such person, while in the act of stepping onto the platform of the car, was a passenger. McDonough v. Metropolitan, etc., R. Co., 137 Mass. 210. In the appeal of Rogers v. The Kennebec Steamboat Co., 86 Me. 261, 29 Atl. 1069, it was held that, where a person goes upon the gang plank of a steamboat for the purpose of taking passage on the boat, he must be considered as a passenger.

To recapitulate: By the facts as shown in each of the paragraphs of the complaint, it appears that appellee was in waiting at the point where it was customary for appellant to stop its cars to receive passengers; that he desired and intended to take passage on the car over the line in controversy. The car or cars on that occasion, as was the custom, were

stopped at this point for the purpose of taking on passengers, and appellee stepped upon the step of the rear platform of the car, and was at least endeavoring, as shown, to move forward onto the platform, when he was injured through the negligence of appellant. Under these circumstances, as the authorities to which we have referred affirm, he is at least prima facie shown to have been a passenger on appellant's car at the time of the accident. If, under the circumstances, upon the occasion in question, he got upon the car step merely as a trespasser, and not for the purpose of becoming a passenger on the car for hire, as alleged and claimed, then the burden was upon appellant to establish that fact.

In regard to the fifth contention or objection of counsel for appellant, it may be said that appellee, by virtue of the provisions of an act of the Legislature approved February 17, 1899 (Acts 1899, p. 58), was relieved of the burden of showing in his complaint an absence on his part of contributory negligence. But at this point we are confronted with the insistence of appellant's counsel that this act is unconstitutional, and various reasons are advanced in support of this contention. It is claimed that this statute attempts to make a distinction, in regard to contributory negligence, between cases of personal injury and those for injury to property, where each arises out of negligence; that it is special legislation "regulating the practice in courts of justice"—a matter over which the Legislature, by reason of section 22, art. 4, of the state Constitution, has no power of classification. The constitutional validity of this act was passed upon and affirmed in the appeal of The Indianapolis St. R. Co. v. Robinson, 157 Ind. 232, 61 N. E. 197, and a majority of the members of this court still adhere to that decision. It follows from the holding therein that neither paragraph of the complaint is open to the objections pointed out and urged by counsel for appellant.

It is next insisted that the trial court erred in giving certain instructions to the jury, and in refusing others tendered by appellant. At the close of the evidence it requested the court to instruct the jury to find in its favor upon the ground that there was no evidence to prove that appellee intended to become a passenger for hire, or that he was endeavoring to become such a passenger upon the car at the time of the accident. An inspection of the evidence as it appears in the record discloses, however, that this request was properly denied. The court also refused instructions 4 and 7. By the fourth instruction the court was requested to charge the jury that the burden was upon appellee to prove that he did not assume any risk or danger which contributed to the injury which he sustained. There was no error in refusing to so charge. Whatever element, if any, of assumption of risk, there may be in the case at bar, the burden was upon appellant to prove

that fact as a defense. Indiana, etc., Oil Co. v. O'Brien (at last term) 65 N. E. 918.

It appears that appellant was not harmed by the court's ruling in refusing to give the seventh instruction as tendered, relative to the assumption of risk on the part of appellee, for the reason, if for no other, that this charge is substantially contained in those given by the court on its own motion. Instructions 3 and 4, as given by the court, relative to what was essential to constitute the relation of passenger and carrier between appellant and appellee, in the light of the authorities to which we have referred in passing upon the sufficiency of the complaint, certainly afford appellant no grounds of complaint.

Instruction 27 given by the court is criticised by counsel as erroneous. In this charge the court, among other things, said "that the defendant was not bound to so maintain its track, frog, and switch that there would be no swaying, jostling, or vibration of the car in passing over the same. Nor was it bound to replace the same whenever any part became slightly worn or rough, *if it remained entirely safe to operate defendant's cars over the same.*" (Our italics.) The objections of appellant are urged against that portion of the instruction which we have embraced in italics. It is contended that by this statement the jury was informed and given to understand, in effect, that appellant must be considered as an insurer of the safety of its passengers. Appellant company, as shown, was a common carrier of passengers for hire. The law, therefore, exacted of it the highest degree of care, skill, and diligence for the safety of its passengers in operating its cars and road, consistent with the mode of its conveyance, and likewise in the construction and maintenance of its tracks, roadway, and machinery. But it was only liable for negligence, and cannot be considered as an insurer of the safety of its passengers. Jeffersonville, etc., R. Co. v. Hendricks' Adm'r, 26 Ind. 228; Citizens' St. R. Co. v. Twiname, 111 Ind. 587, 13 N. E. 55; Anderson v. Citizens' St. R. Co., 12 Ind. App. 194, 38 N. E. 1109; Terre Haute, etc., R. Co. v. Shekes, 155 Ind. 74, 56 N. E. 434; Booth, Street Railways, §§ 328, 331. It is possible that the portion of the charge criticised was calculated to mislead the jury in respect to the issue of the condition of appellant's track as tendered by the second paragraph of the complaint, but in regard to this point we need not and do not decide, for the reason that the judgment must be reversed for the error hereinafter mentioned, and upon a retrial the court will no doubt so modify or change the instruction in dispute as to avoid the objection now urged.

It is insisted with much earnestness by appellant's counsel that the trial court manifestly erred in giving instruction numbered 8 in the series given by it on its own motion. This instruction reads as follows: "If you find from the evidence that plaintiff got upon one of the defendant's cars at a place

where it was and had been accustomed to take on passengers, and that he was unable to get any further than the steps of the rear platform of said car, and that he was there without notice or knowledge of any objection to his being upon said step at said time, and with the knowledge and acquiescence of the defendant's servants in charge of said car, and that the plaintiff was retaining his position upon said step as well as he could by using such supports which were within his reach, and that he was thrown off of the step of said car upon which he was standing as aforesaid by reason of a severe jolt or jerk caused by said car going over a switch or a frog which was old and much worn, *or for any other cause which the defendant could have guarded against by the exercise of the highest degree of care and foresight for the safe carriage of its passengers upon said car*, and that the plaintiff was injured by being thrown off said car at said time because of said severe jolt or jerk, then I charge you that it is for you to determine whether or not the plaintiff was guilty of negligence on his part, contributing to his injuries; and in determining whether or not he was guilty of negligence on his part, materially contributing to his injuries, you have a right to take into consideration the crowded condition of said car, and whether or not plaintiff could have secured a safer place, and all the other facts and circumstances connected with the transaction." (Our italics.) The part of this charge to which appellant seriously objects is that embraced in italics. This clause or portion, it is insisted, takes the case outside of the issues therein, and the jury was thereby informed or given to understand that they might deal with or inquire in regard to acts of negligence on the part of appellant other than those which were charged or assigned in the complaint. Counsel for appellee argue that the clause "or any other cause," could not have harmed appellant, for the reason that the instruction does not purport to advise the jury in regard to appellant's liability, and that, when read in connection with the other instructions, it will not constitute reversible error. The vice of the clause in the charge in question is that it may be said to so extend the inquiry or investigation of the jury in regard to the negligence of appellant as to take that question outside of the issues made by the complaint. The court by this instruction appears to have summed up certain facts, and stated to the jury that, if they found that these were proven by the evidence, then they were to determine whether the plaintiff was guilty of negligence on his part. The court thereby, in effect, gave the jurors the liberty or privilege to inquire or investigate not only as to whether the plaintiff's injury was due to his being thrown off of the car by reason of a severe jolt or jerk of the car, caused by its going over the switch or frog, as alleged in the second paragraph of the complaint, but they also were at liberty to inquire or investigate as to whether he was thrown off of the car by reason

of a severe jolt or jerk, due to "any other cause, which the defendant could have guarded against by the exercise of the highest degree of skill and foresight." The jury manifestly must have understood by the charge in question that they were not limited to the acts of negligence on the part of appellant as charged in the complaint, but that they had the right and privilege to go outside of this issuable fact, and determine whether the jolt or jerk of the car was due to negligence of the appellant, other than that of which the plaintiff complained. It is not only possible, but quite probable, that the jurors, in their investigation, were misled, to the prejudice of appellant, by the charge in question. As a general rule, a confused and misleading instruction will afford grounds for a reversal, unless it is apparent to the court, from the record in the case, that the jury in fact was not misled thereby. The general rule which affirms that instructions must be considered as a whole, and not in detached parts, and that, when so considered, if the charge of the court appears to be fair and correct as a whole, the judgment will not be reversed because some part thereof, when considered separately, may be said to be erroneous, cannot be invoked in this case to prevent a reversal on account of the erroneous instruction in controversy. That rule is subject to the qualification that the court in the particular case on appeal must be satisfied that the jury was not misled by the error in giving the instruction, to the prejudice of the complaining party. Blashfield on Instructions to Juries, § 391. We are not able to say in this appeal that the jury was not misled by the charge, to the prejudice of appellant.

It is finally contended that the court erred in denying appellant's request for a special verdict. It appears that the jury returned a general verdict along with findings upon a series of interrogatories submitted to them by the court as provided by an act of the Legislature approved March 4, 1897 (Acts 1897, p. 128). Section 389 of the Civil Code of 1881, which authorized a special verdict, was amended in 1895. Acts 1895, p. 248. This section as amended was expressly repealed by section 2 of the act of 1897, supra. Consequently the law providing for or authorizing special verdicts was not in existence at the time of the trial of the case at bar, and therefore appellant was not entitled to demand, nor was the trial court authorized to require the jury to find, a special verdict, instead of a general verdict. But appellant contends that the act of 1897 is unconstitutional, for the reason that it abridges the right of trial by jury as such right existed at the time of the adoption of the present Constitution, and consequently said act cannot be held to have repealed section 389 of the Civil Code. A jury in this state has always been, in a civil action, empowered only to decide or pass upon questions of fact. The act of 1897 provides for a general verdict, and also special findings of fact, through answers to interroga-

tories propounded to the jury. It enables each party in a cause triable by jury to have submitted to and determined by the jury every essential fact in the case, and in no manner can it be said to abridge the right of parties to a trial by jury as authorized by our fundamental law. See Udell v. Citizens' St. R. Co., 152 Ind. 507, 52 N. E. 799, 71 Am. St. Rep. 336.

Other alleged errors of the trial court are discussed by counsel, but, as these may not again arise upon another trial, we pass them by without consideration.

For error of the court in giving to the jury its eighth instruction, the judgment is reversed, and the cause ordered to be remanded to the lower court, with instructions to grant appellant a new trial.

CENTRAL OF GEORGIA RY. CO. v. WOOD.

(*Supreme Court of Georgia, June 1, 1903.*)

[44 S. E. Rep. 1001.]

Carriers—Carrying Passenger beyond Station—Damages.*

In a suit for damages against a railroad company, based on alleged negligence of the defendant in carrying the plaintiff by the station of her destination, where the plaintiff's evidence fails to disclose that she suffered any physical injury, and the utmost damage proven is the inconvenience of several hours' delay and the missing of her dinner by the plaintiff; and where the conduct of the employees of the railroad company was not such as to authorize the grant of punitive damages, but, on the contrary, was in every respect courteous and accommodating, a verdict for the plaintiff for $249.50 is unwarranted, and should be set aside by the trial judge as excessive.

(Syllabus by the Court.)

Error from City Court of Floyd County; John H. Reece, Judge.

Action by Minnie Wood against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

J. Branham, for plaintiff in error.

M. B. Eubanks and R. T. Fouche, for defendant in error.

CANDLER, J. The plaintiff sued the railroad company for damages in the sum of $499, and obtained a verdict for $249.50. Her own evidence showed that she boarded a train of the defendant, accompanied by her infant child, who was sick, and presented the conductor with a ticket to a small station in Floyd county, near the city of Rome; her ultimate destination being the home of her parents, a short distance from the station for which she had a ticket. The train did not stop at her station, and she was carried on to Rome. Had she been put off at her station, she would have reached

*See generally, foot-note appended to Birmingham Ry. Light & Power Co. v. Nolan (Ala.), 6 R. R. R. 89, 29 Am. & Eng. R. Cas., N. S., 89.

her parents' home in time for dinner. As it was, she did not get her dinner that day. The train reached Rome before noon, and shortly after alighting from the train the plaintiff met her father, who happened to be in Rome on business. About 4 o'clock in the afternoon he took her home with him on his wagon. Nothing is shown which would entitle the plaintiff to punitive damages, but, on the contrary, it appears that throughout the transaction she was treated with due courtesy and consideration. The evidence for the defendant was to the effect that, after having passed the plaintiff's station, the conductor offered to back his train and let her off, if she so desired, or to take her on to Rome, and give her free transportation back to her station, and that she expressed a desire to continue on to Rome. This, however, was denied by her. Be that as it may, there is an entire lack of evidence of any suffering or damage sustained by the plaintiff, beyond the inconvenience of being carried beyond her station, causing her to miss her dinner, and delaying her in reaching the home of her parents. While she missed her dinner, it does not appear from her evidence, even, that she suffered from hunger. The day was Christmas Eve, and the weather was cold, but the plaintiff does not say that she suffered the least unpleasantness from the severity of the weather. Her child was sick, and it was on that account that she was going to the home of her parents; but there is nothing to indicate that she was caused any mental anguish by reason of the suffering of the child, granting that the child suffered on account of the alleged negligence of the defendant.

Under all the circumstances, we are constrained to hold that a verdict for the plaintiff for $249.50 was excessive, and should have been set aside on motion for a new trial. We are aware of the extreme difficulty of fixing a limit in cases of this character, beyond which the jury may not go without doing violence to the principles of justice. The plaintiff in the present case, however, does not claim to have suffered any substantial or permanent damage, and it would seem, to say the least, to be more than an ample recompense to allow her approximately $250 for a few hours' delay in the progress of her journey, the loss of her dinner, and the slight inconvenience which she is shown to have suffered. The case of Southern R. Co. v. Bryant, 105 Ga. 318, 31 S. E. 182, we think, is very strongly in point. See, also, Hughes v. Western R. Co., 61 Ga. 132, where, in a somewhat similar case to the one at bar, $50 was held to be enough. While it is with great hesitancy that we interfere with the verdict of a jury duly approved by the trial judge, we cannot see our way clear to allow this verdict to stand.

Judgment reversed by five Justices.

MONNIER *v.* NEW YORK CENT. & H. R. R. CO.

(*Court of Appeals of New York, June 9, 1903.*)

[67 N. E. Rep. 569.]

Enforcement of Rule Requiring Extra Fare for Failure to Procure Ticket—Liability for Act of Conductor in Repelling Assault by Passenger.*

Where a conductor of a train attempts to enforce a rule of the company requiring payment of additional fare by a passenger without a ticket, and the passenger uses force against the conductor and invites a personal collision with him, he cannot sue the company or the conductor for damages for assault and battery.

Failure to Procure Ticket—Excuses Justifying Resistance to Ejection.

The fact that a passenger, refusing to pay the extra fare required of passengers without tickets, was unable to procure a ticket because of the absence of the ticket agent, is not sufficient to justify him in forcibly resisting ejectment by a conductor seeking to enforce the rule. Neither the company nor the conductor is liable in damages for an assault on the passenger under such circumstances.

Bartlett, Martin, and Vann, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Charles H. Monnier against the New York Central & Hudson River Railroad Company. From a judgment of the Appellate Division (75 N. Y. Supp. 521), affirming a judgment for plaintiff, defendant appeals. Reversed.

Thomas D. Watkins, for appellant.

D. F. Searle, for respondent.

O'BRIEN, J. The plaintiff has recovered damages for an assault and battery committed upon his person by one of the defendant's conductors on the 16th day of November, 1900, when the plaintiff was in one of the defendant's cars as a passenger from Oriskany to Utica. There is little, if any, dispute about the facts. It appears that on the day mentioned the plaintiff went to the defendant's station at Oriskany to take passage upon the local train to Utica. The office for the sale of tickets located at the station was open for an hour before the departure of the train, but from five to ten minutes before the train pulled out the ticket agent was absent from the office, as he was obliged to pass over on the opposite side of the track, a short distance, to look after an express package, and before he returned the train pulled out and the plaintiff entered one of the cars without any ticket. We must assume from the verdict of the jury that the plaintiff boarded the car without a ticket for the reason that the ticket agent was absent from the office from five to ten minutes before the train started, and therefore the plaintiff was unable to procure a ticket. Two other passengers entered the train at the same station, but both of them had procured tickets. Soon after

*Right to charge extra fare for failure to procure ticket, see note appended to Coyle *v.* Southern Ry. Co. (Ga.), 20 Am. & Eng. R. Cas., N. S., 529.

leaving the station the conductor passed through for the purpose of taking up the tickets. The two other passengers who entered the train at the same station handed him their pickets, but when he came to the plaintiff he was told that as the office was closed he had no ticket. The plaintiff then tendered 15 cents to the conductor as the fare to Utica, but the conductor told him that the fare was 19 cents when the person had no ticket. The plaintiff replied that the ticket office was not open and he could not get a ticket, and that he would pay the price of a ticket, but no more. The conductor again told him that the fare was 19 cents, and demanded that amount, telling him at the same time that if he did not pay it he must get off at the next station, and the plaintiff's answer was, "I will pay the New York Central Company all the law allows them." On arriving at the next station the plaintiff, in response to a similar request, refused to pay the 19 cents, but offered to pay 15 cents. When the plaintiff refused to pay the sum demanded, the conductor stopped the train at the station and put him off. The plaintiff resisted the conductor, but he was overpowered and finally removed from the car; the conductor using no more force than was necessary. The plaintiff then took a street car to Utica, the fare being 10 cents. The conductor inquired of the other passengers who entered the car at Oriskany if they had purchased their tickets at the station that morning, and they told him that they had; but at the same time they corroborated the plaintiff's statement that the ticket agent had stepped out of the office and across the track a short time before the train started. The removal of the plaintiff from the car in the manner and under the circumstances stated is the assault and battery of which he complains and for which he recovered the damages. The right of the plaintiff to recover was challenged by defendant's counsel, by a motion at the close of the case and by requests to charge, all of which were denied or refused by the learned trial judge, and exceptions taken.

This case presents the question whether the plaintiff had any right to resist the conductor when he was ordered to leave the train. The right of the conductor to remove a passenger from the car when the latter refuses to obey the reasonable rules and regulations of the company, and the right of the passenger to resist the enforcement of such rules by force, cannot exist at the same time. When such claims come in conflict with each other, every reasonable man will agree that there are certain principles so obviously just that, when applied to the facts of the particular case, they will work a fair solution of the question in controversy. The rule of the company that required the conductor to collect 19 cents from the passenger who did not purchase a ticket is concededly a valid and reasonable regulation. It is sanctioned by the terms of an express statute, and the duty of the conductor was to enforce it, and therefore it was the duty of the pas-

senger to submit to it. A person who becomes a passenger in a public conveyance must subordinate his conduct to all rules that are reasonable and valid Without such rules the corporation will not be able to perform the functions for which it was created. In the present case no one questions these propositions, but what is asserted in behalf of the plaintiff is that, behind these reasonable regulations there was a fact which rendered them inoperative or inapplicable to him, and that was the fact that the ticket agent was not in his office when the train started, and in consequence of his absence the plaintiff was unable to procure a ticket. But the conductor could not know what the fact was in that respect, and was not bound to take the passenger's word for it; nor could he try and decide the question upon the word of the other passengers who procured tickets at the same station. The simple duty of the conductor is to execute and enforce all reasonable rules, and that of the passenger is to obey them. If there is some fact or omission behind the rules, not apparent upon the face of the transaction, the passenger must resort to some other remedy for his grievance besides the use of force against the conductor; and if, under such circumstances he invites a personal collision with the officer in charge of the train, resulting in his forcible expulsion, he puts himself in the wrong, and cannot sue the company or the officer for assault and battery. In this case the plaintiff acted upon the principle that if he could ultimately prove that the ticket office was not open when the train started, and that he could not procure a ticket, he had the right to refuse to pay the 19 cents, and to resist the conductor by force when he attempted to put him off. It would be difficult to show that such a principle has any support in reason, justice, or authority. It is based upon the notion that the plaintiff had the right to be the judge in the controversy, and to enforce what he deemed to be his rights with the strong arm, and, if worsted in the struggle, to sue the railroad for assault and battery. That, I think, is not the law. When a railroad company willfully exacts from a passenger more than the legal rate of fare, the latter may sue the company under the statute for the penalty of $50 and the excess of fare, besides the damages that he may sustain in consequence of the wrongful act. But, as in this case, when the conductor demands only what he has the right to demand by the statute and rules of the company, the passenger is not at liberty to assert and maintain by force some right that he may claim which grows out of facts not within the knowledge of the conductor, and which may render the rules inoperative or inapplicable. He is bound for the time being to yield to the reasonable practice and requirements of the officer in charge of the train, and enforce any right that he may have against the company in some other and more proper way. By paying such a demand his cause of action is just as complete as

if he forcibly resisted the demand and suffered himself to be ejected. His ejection in such case will add nothing to his cause of action.

It would be an absurd and intolerable rule of law that would permit passengers upon a railroad to resist the officer in charge whenever a dispute arose in regard to some trivial matter wherein the passenger had a real or fancied grievance. When the plaintiff was told that he must, under the rules, pay the 19 cents or leave the car, it was his duty either to pay the extra 4 cents, or leave, and resort to the remedy which the law gave for the redress of his grievance. The conductor could not suspend the rule merely because he was told that the passenger could not procure a ticket before the train started, and, when notified by the conductor that removal from the train must follow his refusal to pay, he had notice of the rule and the consequence of his disobedience to it. When he waited for the application of force to remove him, he did so in his own wrong. He virtually invited all the force necessary to remove him, and, since no more was applied than was necessary to effect the object, he cannot recover, either against the conductor or the defendant in an action for assault and battery. Townsend v. N. Y. C. & H. R. R. Co., 56 N. Y. 295, 15 Am. Rep. 419.

No case has been cited that sustains the proposition contended for by the learned counsel for the plaintiff, and that is that the plaintiff had the right to resist the conductor by force, on the ground that he was unable to procure a ticket. There are cases where damages were recovered for ejecting a passenger from the train. Such was the case of English v. D. & H. Canal Co., 66 N. Y. 456, 23 Am. Rep. 69, where it was found that the conductor used more force than was necessary, and the proof tended to show that the train was in motion at the time, and therefore the law of self-preservation justified the passenger in repelling any attempt to eject him which would endanger his life. The case of Railroad v. Winter, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71, justifies resistance in a case like this only so far as may be sufficient to denote that the passenger gets off by compulsion and not voluntarily. The cases in other jurisdictions are to the effect that in a case like this the passenger must submit to the inconvenience of either paying the fare demanded or ejection, and rely upon his remedy against the company for the negligence or mistake of the ticket agent. The conductor cannot decide, from the statement of the passenger or his neighbors, what the facts are which may affect the operation of the rules. This would require more time than the conductor can find in the proper discharge of his duties, and would expose the company to numerous and constant frauds. Bradshaw v. Railroad, 135 Mass. 407, 46 Am. Rep. 481; Frederick v. Railroad, 37 Mich. 342, 26 Am. Rep. 531; Shelton v. Railroad, 29 Ohio St. 214; Dietrich v. Railroad Co., 71 Pa. St. 432, 10 Am. Rep.

711; Railroad Co. v. Griffin, 68 Ill. 499; Pouilin v. Can. Pac. Ry. Co., 52 Fed. 197, 3 C. C. A. 23, 17 L. R. A. 800; Hall v. M. & C. R. R. Co. (C. C.) 15 Fed. 57; Wiggins v. King, 91 Hun, 343, 36 N. Y. Supp. 768.

The question always is, in controversies of this character, whether it is the conductor or the passenger that is in the wrong. If in this case it be the conductor, it must be because he should have disregarded the rules of the company upon the faith of the statement of the passenger and his neighbors that the ticket agent was absent from the office. On the other hand, it must be that the passenger, finding that the ticket agent, at a rural station where few tickets are sold, stood at the window ready to hand out tickets for only 50, instead of 60 minutes, was justified in starting a dispute with the conductor which involved only 4 cents more than he offered to pay, resulting in a personal collision or trial of strength and force, and ending in his expulsion from the train. It seems to me that, when a passenger defies the authority of the officer in charge upon such grounds and under such circumstances, he must be held to have deliberately invited and procured the assault of which he complains. In the interests of peace and good order the law imposed upon the passenger the duty of obedience, and hence he should have either paid the four cents or left the car under protest, and then resorted to those peaceful remedies which the law provides in cases of wrongful or oppressive acts on the part of the railroad. The law imposes upon the individual the duty of obedience, under all circumstances, to lawful authority, and if, underlying the authority, there may be a question of fact which renders the exercise of it unlawful, it is not for the party himself to decide that question, and resort to violence or forcible resistance. The remedy is to appeal to the regular tribunals for the redress of any wrong or injury that he may have sustained in consequence of his enforced obedience to the regulation which he claims was not, for some reason, applicable to him under the circumstances.

We have, of course, no reference here to cases where personal rights or privileges may be invaded without jurisdiction or warrant of law, but to cases that in some sense are analogous to that of an officer who is called upon to execute process regular upon its face, though behind the process there may be some fact which would justify the decision that it was absolutely void. In such cases the individual affected must, for the time being, yield to the process and resort to proper proceedings to set it aside or to redress the injury.

For these reasons I think the judgment should be reversed, and a new trial granted; costs to abide the event.

CULLEN, J. I vote for a reversal of the judgment appealed from. By section 1, c. 228, p. 488, Laws 1857, it was enacted that the defendant, at every station on its road where it maintained a ticket office, should keep the same open

for the sale of tickets for at least one hour prior to the departure of each passenger train. By section 2 it was provided that if any person should, at any station where a ticket office was established and open, enter the cars without first having purchased a ticket, it should be lawful for the company to demand and receive 5 cents in addition to the prescribed rate of fare. The plaintiff entered the cars without a ticket at a station where a ticket office was established, but, as we must assume, for the jury have so found, on an occasion when the same was not continuously kept open for the period of one hour before the departure of the train. He contends that therefore the demand for the extra 5 cents was unlawful, and that principle has been held by this court. Chase v. N. Y. Central R. R. Co., 26 N. Y. 523. Hence, had he paid that sum he could, under chapter 185, p. 432, Laws 1857, have recovered it back from the company, together with a penalty of $50 for its exaction. I agree with Judge Bartlett that each party was bound to know and to determine for itself its legal rights, and also that, if the plaintiff was within his legal rights, he was justified in resisting any attempt to remove him from the cars. The question, as is said by Judge Bartlett, is not one of good taste (though I deny that good taste requires a passenger to submit to an imposition or unlawful exaction), but of legal right. The question, however, remains whether the conductor was justified in requiring the plaintiff to pay the additional 5 cents, though as between the plaintiff and the company it was an unlawful exaction. The object of the statute, that passengers should be induced, under the penalty of an additional fare, to purchase tickets before entering the train, was in the interest of the public, as well as in that of the company. There was a ticket office established at the station, and therefore the case of the plaintiff, prima facie, fell within the statutory provisions. The conductor did not know, and ordinarily could not know, whether the ticket office there had been kept open continuously for an hour before the departure of the train. He had a right to act on appearances. If he were obliged either to take the statement of every passenger that the office was for some part of the hour closed, or reject it at his peril, in case the statement should prove to be true, the provision requiring the purchase of tickets in advance of entering in the trains would entirely fail. In determining the unlawfulness of the act of the conductor, we must consider the common course of business of the country, and it seems to me fairly plain that the rule laid down in the courts below would be unreasonable and inconsistent with the common and proper methods of conducting the transportation of passengers on railroads. If the conductor had attempted to exact as fare a sum in excess of that which by law he was, prima facie, entitled to demand, a very different question would be presented. In such a case I would agree with Judge Bartlett that the passenger would be justified in resisting

an attempt to eject him from the train, and that the good faith or ignorance of the conductor would not relieve the defendant from liability.

BARTLETT, J. (dissenting). The material facts are undisputed. The plaintiff arrived at the depot of defendant at Oriskany on the morning of a certain day at 8:50 or 8:53 to take the 9:01 train for Utica. From the time of plaintiff's arrival until the departure of the train the ticket agent was absent from his office, and no opportunity was afforded plaintiff to purchase a ticket. The plaintiff took a seat in the train, and, when the conductor asked for his ticket, stated to him the facts accounting for its nonproduction, being corroborated by two friends. The plaintiff thereupon tendered the regular fare to the point of destination, but the conductor insisted on collecting the 5 cents extra imposed by the statute as a penalty for failing to purchase a ticket at the station. The plaintiff refused to pay the penalty and the conductor, against his protest and resistance, and with violence, ejected him from the train at Whitesboro, a station between Oriskany and Utica. The plaintiff thereupon brought this action against the defendant to recover damages for assault and battery.

We have thus presented a not unusual situation, arising between the common carrier and its passenger, involving the single legal question as to which party acted within legal right. If plaintiff failed to purchase a ticket before entering the train, opportunity having been afforded him to do so, he was liable to pay the statutory penalty of extra fare, and, refusing to do so, his ejection from the train was proper. On the other hand, if the defendant, by its act, rendered it impossible for the plaintiff to procure a ticket, his ejection from the train was wrongful, and this action lies. The argument on behalf of the defendant and appellant is, in brief, that the plaintiff should have paid the extra fare penalty, or left the train when requested to do so by the conductor, relying in either event upon his legal remedy; that the violence and indignity visited upon the plaintiff were of his own seeking, and he cannot recover damages therefor. This is not the law. The plaintiff and defendant were each bound in the emergency to determine the character of his or its legal rights, as it frequently happens that parties drifting into a legal controversy are driven to decide this question at their peril.

Much has been said as to the good taste of plaintiff in resisting so slight an invasion of his legal rights as was involved in the collection of the extra fare penalty. The matter of good taste is wholly aside from the questions presented by this appeal. Courts do not sit to enforce duties of imperfect obligation. As to the extent the rights of the person were invaded in this case was a question very properly submitted to the jury, and the plaintiff received at their hands a sub-

stantial verdict. We agree with and adopt the prevailing opinion of the learned Appellate Division.

The judgment appealed from should be affirmed, with costs to the plaintiff.

PARKER, C. J., and HAIGHT and CULLEN, JJ., concur with O'BRIEN, J. MARTIN and VANN, JJ., concur with BARTLETT, J.

Judgment reversed, etc.

AIKEN v. SOUTHERN RY. CO.

(*Supreme Court of Georgia, May 30, 1903.*)

[44 S. E. Rep. 828.]

Husband and Wife—Implied Contract for Carriage—Purchase of Ticket.

While a husband may make with a railway company a contract for the safe carriage of his wife, the law will not imply such a contract from the mere purchase of an ordinary ticket by the husband for the wife. In such a case the law raises an implied contract for safe carriage in favor of the wife only.

Pleading.

Construing the petition in the present case most strongly against the pleader, it simply alleged that the husband had purchased an ordinary ticket for the wife, and did not set up that there was any other contract than one which would result from the purchase of such a ticket.

(Syllabus by the Court.)

Error from City Court, Polk County; F. A. Irwin, Judge.

Action by F. D. Aiken against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Bunn & Trawick, for plaintiff in error.

Shumate & Maddox and Fielden & Mundy, for defendant in error.

COBB, J. Aiken, as administrator of King, brought suit against the Southern Railway Company on January 20, 1902, alleging that King was the husband of Eugenia King, and that on the 15th of September, 1897, King, "desiring to go with his wife and other members of his family to Cedartown, Ga., upon a visit, contracted with the said Southern Railway Company, through its ticket agent at Brunswick, Ga., to be carried, together with his wife, from Brunswick, Ga., to Rockmart, Ga., in said county of Polk, and that his wife and himself should be safely transported by said defendant and landed safely at Rockmart, Ga.; and he purchased from the said defendant, through its said agent at Brunswick, a ticket for himself and a ticket for his wife, and a ticket for the other members of his family, paying for said ticket for his wife, as well as for the others, the usual passenger fare from Brunswick, Ga., to Rockmart, Ga." It was further alleged that, "in consideration of said price paid for said ticket for Mrs. Eugenia King by her husband the defendant undertook and

promised to convey her from Brunswick, Ga., to Rockmart, Ga., and to afford her all reasonable and proper opportunities safely to alight from the train." The petition then avers, in substance, that after purchasing the tickets, and making the contract with the defendant, King and his wife and the other members of his family entered the train of the defendant at Brunswick, and surrendered their tickets to the conductor; that they were safely conveyed until they reached the town of Rockmart, when Mrs. King received painful and serious injuries as a result of the negligent jerking of the train while she was attempting to alight therefrom. The petition sets forth in detail the circumstances under which she was injured, and the extent of her injuries. The value of her services are set forth, and also various items of expense which her husband incurred by reason of the accident. A general demurrer to the petition was sustained, and the plaintiff excepted.

Where a person makes a contract with a railway company engaged in the business of a common carrier to be transported from one point to another along its line of road, and he is injured by the negligence of the carrier, he has two remedies—one an action for a breach of the contract, and the other an action on the case for the wrong; and he may elect which of the remedies he will pursue. Patterson v. Railway Co., 94 Ga. 140, 21 S. E. 283. See, also, Civ. Code 1895, § 3811. "Tort is the natural and habitual foundation of the action for the breach of the ordinary contract of carriage, and the declaration will be so construed, unless the facts of the case clearly show that the plaintiff has elected to sue on the contract." Whittenton Mfg. Co. v. Packet Co. (C. C.) 21 Fed. 896. When the petition in the present case is construed as a whole, we think it sufficiently appears that the purpose of the pleader was to bring an action on the alleged contract of carriage. So construing it, it is to be determined whether it sets forth a cause of action. Does it sufficiently appear that the railway company entered into a contract with King for the safe transportation of his wife? It is alleged in terms that King contracted with the railway company, but the manner in which the contract was made is also set forth, and from this it is apparent that King made no other contract than one which would arise from the mere purchase of an ordinary ticket for his wife. The question, therefore, arises whether, when one purchases such a ticket from a railway company for the use of another, and there are no other transactions or negotiations between the purchaser and the company, the contract of carriage is made with the purchaser of the ticket, or with the one who uses the ticket as evidence of a right to passage. While there has been some difference of opinion as to whether a railroad ticket constitutes a contract, by the great weight of authority "the ordinary ticket is not a contract, but is evidence of the right to transportation furnished to the passenger in consequence of a contract to carry, and is in-

tended to enable the passenger to secure transportation, under the rules and regulations of the carrier in performance of such contract." 6 Cyc. 570. See, also, 25 Am. & Eng. Enc. L. (1st Ed.) 1074; 1 Fetter, Carriers, § 275; Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469; McLain's Cas. Car. 57, 222, 663, 682. In Boyd v. Spencer, 103 Ga. 828, 30 S. E. 841, 68 Am. St. Rep. 146, this language was used: "A ticket issued to a passenger by a common carrier does not constitute the contract between the parties unless made so by express agreement. It is in the nature of a receipt for the passage money, and is generally only a token, the purpose of which is to enable the carrier to recognize the bearer as the person entitled to be carried. Any other system by which the business of the carrier would be equally facilitated would answer the same purpose as the ticket system." See, also, Southern Railway Company v. Watson, 110 Ga. 691, 36 S. E. 209. There is nothing alleged in the petition as to the character of the ticket purchased by King for his wife, and it is to be presumed that it was the ordinary ticket indicating the points between which the passenger was to be transported. When one purchases an ordinary ticket from the ticket agent of a railway company, and there is no other communication between the purchaser and the company than the application to the ticket agent for the ticket, the delivery of the ticket, and the payment of the price, the railway company, by the delivery of the ticket under such circumstances, undertakes to safely transport and carry any person who may enter its cars as a passenger having possession of such ticket. In the absence of some express agreement to the contrary, this is the undertaking of the company. If the purchaser himself becomes the passenger, he has a right to rely upon the implied contract of safe transportation. On the other hand, if he does not become the passenger, but delivers the ticket to some one else, either for a valuable consideration or gratuitously, the implied obligation on the part of the railway company to safely transport arises in favor of him who presents himself as a passenger and tenders the ticket as evidence of his right to passage. In other words, in such a case the contract entered into by the railway company at the time the ticket is delivered is simply a contract safely to transport whoever may present himself as a passenger holding the ticket. We do not mean to hold that a husband might not make an express contract with a railway company for the safe transportation of his wife; but it would seem that, where such a contract was claimed, it would be incumbent upon the person setting it up to show that the agent with whom it was made had authority to do so. What we do mean to hold is that the mere purchase of an ordinary ticket by a husband for his wife, even though he pays for it, does not constitute a contract between the purchaser and the company for the safe transportation of the wife, but the implied contract for safe

passage which the law raises from the purchase of the ticket is in favor of the wife, and in her behalf alone can an action be maintained for its breach. Of course, we do not mean to hold that where a railroad company has undertaken to safely carry a wife, or child, or servant, the husband, or father, or master may not, in an action of tort, recover any damages he sustained on account of injuries received by the wife, child, or servant in consequence of the negligence of the carrier. The recovery in such a case is for the injury to the husband, father, or master on account of the tort, and not for the breach of any implied contract which the law raises in his favor. The only case called to our attention which seems to be at all in conflict with what is above laid down is the case of Jacksonville Railroad Company v. Mitchell (Fla.) 13 South. 673, 21 L. R. A. 487. In that case it was held that a husband traveling with his wife, where he purchased tickets for himself and his wife, and had his own and her baggage checked to the point of destination, might sue the company in his own name for the loss of the wife's trunk containing her wearing apparel and that of her child. It seems, though, that this decision was put upon the special ownership which the husband had in the property of his wife, which was intrusted to his care; that is, not so much upon the ticket which he had bought for his wife, but upon that which he had purchased for himself. If the case cannot be distinguished upon the ground stated, it seems to us to be manifestly unsound. See, in this connection, 2 Fetter, Carriers, § 644.

Judgment affirmed by five Justices.

DYSART v. MISSOURI, K. & T. RY. CO.

(*Circuit Court of Appeals, Eighth Circuit, April 20, 1903.*)

[122 Fed. Rep. 228.]

Principal and Agent—Apparent Authority of Agent Sometimes Equivalent to Actual Authority.

A principal is bound to third persons, who act without notice or reasonable cause to believe that there is a defect of power, by the apparent authority with which he clothes the agent, within the scope of his agency, to the same extent as by the actual authority he confers upon him.

Carrier—Apparent Authority to Trainmaster to Take Passenger on Freight Train.

A trainmaster, who had no authority to permit passengers to ride upon freight trains without the order of the superintendent, but whose duty it was to issue orders to that effect to conductors when directed to do so by the superintendent, and whose orders the conductors were required to obey without question, issued an order to a conductor without authority from the superintendent to carry a physician on his freight train, and the conductor did so. Neither the conductor nor the doctor knew, or had reasonable cause to believe, that the trainmaster had violated his duty and issued the order without authority from the superintendent: *held*, the act of the trainmaster was within the scope of his agency. He had authority

to perform it under some circumstances. His master had clothed him with apparent authority to issue the order, and as against the conductor and the doctor, who had no notice or cause to believe that there was any defect in his authority, the apparent authority was as binding upon the railway company as actual authority would have been.

Same—Presumption—Passengers on Freight Trains.*

In the absence of any rule or practice permitting freight trains to carry passengers, the presumption is that conductors have no authority to authorize them to ride thereon, and that one riding for his own convenience on a freight train, an engine, a hand car, or any other carriage of a common carrier that is evidently not designed for the transportation of passengers, is unlawfully there, and is a trespasser. Purple v. Union Pac. Ry. Co., 51 C. C. A. 564, 114 Fed. 123, 132, 57 L. R. A. 700. But this presumption may be overcome by proof of an order to the conductor, from the superior officer from whom conductors customarily receive such orders, directing him to carry the person on his freight train.

Appeal and Error—Review—Errors of Court Below Alone Considered.

In an action at law the United States Circuit Court of Appeals is a court for the correction of the errors of the court below only. Where there was a fatal error at the trial, the appellate court will not ordinarily discuss and determine other questions of law, which were not considered or ruled by the court below.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Thomas H. Bacon (James H. Whitecotton, on the brief), for plaintiff in error.

George P. B. Jackson (George A. Mahan, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an action by an alleged passenger upon a freight train for damages caused by negligence in its operation. A judgment was rendered in favor of the railway company upon a directed verdict, on the ground that the trainmaster of the defendant, who ordered the conductor to carry the plaintiff upon his freight train, was without authority to do so. This question arose upon the trial, when the plaintiff's evidence to show authority was rejected. The plaintiff was a physician at Paris, a station on the railroad of the defendant in the state of Missouri, and he wished to ride to Higbee, another station on the defendant's railroad, for the purpose of rendering professional services to a child in a case which demanded immediate attention. The next train from Paris to Higbee, after he received his call, was a through freight train which did not stop at Paris, and the doctor knew this fact, and he also knew that neither the conductor nor the station agent had authority to permit passengers to ride upon that train, and that some higher official

*As to who are, and who are not, passengers, see foot-note appended to Mendenhall v. Atchison, etc., Ry. Co. (Kan.), 6 R. R. R. 685, 29 Am. & Eng. R. Cas., N. S., 685.

of the defendant had this power; but he did not know which officer possessed it. In this state of the case he applied to the station agent to procure permission for him to ride upon the coming freight train. The officers above the station agent and the conductor, in their order of rank, were the trainmaster, the general superintendent, and the vice president and general manager. The trainmaster had authority to stop and to move trains, but he had no power to permit a passenger to be carried upon a freight train. This authority was vested in his immediate superior, the general superintendent. The station master was aware of this fact, but he did not apply to the general superintendent, because it was a rule and a practice of the railway company that the station master and the conductor should seek such permissions through their immediate superior, the trainmaster, and that the conductor should obey the latter's orders. The general superintendent communicated his orders through the trainmaster. The station master accordingly applied to the trainmaster by telegraph for permission for the plaintiff to ride upon the through freight train from Paris to Higbee. The trainmaster failed to apply to the general superintendent to grant this request, and never had any authority to do so.

After these facts had been established the court made the ruling which is challenged, and which was fatal to the plaintiff's case. It rejected evidence of the following facts: The trainmaster, Davis, without authority so to do, informed the station agent that the request of the doctor to ride upon the freight train was granted, and issued an order to the conductor of that train to stop it at Paris, and to carry the plaintiff upon it from Paris to Higbee. The station agent notified the doctor that he had received permission for him to ride upon the train. The conductor stopped the train at Paris, and took the doctor upon it, in obedience to the order of the trainmaster. The Circuit Court held that this evidence was immaterial, and rejected it, because it did not tend, in its opinion, to show any authority on the part of the trainmaster to empower the conductor to accept the plaintiff as a passenger. But can the railway company, which placed this trainmaster where it was his duty to determine whether or not he had authority to grant this permission, and to act upon that determination, and which required the conductor of this train to immediately obey his order, be heard, after the event, to say to him, or to those who acted in reliance upon the order of the trainmaster to him, and who had no notice or suspicion that this order was unauthorized, that it was beyond the power of the trainmaster, and that all acts and contracts based upon it are void? Let us see. The plaintiff knew that neither the conductor nor the station master had authority, without an order from some superior officer, to accept him as a passenger; but he did not know what officer had this power. The railway company placed the trainmaster in command of

the conductor, and required the latter to obey his orders. It did not impose upon the conductor the duty of investigating the source from which the trainmaster derived his authority before he obeyed his orders, but it required of him prompt and implicit obedience in every instance. The general superintendent had authority to grant permissions to passengers to ride upon freight trains. When he granted them, he communicated them to the conductors through the trainmaster, who issued the proper orders. It was therefore the duty of the trainmaster to ascertain and determine in each case whether or not the general superintendent had granted him permission to allow a passenger to ride upon a freight train, and it was his duty to issue or to refuse to issue an order to the proper conductor permitting him to ride, in accordance with the authority or lack of authority which he had received from the general superintendent. In the case at bar he issued an order to this conductor to carry the plaintiff upon his freight train. If he had faithfully discharged the duty imposed upon him by the company, there would have been an order from the superintendent, back of the order of the trainmaster, authorizing the latter to issue his order. When the conductor received that order, the legal presumption was that the trainmaster had discharged his duty, that there was an order of the superintendent back of it, and both the conductor and the plaintiff had the right to rely upon that presumption, and to make the contract of carriage in accordance with it.

Nor is it material now, after the plaintiff and the conductor have acted upon the apparent authority of the trainmaster, that his actual authority was not as great as it seemed to be. For a master is as conclusively bound to innocent third persons by the acts of the agent, in the exercise of the apparent authority with which the master has clothed him, within the scope of his agency, as he is by the actual authority which he confers upon him. Chicago, St. Paul, Minneapolis & Omaha Ry. Co. v. Bryant, 13 C. C. A. 249, 253, 65 Fed. 969, 973; Mechem on Agency, § 283; Austrian & Co. v. Springer, 94 Mich. 343, 349, 54 N. W. 50, 34 Am. St. Rep. 350; Foster v. Ry. Co. (C. C.) 56 Fed. 434, 436; Butler v. Maples, 9 Wall. 766, 19 L. Ed. 822; Inglish v. Ayer, 79 Mich. 516, 44 N. W. 942. The issue of this order by the trainmaster was within the scope of his agency, because he was the officer empowered to issue such orders to the conductors, when they were authorized by the superintendent, and it was his duty to know whether or not they were so authorized, and to act accordingly.

The question which this case presents is fairly answered by the propositions announced by the Supreme Court in Merchants' Bank v. State Bank, 77 U. S. 604, 644, 19 L. Ed. 1008, and by this court in Purple v. Union Pac. Ry. Co., 114 Fed. 123, 129, 51 C. C. A. 564, 570. In the former case the Supreme Court said:

"Where a party deals with a corporation in good faith, the

transaction is not ultra vires, and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them."

In the latter case this court declared:

"One who enters and rides upon a car or train which he knows, or by the exercise of reasonable diligence would know, is prohibited from carrying passengers, is a trespasser, and not a passenger, and the only duty of the railroad company toward him is to abstain from wanton or reckless injury to him."

In the case under consideration the plaintiff knew that the conductor had no authority, without an order from some superior officer, to carry him upon the freight train. But, when he learned that the conductor had an order from such an officer to stop his train and to transport him upon it, he did not know, nor would he by the exercise of reasonable diligence have known, that there was any defect of authority, or any other irregularity in the issue of this order, on the part of those acting for the corporation; and there was nothing to excite his suspicion of any lack of authority on the part of the conductor, or of the officer from whom the conductor received the order, which he was implicitly obeying. The rejected testimony disclosed acts of the trainmaster and of the conductor, within the scopes of their agencies, in the exercise of the apparent authority with which the company had clothed them, and they were as binding upon the railway company as they would have been if their apparent authority had been actual authority. The evidence should have been received.

Counsel for the defendant in error argue at great length that, although the court erroneously rejected the testimony of authority to make the contract, yet the judgment below was right, and it should be affirmed, because, as they say, the contract proved by the plaintiff subjected the railway company to no liability for negligence, and there was no proof that the company was careless. They insist that the plaintiff produced at the trial below all the evidence which he had upon these issues, and that, because this evidence was insufficient to establish liability, the judgment should be affirmed. There are two answers to this contention. In the first place, it does not appear that the plaintiff did produce at the trial below all the evidence which he would have produced, if the court had not erroneously ruled that he had shown no authority to make the contract upon which he relied; and he must be given an opportunity to produce all his evidence, and to try these issues, in view of the rule of law which governs the authority of the trainmaster. In the second place, this is a court for

the correction of the errors of the court below only. That court did not consider. try, or rule upon the issues relating to the character of the contract and the negligence, and therefore there is nothing in its action regarding these issues for this court to consider or determine, and the discussion and decision of them here must be deferred until there has been an opportunity to try and a trial of them in the court below. That court rejected the evidence of the action and of the apparent authority of the trainmaster and conductor, and then directed a verdict for the railway company, because there was no evidence that these officers had authority to make the contract of carriage upon the freight train upon which the plaintiff relied. This was the ruling which determined the case. It was erroneous, and the judgment below must be reversed, and the case must be remanded to the Circuit Court for a new trial.

It is so ordered.

MEMPHIS NEWS PUB. CO. v. SOUTHERN RY. CO. *et al.*

(*Supreme Court of Tennessee, June 30, 1903.*)

[75 S. W. Rep. 941.]

Carriers of Freight—Duty to Carry—Discrimination.*

A railroad company contracted with a newspaper publisher, agreeing to run a special early morning train carrying only the newspapers of the publisher, in consideration of the publishing company guarantying to it a certain revenue from the operation of the train. This train became one of its scheduled trains, and was advertised as such. It was controlled exclusively by the company, and all the revenue derived from its operation in the carrying of passengers and freight was its property: *held*, that the railroad could not, relying on its contract, refuse to carry on such train newspapers tendered it by a rival publishing house, which offered to comply with all the conditions as to guaranty, indemnity, etc., complied with by the house making the contract, and such refusal constituted an illegal discrimination between persons of the same class.

Same—Same—Same—Special Trains—Definition.

The fact that the publishing company solicited the institution of the train service and supported it by a large outlay of money during its early days did not change the rule, nor make the train a special one, chartered for a special purpose.

Same—Same—Same—Newspapers.

It was the duty of the railroad company to forward the papers tendered it, without discrimination in time or order of shipment; and it could not refuse to carry papers of the rival house on the early morning train, on the ground that it had other trains going out later in the day.

Same—Same—Same—Defenses.

The early morning train being in operation, the railroad company could not refuse to accommodate the rival publishing house, and defend, when sued for such refusal, on the ground that such house could make a special contract similar to that made by the first house.

Equitable Relief.

In a suit by a publishing house against a railroad company for refusal to carry its papers on an early morning train, which was put in

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*As to the duty of railroad companies as common carriers to receive and carry freight, see monograph appended to Carter v. Wilmington & W. R. Co., 1 R. R. R. 131, 24 Am. & Eng. R. Cas., N. S., 131.

service by the railroad under a contract with another publishing house which stipulated that the railroad company should not forward the papers of any other house than the contractor, the contracting house could not, when made a party to the suit by its rival, file a cross-bill, and thereby work out any equities that it might have against it on account of expenses incurred through the establishment and early maintenance of the train service.

Same.

The granting of such relief would be impracticable, as an account could not be stated which would do equal justice to the parties, since it would be impossible to ascertain the kind or value of the advantages which should be taken into account, derived by the contractor from the enterprise.

Same.

If bound to contribute to such expenses at all, the rival house could only be required to contribute to the extent of its proportional part of the service; other shippers, who had availed themselves thereof, being equally liable to contribution.

Freight—Duty to Carry—Conditions.

Since the railroad company was bound, under its duty as a common carrier, to carry any freight properly tendered to it, neither the railroad nor the house contracting for the service could impose, as a condition of acceptance and delivery of goods tendered, an obligation to share the burden of establishing the service voluntarily assumed by the contracting house.

Appeal from Chancery Court, Shelby County; F. H. Heiskell, Chancellor.

Bill for an injunction by the Memphis News Publishing Company against the Southern Railway Company and the Commercial Publishing Company. From a decree for plaintiff, defendants appeal. Affirmed.

F. P. Poston and Wright, Peters & Wright, for appellants.
G. T. Fitzhugh, for appellee.

BEARD, C. J. This is an injunction bill, filed by the complainant, a corporation organized under the laws of Tennessee, against the Southern Railway Company, a corporation chartered by the state of Virginia, engaged in operating a line of railroad running between the cities of Memphis and Chattanooga, and the Commercial Publishing Company, a corporation with a charter issued under the authority of the state of Tennessee. The first and third of these corporations are engaged in the publication and circulation of two daily newspapers, and have their situs in the city of Memphis, and the Southern Railway Company is a common carrier of freight and passengers between the termini mentioned The controversy arises out of a refusal upon the part of the railway company to receive and carry upon its train No. 6, scheduled to leave Memphis for Huntsville, Ala., each morning at 4:30 o'clock, packages containing newspapers published by the complainant company and put up for delivery at certain stations along the line of said railroad; the refusal being based upon the ground, alleged by the railway company, that by the terms of a contract already existing between it and the Commercial Publishing Company it was prohibited from carrying

any other newspaper than such as was published by that company. The facts, conceded in the pleadings or found in the agreed stipulation of counsel in the record, are:

The defendant the Commercial Publishing Company was on the 29th of November, 1901, and had been for years prior thereto, engaged in the publication daily of a newspaper called the "Commercial-Appeal," of wide circulation, and especially with many subscribers living along the line of the railroad. At that time there was no early train service out of Memphis by which newspapers could be carried to points between that place and Huntsville, a point on the road situated in the state of Alabama. Conceiving the idea that the value of its newspaper would be largely enhanced by the establishment of such train, it entered into a contract with the Southern Railway Company, the terms of which, so far as it is necessary to state them, may be summarized as follows: (1) The railway company agreed to operate a passenger train, consisting of an engine, a combination passenger and baggage car, and at least one passenger coach, between Memphis and Huntsville, leaving Memphis about 4 a. m. daily, and reaching Huntsville at or about 10:40 a. m., and on its return trip departing from the latter place about 7:20 a. m. and arriving at Memphis about 2:00 p. m. (2) It agreed to forward upon said train all newspapers which the Commercial Publishing Company might desire to distribute between Memphis and Huntsville, and to transport upon such train daily also such employees of the Commercial Publishing Company as might be necessary to handle the same, and also to forward daily on a freight train such newspapers to points east of Huntsville; also to operate its own hand car or velocipede, at its own risk and expense, over its branch line to Somerville, Tenn., from the town of Moscow. (3) It further agreed to refuse, so far as it might lawfully do so without violating the postal laws, rules, and regulations of the United States, to carry upon said train the newspaper or publication of any other publishing company; but other newspapers or publications were to be transported upon any other train or trains of the railway company except the one in question. (4) The contract further provided that the railway company might carry on said train all such passengers and their baggage, express matter, and other business usually accommodated upon passenger trains, as might be offered, upon such rates or terms as it might prescribe, and should retain all earnings and revenue derived from the operation of these trains. (5) It was also provided that the employees of the Commercial Publishing Company were to be under the exclusive control of the railway company, and amenable to the orders and instructions of its conductor, and to the reasonable rules and regulations of the carrier company. In consideration of these undertakings on the part of the railway company, on its part the Commercial Publishing Company in this contract guarantied to the rail-

way company a revenue from the operation of this train of $125 for each one of the round trips contemplated by the contract, and agreed to pay the railway company the difference between the gross earnings of each of these trips and this sum. The Commercial Publishing Company further agreed to indemnify the railway company against all demands, suits, judgments, or sums of money accruing to the publishing company or any one or more of its employees and to protect it against any claims of the employees of the publishing company and the cost of defending them, if suits were brought against it. In other words, the publishing company agreed to be responsible for all costs, demands, and claims growing out of the operation of the train and incurred in handling papers by and transporting employees of the publishing company. It also undertook to publish daily a schedule time-card of the railway company in the Commercial-Appeal, as the same might be promulgated from time to time, with all desired changes and corrections therein as might from time to time be made, and also to publish 500 inches of any advertising matter desired by the railway company, all of which should be done at the expense of the Commercial Publishing Company. The railway company, however, agreed to grant a reasonable amount of free transportation over its lines to the publishing company. This contract took effect December 1, 1901, and was to continue until December 31, 1902, with the right of renewal for a further period of one year. The train thus provided for was soon thereafter put in operation by the Southern Railway Company, and it is agreed in the cause that it was one of its scheduled trains, and was advertised to the public as such. It is also agreed that it was controlled exclusively by that company, that all of the revenue derived from its operation was its property, and that it carried passengers and their baggage, the United States mail, express matter, newspapers of the Commercial Publishing Company, and all such other freight as is usually transported on passenger trains of a commercial railroad.

On the 4th of May, 1902, the complainant began in the city of Memphis the publication and issuance of a daily morning paper called the "Memphis Morning News," and immediately secured several thousand subscribers in the territory reached by this line of railroad. Desirous of reaching these subscribers at as early hour as possible, the complainant demanded the right to ship as freight its packages of newspapers, properly directed to its several agents at the various stations along the line of the railroad where the train was scheduled to stop, and tendered the usual charges on the same. This demand, however, was refused by the railway company, upon the ground that it was restrained from such carriage by the terms of its contract with the Commercial Publishing Company. Upon this refusal the complainant then tendered to the railroad company a bond, with proper security, in con-

sideration of being allowed to ship its packages of newspapers as freight on this train, by which it undertook to indemnify it against all loss resulting from the operation of the train up to $125 for each round trip thereof; complainant thereby seeking, so far as the railway was concerned, to place itself in the same condition of liability as was the Commercial Publishing Company. This tender was also declined. Thereupon the complainant offered for transportation, with charges prepaid, its packages of newspapers to the Southern Express Company, which was shipping express matter on this train; but it also declined to receive or transport these packages, assigning as a reason for the refusal that the railway company had reserved to itself exclusively this right. The record discloses that, in order to avoid complications which possibly might result from this refusal, the express company temporarily withdrew its service from these particular trains. Thus thwarted in all its efforts to avail itself of the advantage of this daily train, and there being none other by which it could reach its subscribers in the territory tributary to this railway, so as favorably to compete with the Commercial Appeal newspaper, the present bill was filed.

The theory of the bill is found in the ninth clause thereof, which is in these words: "Complainant avers that in receiving and transporting the papers of the aforesaid Commercial Publishing Company on said train, thus enabling it to deliver its papers to its subscribers in that particular territory a short time after the publication thereof, and in refusing to receive and transport on the same terms the papers of complainant, and thus depriving it of an opportunity to deliver its papers to its subscribers with equal promptness, the defendant railway company has been, and still is, granting daily to said Commercial Publishing Company an undue, unreasonable, and unlawful preference or advantage over complainant, and has been, and still is, guilty of an unjust and illegal discrimination against complainant and in favor of the said Commercial Publishing Company. * * * Complainant is advised, and so charges, that the said contract so entered into by and between defendant and the said Commercial Publishing Company, in so far as it attempts to give to the said Commercial Publishing Company a monopoly of transportation of a certain kind of traffic, to wit, newspapers, causes the defendant Southern Railway Company to violate its duty as a common carrier by refusing to receive and transport on said trains the newspapers or publications published by any other publisher than said Commercial Publishing Company, is absolutely prohibited, and unlawful." It is also alleged that the contract was violative of the seventeenth section of an act of the General Assembly of the state of Tennessee, passed March 24, 1897, and approved April 7, 1897, which is in these words: "Be it enacted, that it shall be unlawful for any corporation to make or give any undue or unreasonable preference or

advantage to any particular description of traffic, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage." Acts 1897, p. 120, c. 10. The prayer of the bill was, in effect, that the rights of the complainant in this regard be ascertained and established, that an injunction be awarded restraining the defendant the Southern Railway Company as a common carrier from discriminating in favor of the Commercial Publishing Company and against the complainant in the transportation of packages of their respective newspapers upon this train, and for a mandatory injunction requiring the railway company to accord to it the same privileges as was granted the publishing company in the matter of transportation, upon the tender of freight charges and guaranties against loss such as had been executed by the Commercial Publishing Company; and upon final hearing it was asked that the injunction be made perpetual and general relief be granted.

To this bill answers were filed by the two defendants, in which it was insisted that under the conditions existing at the time of the making this contract it was legal; that there was at that time no early train service out of Memphis on which newspapers could be carried; that the railway company did not believe this train would be self-supporting, and it was only at the solicitation of the Commercial Publishing Company, and upon its guaranty that it should earn at least $125 for each round trip, that the train was put on; that in the early history of its operation it was not self-sustaining, but entailed a loss on the Commercial Publishing Company under its guaranty of about $7,000 in money paid by it to the railway company. Under these facts it was insisted that this train was a chartered train, on which alone the Commercial Publishing Company was entitled to carry its newspapers, and that the railway company, in complying with this contract hereinbefore set out, was not a common carrier, and was not guilty of any unjust, unlawful, or discriminating conduct against the complainant.

With its answer the Commercial Publishing Company filed a cross-bill, in which, after repeating many of the allegations of its answer, it insists, among other things, that, if the Memphis News Publishing Company should, by decree of the court, be let into an equal enjoyment of this train service, for the carriage of its packages of newspapers, then it should only be on the conditions that it reimburse the cross-complainant to the extent of one-half the money paid out by costs expended by it in the establishment of this service, and, in addition, one-half the value of the advertisements which, under the contract. it had done for the railway company. To this end the chancellor was asked that, if it should be held the News Publishing Company was entitled to an equal advantage in this service, then it should be decreed to pay to cross-com-

plainant one-half of all such sums. This cross-bill was dismissed on demurrer.

Upon the hearing of the issue made by the original bill and answers thereto, a decree was entered adjudicating all the questions involved in favor of the Morning News Publishing Company. From the decree dismissing its cross-bill, and from the final decree, the Commercial Publishing Company has appealed, and now makes the following assignment of errors, to wit:

"(1) The court erred in holding that the contract with the Commercial Publishing Company was made by the Southern Railway Company as a common carrier, and that it was invalid and illegal, in that it undertook to grant exclusive rights and privileges to the Commercial Publishing Company, and in holding that the Memphis News Publishing Company was entitled to the same rights as were conferred upon the Commercial Publishing Company by the said contract in transporting its newspapers and employees on this train.

"(2) The court erred in holding that the contract between the Southern Railway Company and the Commercial Publishing Company was not valid.

"(3) The court erred in holding that the contract between the Southern Railway Company and the Commercial Publishing Company created a monopoly, that it unjustly and illegally discriminated against the Memphis News Publishing Company, and was invalid as against said company.

"(4) The court erred in holding that the Memphis News Publishing Company was entitled to transport its papers and employees on this train, and to enjoy equal privileges and rights with the Commercial Publishing Company thereon, without paying to it anything therefor.

"(5) The court erred in not holding that, before the Memphis News Publishing Company could conduct its business and transport its newspapers and agents on this train, and avail itself of all the rights and privileges accorded to the Commercial Publishing Company on said train under its contract with the Southern Railway Company, the said Memphis News Publishing Company should be required to pay to the Commercial Publishing Company one-half of all the sums of money expended by it in inaugurating and maintaining the operation of the said train, and in advertisements and other expenditures, which amounted to a very large sum of money."

The first three of these assignments may well be treated together, as raising the question whether the Southern Railway Company, in the matter of the transportation of the newspapers of the Commercial Publishing Company, is a common carrier; for, if so, then it cannot, at common law or under the statute, discriminate against any other person who in like condition, with a tender of all reasonable charges, offers its newspapers to be transported as freight over its line of road. The criterion by which it is ordinarily determined whether one

is a common carrier is that "he has held himself out, or has advertised himself in his dealings or course of business with the public, as being ready and willing for hire to carry particular classes of goods for all those who may desire the transportation of such goods between the places between which he professes in this manner his readiness and willingness to carry. If he has done so, he is, of course, to be regarded as a common carrier; but, if not, he will be treated as a private carrier for hire." Hutchinson on Carr. § 48. This, however, it has been held, is not a universal test. There are cases, exceptional, it is true, where a party has had imposed upon him the character of a common carrier, though it be he has not given the public to understand that this was his profession, but has carried only in occasional or particular instances, but in this has received hire for his service. In Gordon v. Hutchinson, 1 Watts & S. 285, 37 Am. Dec. 472, and Moss v. Bettis, 51 Tenn. 661, 13 Am. Rep. 1, it was ruled that such a party pro hac vice assumed the responsibilities of a common carrier.

Whatever doubt may have been thrown by text writers on the wisdom of extending the common-law definition or rule so as to embrace such exceptional cases, there can be none that commercial railroad companies are by their very nature and organic character common carriers. Recognizing them as public utilities, as well as private enterprises, there has been conferred upon them extensive rights and franchises, among these being that of the right to invoke the power of eminent domain; but at the same time, whether by statute or upon the principles of the common law, they have had imposed upon them duties they cannot avoid, one of which is that they shall serve the public without unjust discrimination. Not only have they been fostered by the government, but, by reason of aggregation of capital and the great facilities which they possess for the transportation of all the commodities of commerce, they have practically monopolized the land carriage of the country. This being so, it is just and proper that they should be held to the strict discharge of their common law and statutory duties. Hutchinson on Carr. § 67. One of the duties imposed upon a railroad as a common carrier is that it shall deal fairly and impartially with all who seek, as passengers or shippers of freight, to avail themselves of its service. Impressed, as it is, by its grant of franchises, with a trust to the public, this trust can only be discharged by extending equal facilities to each member constituting the public. It fails of its duty, therefore, when, discriminating between individuals in like condition, it gives one an advantage in the carriage of his person or property which it refuses to another, and it follows that any contract made by it, by which one or more members of a class are fostered at the expense of or to the detriment of others of the same class, who demand like service, is unenforceable. Granting that goods

not dangerous in their nature and not unfit for shipment are offered at a proper place and time, and that the cost of carriage is tendered, and the railroad has facilities for shipment, then it must accept and transport them. In doing this it "can show no favor, nor make distinctions which will give one employer an advantage over another, either in the time or order of shipment, or in the distance of the carriage, or in the convenience or accommodations which may be afforded." Hutchinson on Carr. § 297; New Eng. Ex. Co. v. Maine Cent. R. R., 57 Me. 188, 2 Am. Rep. 31; Messenger v. Penn. R. R., 36 N. J. Law, 407, 13 Am. Rep. 457; Union Pac. Ry. Co. v. Goodridge, 149 U. S. 680, 13 Sup. Ct. 970, 37 L. Ed. 986.

These general principles are conceded by the defendants to be sound, but it is insisted they do not control the present case. It is admitted—or it is true, whether admitted or not—that the railway company, as to the train in question, was a common carrier of passengers and of mail and express; but it is contended that it was, by reason of its contract with the Commercial Publishing Company, a private carrier of newspapers, and therefore was under no obligations to admit the newspapers of the complainant on its train. It is true "a common carrier may become a private carrier or bailee for hire, when as a matter of accommodation or special agreement he undertakes to carry something which it is not his business to carry." Hutchinson on Carr. § 44. For example, "if a carrier of produce, running a truck boat, should be requested to carry a keg of silver or a load of furniture, * * * he might justly refuse to receive such freight, except by such an agreement as he might choose to make. * * * But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character." N. Y. C. R. R. Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627. If the contract complained of in this case was one which granted an exclusive right and privilege to the Commercial Publishing Company to sell its newspapers on this train, and the complainant was here seeking to interfere with this contract and to force the railroad to grant it an equal privilege, then there would be presented a special agreement which the courts would not intermeddle with; and this upon the ground that as a common carrier it owed no duty to furnish newspapers to the traveling public, and was not bound to permit another to do so. If it choose, however, to grant this privilege, another to whom it was refused would not be heard to complain.

But this is not the case at bar. Under the contract the railway company is carrying the newspapers of the Commercial Publishing Company as property, and the complainant is

insisting that, having the means of doing so, it should equally and impartially carry its packages of papers upon the same terms as merchandise It would hardly be contended that a railroad by making a special and exclusive contract to transport shoes manufactured by one party in a community, could strip itself of its common-law character, and decline, without any reason save the existence of said contract, to transport boxes of shoes for another manufacturer in the same community. If this be so, where is the controlling difference between such a case and the one now before us? Packages of newspapers are as much property as shoes, and the principle which controls in the one case, it seems to us, must equally apply to the other. If this be not so, by parceling out its means of transportation to the full extent of its carrying capacity, it would be possible for a railroad to build up a few in a community to the destruction of the many who equally seek shipment. This the law will not tolerate in one who holds himself out as a common carrier. As has been already said, he must accord equal privileges to all who are in like condition. He cannot foster monopolies. He will not, by making special preferential agreements, be permitted to build up one set of shippers at the expense of another. He must carry for all alike.

These general principles being established, what is there to prevent their application in this case? We see nothing. A railroad by its very nature, as has been seen, is a common carrier. The train in question is a scheduled one, advertised to the world as such. An invitation is given to the public to take passage and ship freight upon it. Its own employees, managers, and the railway company appropriate all its revenues. So far as the record shows, it receives on this train merchandise from every other member of the community, and refuses carriage alone to that of this complainant; and this refusal is based, not upon a lack of carrying capacity, but exclusively upon the ground that it has contracted away its duty, in respect to such property as the complainant has tendered, to another party. Such an excuse cannot relieve the railway company from its obligations to complainant as one of the public, unless it be that this contract in question brings this within the lines of certain exceptional cases on which the defendants rely as authority for their contention. Some of these cases, which may be taken as representatives of their respective classes, will be now referred to.

It has been held that a common carrier of passengers may establish in his car or vessel an agency for the delivery of passengers' baggage, and may exclude all other persons from entering upon it for the purpose of soliciting or receiving orders therefor. Barney v. Oyster Bay, etc., Steamboat Co., 67 N. Y. 301, 23 Am. Rep. 115. It has been also held that a railroad corporation may exclude from its right of way one party who comes to sell lunches to its passengers and admit

another to this privilege, if it pleases (Fluker v. Ga. R. R., etc., Co., 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843, 12 Am. St. Rep. 328), and that a steamship corporation and a railroad may equally give preferential privilege to certain hackmen to solicit passengers on their property and exclude others (Smith v. New York R. R. Co., 149 N. Y. 249; Norfolk & W. R. R. v. Old Dominion Bog. Co., 99 Va. 111, 37 S. E. 784, 50 L. R. A. 722). These cases and others like them rest, however, on the ground that, save as to duties which he owes to the public, a common carrier has as complete dominion over its property, whatever it may be, as does every other owner, and may therefore exclude from or admit to it, at its will, particular persons. In other words, an inhibition upon preferential indulgences extends only to those services which inhere in or pertain to the office of a common carrier, and beyond these he is entitled to the absolute control of his own, and that in none of these matters covered by these cases does he owe anything to the public.

In Audenried v. Philadelphia & Read. R. R., 68 Pa. 370, 8 Am. Rep. 195, the question was as to the right of the defendant company to so parcel or divide its wharf among other coal dealers as to exclude the complainant therefrom. After expressing great doubt as to whether the defendant, under its charter, was bound to provide wharf accommodations to any of the coal dealers in question, or was a trustee to any extent for them, the court adds: "But, concede both of these points; what then? As trustee there is a discretion reposed in them in the use of the property with which a chancellor cannot interfere. It is agreed that they have not room enough for all. They must select some and reject others. Can a chancellor inquire into their motives and, not approving of them, assume the selection himself?" The court in this opinion by necessary implication declared that its holding could not be authority for such a contention as is now made by these defendants; for it adds: "Transportation by a common carrier is necessarily open to the public upon equal and reasonable terms. An exclusive right granted to one is inconsistent with the rights of all others. This was not transportation, but wharfage, the nature of which requires exclusive possession temporarily."

In Hoover v. Penn. R. R., 156 Pa. 220, 27 Atl. 282, 22 L. R. A. 263, 36 Am. St. Rep. 43, the court held that an agreement made in 1881 to charge a uniform rate on shipment of coal to the Bellefonte Nail Works for consumption in operating its machinery could not be complained of as unjust discrimination against a mere dealer, who received his coal over the same road and was charged a higher rate. This was held not to be unjust discrimination, because the business of the coal dealer paid but one freight to the carrier, while that of the nail company paid two freights, to wit, one for handling the coal to the nail works, and the other for carrying all the

products manufactured by the nail company. "This," said the court, "was a most important and vital difference in the conditions and circumstances of the two shipments. The authorities are very clear and strong that, where an additional freight is obtained by means of the lesser charge, the discrimination is justified, both at common law and under the statute." To save such an arrangement from condemnation, however, it must appear that "the same advantages" were "extended to all persons under the like circumstances. This latter incident," adds the court, "would, of course, be essential where all the favored class were in the same business." The case was distinguished from Messenger v. R. R. Co., 37 N. J. Law, 531, 18 Am. Rep. 754, where it was held that there was a clearly unlawful preference by the common carrier in favor of one party over all others in the same business in "giving him a specified drawback upon freight on hogs carried from the same points." "This drawback," said the Pennsylvania court, "as of course, was giving one a direct preference over all others, and was in violation of the law."

We think, as the discrimination of the case at bar is one in favor of and against another of the same class, it falls under the condemnation of the Messenger Case, rather than being within the saving authority of that of Hoover, supra. Nor can we see how the fact that the solicitation of the money of the Commercial Publishing Company, however able was its exhibition of public or private enterprises, contributed to the institution of this train service and its support in its early days, is to affect this question. From the beginning the railway company had itself recognized that it was operating this train as a part of its common carrier service. It was in no sense a special train, chartered for a special purpose, with the carriage of freight and passengers as simply incidental. The contract itself gives notice that it is a public enterprise, and the contemporaneous conduct of the parties has so construed it. The railway company has controlled it by its own employees, and has advertised its readiness to serve the public with it: and the Commercial Publishing Company, according to this record, has continually published it as one of the schedule trains of the railway company.

It is said, however, that the railway company has other trains going out every day, though later in the day, on which the complainant may ship his papers. But it was the duty, upon the record, of the company to receive the packages for shipment. Having done this, it could make no "discrimination, either in the time or order of shipment," between these two publishing companies. Hutchinson on Carr. § 297. It was bound to use due diligence in the delivery of the goods. N. & C. R. R. v. Jackson, 53 Tenn. 271.

It is also said that, if complainant wishes a train to use in carrying its goods, it should make a special contract, as is relied on in this case by the defendant. This would be a good

answer for the railway company, if complainant wanted an early service and there was no train on which could render the service. But it is not for either defendant, with the present train on, amply able to take complainant's goods, to decline only upon the ground of the special agreement.

After a careful consideration of the assignments of error raising the question as to legal effect of this agreement upon the carrier duty of the railway company, we hold that they are not well taken, and they are overruled.

There remains open now only the assignment of error upon the action of the chancellor in sustaining the demurrer to the cross-bill. In arguing this assignment, the cross-complainant overlooks the fact that the real controversy in this cause is between the Memphis News Publishing Company and the railway company. It was a proper, but by no means a necessary, party to this suit. No relief was asked against the Commercial Publishing Company. Complainant sought a remedy alone against the railway company, and this remedy would have been applied as effectually without, as with, the former company a party defendant; and the defense of the railway company, if sound in law, was maintainable even if it stood alone. This company has been paid all it is entitled to, and is claiming nothing for past service. This being so, we know of no principle upon which the cross-complainant can in this suit work out any equity against complainant, if it has any; for on this cross-bill it is in the attitude it would be in if, not a party to this suit, it had filed an independent bill, and asked the court to grant it relief before giving a decree in favor of the Morning News Publishing Company against the railway company. It would hardly be insisted that such a bill could be maintained. Nor do we think the contention of cross-complainant that the original complainant shall be compelled to account to it for one-half of the sums expended in placing this train service on a self-sustaining basis before being let into its enjoyment can be maintained on other grounds.

First. We think it would be impracticable to state an account that would do equal justice to the parties. While it would be easy to ascertain the amount of money expended and the value of the service rendered in fostering this train by cross-complainant, yet it would be impossible to ascertain the kind or the value of the advantages derived by it from this enterprise. Certainly the worth of this advantage should be taken into account.

Second. If bound to contribute at all, we think the Morning News Publishing Company could only be required to do so to the extent of its proportional part of the same; all other shippers who have availed themselves of this service being equally liable to contribution.

Third. Having held, however, that the duty of a common carrier attached from the establishment of this train service,

it follows that every shipper who made a timely and proper tender of freight was entitled to its benefit, as long as there was accommodation for his freight, without regard to the connection between the railway company and other shippers. All other things being equal, the company was bound to accept and make prompt delivery of the goods so tendered. Neither the company nor a third party could impose as a condition for acceptance and delivery that complainant should agree to share a burden voluntarily assumed by this third party. No more can either demand at this day that this burden shall now be divided as a condition precedent to the railway company's discharging its duty.

However meritorious this claim of cross-complainant, we can see no legal or equitable ground on which it can be vested. The assignment is therefore overruled.

The decree of the chancellor is in all things affirmed.

ATCHISON, T. & S. F. RY. CO. v. PARRY.

(*Supreme Court of Kansas, July 10, 1903.*)

[73 Pac. Rep. 105.]

Sick Passengers—Care Due from Carrier.

It is the duty of a carrier of passengers to exercise reasonable and ordinary care in looking after and protecting one who becomes sick or unconscious while a passenger. Whether such care has been exercised is ordinarily a question of fact for the jury.

Negligence—Proximate Cause.

Negligence, to be the proximate cause of an injury, must be such that a person of ordinary caution and prudence would have foreseen that some injury would likely result therefrom, not that the specific injury would result. The question whether negligence is the proximate cause of an injury is ordinarily one of fact for the jury.

(Syllabus by the Court.)

In Banc. Error from District Court, Harvey County; M. P. Simpson, Judge.

Action by Alice M. Parry against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

A. A. Hurd and C. S. Bowman, for plaintiff in error.

John J. Hildreth, for defendant in error.

CUNNINGHAM, J. Robert Parry was a passenger on the Santa Fe Railway going from Purcell, Ind. T., to Denver, Colo. In making this journey he was required to change cars at Newton, Kan. As the train approached Newton, and a mile or two south of it, the conductor observed that Parry was ailing with something that looked to him like a fit. He noticed that Mr. Parry "was straightened out, and his limbs was stiff and jerking. He was frothing at the mouth, and his eyes looked glaring and starry, just like a man that had a fit." When the train arrived at Newton, Mr. Parry seemed

to be recovering, but had not entirely regained consciousness, and the conductor was unable to get any response when he tried to converse with him. The conductor called the depot master, who, with the assistance of the porter, removed Mr. Parry from the train; the depot master being informed by the conductor of the condition of the passenger, and requested to take care of him, and see that he was put upon the right train to take him to his destination, which train was to leave in about four hours. After the passenger was removed from the train, he was left in the care of the depot master, the porter going to his other duties. The depot master tried to talk with him, but elicited nothing but groans, mutterings, and unintelligible replies. It seemed, however, to the depot master that he desired to go his own way without any assistance, so that, after helping him on with his coat, he was allowed, after about five or ten minutes, to take his own course, without further attention, the depot master supposing that he had been drinking, and desired to go where he could procure liquor. The next seen of him was about four hours after his removal from the train, at a point about five miles south of Newton, where, having lain down upon the railway tracks, he was run over by a south-bound train and killed. The negligence counted upon by the plaintiff, his widow, as a ground for recovery, was that the company failed to exercise a proper degree of caution and care in looking after Mr. Parry after he was removed from the train in an unconscious and irresponsible condition of mind and body. The jury returned a general verdict in favor of the defendant in error, and also answered special questions submitted to them, among which are the following: "(7) What was his appearance and condition, mentally and physically, on his arrival at Newton? Ans. Recovering from a convulsion, and partially unconscious. (8) Did J. W. Anderson, the depot master, at Newton, of the defendant, take charge of the deceased upon his arrival at Newton? Ans. He did." "(10) Does said Anderson possess the common and ordinary capabilities, judgment, and prudence of men and persons generally? Ans. We think so. (11) About how long did said Anderson keep charge of said deceased? Ans. Five to ten minutes.", "(15) When said Anderson ceased to care for the deceased, did Anderson believe that the deceased had sufficient strength and consciousness to take care of himself? Ans. He claimed so. (16) At the time Anderson ceased to care for the deceased, did he think or contemplate that deceased would wander away, and afterwards get into a place of danger and lose his life? Ans. No." The railroad company demurred to the plaintiff's evidence, which was overruled. It also moved for judgment in its favor upon the special findings. This was overruled, and judgment entered for plaintiff upon the general verdict.

The railway company here insists that the judgment against it was erroneous, first, because there was no evidence showing

any culpable negligence on the part of any of its agents or servants; second, if there was, that such negligence was not the proximate cause of the injury. The principles to which we must look for a solution of these questions are neither novel nor intricate. Parry was a passenger, not only while on the train, but after his arrival at Newton. Through no fault of his, he was in such a condition of mind and body as to be unable to care for himself by reason of the sudden sickness which had overtaken him. The duty of a carrier of passengers under such circumstances is announced in the syllabus in A. T. & S. F. R. Co. v. Weber, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543, in the following language: "Where an unattended passenger, after entering upon a journey, becomes sick and unconscious or insane, it is the duty of the railroad company to remove him from the train, and leave him until he is in a fit condition to resume his journey, or until he shall obtain the necessary assistance to take care of him to the end of his journey. The duty of a railroad company to such a passenger does not end with his removal from the train, but it is bound to the exercise of reasonable and ordinary care in temporarily providing for his protection and comfort." The following language is found in the opinion: "The duty of the railroad company, however, with respect to Weber, did not end with his removal from the train. He was unconscious, and unable to take care of himself. The company could not leave him upon the platform helpless, exposed, and without care or attention. It was its duty to exercise reasonable care and diligence to make temporary provision for his protection and comfort. As was said by the learned court who tried the cause: 'Of course, the carrier is not required to keep hospitals or nurses for sick or insane passengers; but when a passenger is found by the carrier to be in such a helpless condition, it is the duty of the carrier to exercise the reasonable and necessary offices of humanity toward him until some suitable provision may be made.'" Whether or not the depot master discharged this duty to its required measure in this case was a question for the jury to determine. The jury does determine that he possessed the common and ordinary capabilities, judgment, and prudence of men generally, and that at the time he ceased to look after Parry he thought that deceased had sufficient strength and consciousness to take care of himself, and did not contemplate that he would wander away into a place of danger. We think, however, that this hardly shows affirmatively that degree of care commensurate with the duty resting upon the company. It is not thus made to appear that reasonable and ordinary care in providing for the safety of the deceased was exercised, whereas by the general verdict it does appear that such care was not exercised.

2. It is further contended that, even though the depot master was negligent in his manner of treatment of the deceased, such negligence was not the proximate cause of the

death; that no reasonably prudent man would have foreseen that Parry would have wandered away for a distance of five miles, and have laid down or fallen upon the track in such a place and position that he would be run over by the train, and thus killed; and that the company, therefore, was not required to guard against so improbable a result. Negligence, to be the proximate cause of an injury, must be such that a person of ordinary caution and prudence would have foreseen that an injury would likely result therefrom; not that the specific injury would result, but an injury of some character. "'It is not necessary,' say the Supreme Court of Minnesota, following the Supreme Judicial Court of Massachusetts, 'that the injury, in the precise form in which it in fact resulted, should have been foreseen. It is enough that it now appears to have been a natural and probable consequence.' In other words, it is not necessary to a defendant's liability, after his negligence has been established, to show, in addition thereto, that the consequence of his negligence could have been foreseen by him; it is sufficient that the injuries are the natural, though not the necessary and inevitable, result of the negligent fault." Thompson's Com. Law of Neg. § 59. It here appears that the place where the depot master permitted Parry to go by himself was near a street crossing over which tracks were laid along which trains passed. It was a place of danger to one not in the possession of his faculties; a place where the depot master might reasonably have apprehended that harm of some sort would come to Parry in his then condition. So that, although he wandered for four hours, and was run over five miles from this place, the act of the depot master in permitting him to go was no less the proximate cause of his death than it would have been if it had occurred within a short distance and a few moments. At most, the question whether the negligence of the depot master was the proximate cause is one upon which the minds of different parties might reasonably disagree, and, such being the case, and the whole matter having been submitted to a jury under proper instructions, and it having found that it was, we may not disregard these findings of fact. We are of the opinion that upon both questions there was sufficient evidence to go to the jury, and to sustain the general finding in favor of the defendant in error.

The judgment will be affirmed. All the Justices concurring.

MISSOURI PAC. RY. CO. v. L. NEWBERGER & BRO.

(Supreme Court of Kansas, July 10, 1903.)

[73 Pac. Rep. 57.]

Carriers—Liability for Freight—Destruction after Arrival.

In the absence of a special contract, a carrier is liable for loss by fire, without its negligence, of goods shipped, after their arrival, but before the consignee has reasonable time for inspection and removal.

In Banc. Error from District Court, Reno County; M. P. Simpson, Judge.

Action by L. Newberger & Bro. against the Missouri Pacific Railway Company. Judgment for plaintiffs. Defendant brings error. Affirmed.

J. H. Richards and C. E. Benton (Prigg & Williams, of counsel), for plaintiff in error.

Vandeveer & Martin, for defendants in error.

PER CURIAM. This is the second time this litigation has been before us. Railway Co. v. Newberger, 65 Pac. 655. On the second trial the jury found that the special contract set up by the railroad company, and purporting to limit its liability, was not consented to by the consignees, and in effect that it was without validity. The other issue was found in favor of the railroad company; that is, that the fire was not occasioned, and the goods shipped were not destroyed, through the negligence of the railroad company. The general verdict, on a trial involving the extraordinary liability of the railroad company, was in favor of the shippers. The extraordinary liability of a carrier of goods extends, not onlv during transit to destination, but also until the consignee has a reasonable time thereafter to inspect and remove the goods during business hours. Railroad Co. v. Maris, 16 Kan. 333; Railway Co. v. Grocery Co., 55 Kan. 525, 40 Pac. 899. A finding was made by the jury that a reasonable time for inspection and removal was not afforded the consignees after the arrival, and before the destruction, of the goods. No question is made as to the sufficiency of the evidence to support the findings and verdict, as the motion for a new trial once filed was withdrawn. It is now claimed that the last inquiry was limited to the mere question of negligence, and that the former opinion so indicated. An expression of that kind does appear in the opinion, but it appears from the pleadings and the proceedings that the question whether the railroad company was liable as an insurer, or whether its liability was limited by an alleged contract, was submitted at the first trial, and it is manifest that it was also tried and determined in the second trial. In view of these facts, it cannot be held that the parties are confined to the mere matter of negligence.

The only question presented is whether there should have been judgment upon the special findings; and assuming, as we must, that the instructions submitting the case were correct, and that the evidence did sustain the findings made, it must be held that no error was committed in denying the company's motion for judgment on the special findings, or in giving the judgment that was rendered.

Affirmed.

MISSOURI, K. & T. RY. CO. *v.* ORTON.

(*Supreme Court of Kansas, July 10, 1903.*)

[73 Pac. Rep. 63.]

Carriers—Injury to Passenger—Cinder from Locomotive—Negligence.

A carrier is not liable for injury to a passenger from a cinder from the locomotive coming through an open door of a car, the locomotive being in good repair and equipped with the best spark arrester, and being properly and skillfully managed and operated, and the proof not warranting a finding of culpable negligence in the carrier's having the door open.

In Banc. Error from District Court, Neosho County; L. Stillwell, Judge.

Action by Fred Orton against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

T. N. Sedgwick, for plaintiff in error.

W. R. Cline and H. P. Farrelly, for defendant in error.

PER CURIAM. Action by Fred Orton to recover for injuries sustained while he was riding on an excursion train. The cars were greatly crowded, the seats were occupied, and many were standing in the aisles. Orton passed through the train, looking for a seat, and, finding none, he stopped in the door of a car, and while standing there a cinder struck him in the eye, causing a severe injury. The verdict was in favor of Orton, but the jury found that the engine of the train was in good repair, and was supplied with the best known appliances to prevent the escape of cinders; that the engineer in charge was both competent and skillful, and so was the fireman; and that the engine was being properly and skillfully managed and operated at the time the injury occurred. The findings, therefore, acquit the company of all negligence as to the construction of the locomotive and its management and operation.

The only other charge of negligence was in failing to keep closed the door of the coach wherein the plaintiff was riding. The rules of the company, it is true, required that the doors be kept closed; but the opening and closing of the doors and windows of cars is not fully within the control of the company or its employees. Passengers pass from one coach to another, and hence the doors are frequently opened. They are also frequently opened by passengers for purposes of ventilation. The mere fact that a cinder comes in at a door or window and strikes a passenger is not evidence of negligence. Cinders come into cars and into contact with passengers, whether they are sitting or standing. Orton might have been struck as readily if he had been occupying an end seat as when standing. As the appliances were of the best, and the operation and management proper and skillful, the presumption of negligence does not obtain in favor of the pas-

senger as it otherwise might have done. In view of the excellent condition and skillful operation of the locomotive, the company was no more responsible for the accident than if the cinder had come from a steam thresher operated in proximity to the railroad. From the record we cannot say that there was such proof as warranted a finding of culpable negligence with respect to the open door. For that reason we are of the opinion that the motion for a new trial should have been sustained, and therefore the judgment will be reversed, and the cause remanded for further proceedings.

CARROLL v. CHARLESTON & S. R. CO.

(*Supreme Court of South Carolina, March 24, 1903.*)

[43 S. E. Rep. 870.]

Carriers—Degree of Care—Question for Jury.

Whether a carrier has exercised the care required of him by law is a question for the jury to decide upon the facts, and an instruction that the carrier owes to a passenger the greatest care to save him from harm, and whether the carrier has exercised the degree of care, depends upon the circumstances, and on the jury's conception of what was the highest degree of care, and whether it was exercised, is not erroneous, as leaving the jury to determine for themselves what was in fact care.

Care Required of Passenger.*

A passenger is only held to the exercise of ordinary care.

New Trial.

Where the reasons assigned for ordering a new trial relate to the facts, the Supreme Court cannot interfere with the decision made.

Appeal from Common Pleas Circuit Court of Orangeburg County; Gage, Judge.

Action by Annie B. Carroll against the Charleston & Seashore Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mordecai & Gadsden, for appellant.
Mitchell & Smith, for respondent.

POPE, C. J. The action was for damages. At the trial at Orangeburg, at May term of court, 1902, the verdict of the jury was in favor of plaintiff. On motion of defendant the circuit judge required the plaintiff to remit $3,000 of her verdict. This was done. Defendant then appealed to this court on four grounds. These grounds virtually raised two questions. The questions are: Was the circuit judge in error in his charge to the jury? Did the circuit judge err in only granting a new trial nisi?

Before going into an examination of these questions, it may be as well to give a brief recital of the salient facts underlying this contention. The plaintiff, in the year 1898 (in July), at the request of defendant, with a number of others residing in

*See Barker v. Ohio River R. Co. (W. Va.), 4 R. R. R. 132, 27 Am. & Eng. R. Cas., N. S, 132.

the city of Charleston, became a passenger on the lines operated by the defendant to the Isle of Palms, where a dance was had. The party embarked at the Isle of Palms for the city of Charleston, traveling to Mt. Pleasant, S. C., on the electric railway of the defendant. At Mt. Pleasant the passengers over the wharf of the defendant were to be received on board a small steamer operated by the defendant to the city of Charleston. It was about the hour of 1:30 at night that the party left the electric car of the defendant and started across the wharf to the steamer. When on the wharf the party started to embark on the steamer, but Miss Annie Carroll, while no lights were burning on the said wharf, with no one to guide them, fell into a hole in said wharf, down into the deep water underneath said wharf, where the current was very strong, and was only saved from drowning by the heroic conduct of a Mr. Marshall and Mr. Paine, who plunged into the water in utter darkness, and rescued her from death. She claims that she received physical injuries from which she has never recovered, paying to one physician for attention to her some $256, besides having gone north to consult medical authority. Her case was twice tried in the city of Charleston, but mistrials were ordered because of the inability of the juries to agree. Therefore, on application, her action was transferred to the county of Orangeburg for trial. At this trial both sides introduced much testimony. The testimony offered by the plaintiff tended to prove her cause of action, while that of defendant tended to show that there were lights burning on the night of the accident, and also that the defendant had the hole in the wharf barricaded so as to prevent any one falling through, and also testimony was offered tending to belittle the injury of plaintiff. On these issues the testimony was submitted to the jury, and, after the charge of his honor, the jury rendered a verdict for plaintiff for $9,000. On defendant's motion, however, the circuit judge ordered a new trial unless plaintiff remitted $3,000 of the verdict, which was done by her. Judgment was entered for $6,000. Thereupon defendant appealed, as before remarked. We will reproduce just here the exceptions:

"First. His honor erred in charging the jury: 'Whether or not in any case a party has exercised the degree of care required of them depends upon all circumstances of the case —depends upon the place, the situation, what was done and what was left undone; and above all, gentlemen, depends upon the jury's conception; for at last it rests with the jury, you see—depends at last upon the jury's conception of what is care and what is the highest degree of care, and depends upon the jury's conception of what was done then and there;' whereas the degree of care required of a railroad company is fixed by law, and the sole question for the jury to decide was whether the acts performed by the company measured up to that degree of care required by law; and it was improper for

the circuit judge to leave the legal liability of the company as to the degree of care performed by it to a jury's conception of what is care and what is the highest degree of care.

"Second. His honor erred in charging the jury: 'Whether or not in any case a party has exercised the degree of care required of them depends upon the circumstances of the case —depends upon the situation, place, what was done and what was left undone; and above all, gentlemen, depends upon the jury's conception—for at last it rests with the jury, you see —depends at last upon the jury's conception of what is care and what is the highest degree of care, and depends upon the jury's conception of what was done then and there;' whereas, the liability of the defendant does not depend upon the jury's conception of what was done then and there, but the jury should have been instructed that whether or not the company was negligent, as alleged, depends upon the testimony introduced before them as to what was done then and there by the company.

"Third. His honor, Judge Gage, having found in his order granting a new trial nisi, that there was no testimony to warrant the exaction of punitive damages, that there was no proof of damage to bone or tissue, and that there was no proof in the case that the plaintiff was permanently injured, should have found, as a matter of law, that the verdict of $9,000 was excessive, and, having so found, as a matter of law, have granted the motion of the defendant for a new trial.

"Fourth. The circuit judge, having found in his order granting a new trial that there was no testimony to warrant the exaction of punitive damages, and that there was no proof in the case that the plaintiff was permanently injured, should have found, as a matter of law, that the verdict of $9,000 was excessive, and, having so found, it was an abuse of legal discretion vested in the circuit judge not to have granted a new trial for excessive damages, instead of simply requiring a reduction of $3,000 in said verdict."

As to the first two exceptions, we may remark that they furnish an apt illustration of the rule of this court that it is better to give a construction of the whole charge, rather than pass upon extracts from the charge embodied in exceptions. It is but an act of sheer justice to the judge that his whole charge should be considered. Of course, it was not the purpose of the appellant to seem, even, to do an injustice to the circuit judge, yet that would be the effect in this instance; for, when what the trial judge did charge the jury is examined, it will readily appear that in the language quoted in the exceptions we are now considering the circuit judge was endeavoring to impress their minds with the solemn truth that under our Constitution the jurors are made the judges of the facts. To reach a righteous conclusion, their conceptions as to what the testimony really discloses must necessarily govern them. The language of his charge, in truth, was as follows:

"Now, the allegation of the complaint is that the relationship which existed between these two parties, the plaintiff, Miss Carroll, and the defendant, the Seashore Railroad Company, was the relationship of carrier and passenger; that is to say, that she was a passenger upon its train, and that for a price it undertook to carry her from a point called the 'Isle of Palms' to the city of Charleston, and that the way lay along an electric railway track for a distance until they reached the sea, and then off the railway onto a wharf, and from the wharf on a boat to the city of Charleston. Now, the allegation of the complaint is that on this way, to wit, between the time that she left the electric car and the going upon the boat, between those two points, to wit, upon the wharf, her allegation is that she was injured, and that injury resulted from the wrongful act of the railroad company. If you are satisfied, gentlemen, from the testimony, that the relationship between the parties was that of passenger and carrier, then the next inquiry is one of law, and is this: what obligation does the law put upon carriers of passengers for hire? When that relationship is once established—the relationship of passenger and carrier—what obligation does the law cast upon each one of the parties in that relation? As I told you, that is the question of law in the case, and our courts have held that, where that relationship is established, then the law casts upon the person who carries, called the 'carrier,' the highest degree of care with reference to the passenger carried. Now, that is simple enough. That is the law of the case. Now, what is the fact? The fact for you to determine is whether or not, under the particular circumstances on that day, then and there, the railroad company did exercise towards this lady that degree of care. If it did exercise that degree of care, it has fulfilled the obligation of the law, and should go acquitted. If it did not act up to that degree of care, and the jury is to fix that degree of care, then you are prepared to take one step further. But before I go that step, gentlemen, let me stop and ask you how you are to fix the fact whether or not the railroad company have come up to the degree of care prescribed by the law? You are to fix it, gentlemen, with reference to your own conception of duty, and your own conceptions of what is right and proper in any case. Whether or not in any case a party has exercised the degree of care required of them, depends upon all the circumstances of the case; depends upon the place, the situation, what was done and what was left undone, and above all, gentlemen, depends upon the jury's conception—for at last it rests with the jury, you see—depends at last upon the jury's conception of what is care and what is the highest degree of care, and depends upon the jury's conception of what was done then and there. One man may look at a transaction, and say that that transaction is careful; another man may look at it and say that transaction was not careful.

Now, the object of the law is that these twelve men, set apart here to try this case, should put together their joint judgment, and come to a right conclusion as to whether or not, on the day mentioned here, under all the circumstances detailed before the jury of time, place, and circumstance, whether or not the defendant came up to or fell short of the care required of him by the law. I say, if you find it did, that ends the case, and you must find for the defendant. If you find it did not, then you go one step further, and ascertain if the defendant, the railroad company, did fall short of the care required by law, did that lead to, as a natural consequence and to be expected consequence, the transaction here under consideration, to wit, did it lead to the falling of the lady through the hole?

"Now, the plaintiff undertakes, gentlemen, as they were bound to do in their complaint, to designate specifically in what particulars the railroad company fell short of its care, and it does so in its complaint. Here is the language of the complaint, and the whole transaction is embraced in this one paragraph: 'That there was no light at all on the wharf, and the plaintiff got out on the wharf from the car in which she was, and walked on the wharf towards the steamboat. That as the plaintiff was walking towards the steamboat, on the wharf, in consequence of the obscurity and the darkness, she fell into a hole or opening that had been left on the wharf wholly unprotected, and with no light to show where it was, and then and there fell and went right through down into the water.' Now, the complaint specifies, as it was bound to do, in what two particulars the railroad company fell short of its duty. The first is that there was an opening there on the wharf, and that is an issue for you—was there an opening there? And, second, that that opening was unlighted, and that is an issue for you. You have heard the testimony. You are first to decide was there an opening there; you are secondly to decide whether the opening ought to have been lighted; and, thirdly, you are to decide whether or not it was lighted. The allegation of the complaint is further that the opening was unguarded. You are first to decide whether it was unguarded or not, and you are to decide whether or not it ought to have been guarded, because to leave it unguarded was not a breach of duty, gentlemen, unless, in your judgment, it ought to have been guarded. So in those two issues, rightly, the light and guarding, there are four issues: First, was the hole lighted? If not, should it have been lighted? Then, was the hole guarded? And, secondly, should it have been guarded? Now, if you find those issues against the railroad company, your next inquiry is, was the defendant injured thereby? That is, did the failure to light the hole, if it was unlighted, did the failure to guard the opening, if it was unguarded, were those two things the cause—the proximate cause? And by proximate cause I mean just what that word

implies—did the event which happened, to wit, the falling through the opening, was that the natural and to be expected consequence of the failure to light the hole, if it was unlighted, and to guard the hole, if it was unguarded? If it did, then the plaintiff's injury is said to have resulted from the failure of the railroad company to do what it ought to have done, and she is entitled to damages, unless, gentlemen, unless the defendant establish what they set up in their answer; and what is that? They say this in their answer: 'That this event, to wit, the falling through the hole, was caused, not by their negligence, but by the plaintiff's negligence in abandoning the regular passageway leading from the car to the ferry-boat, along which said passageway all the other passengers were proceeding, and in climbing over a pile of lumber which had been placed on the side of the wharf for the express purpose of guarding the public from falling from said wharf into the water. This is denominated, gentlemen, 'contributory negligence,' and you will apply to the plaintiff this test: 'That is, did the plaintiff upon that day exercise towards the railroad company ordinary care?' Because when an event happens between two persons, and one seeks to hold the other accountable for the consequences of that event, the inquiry is, did either party, or did both parties, do what the law required of them? For instance, gentlemen, if two men in buggies collide upon the public highway, one going one way and one the other, and one demands damages at the hands of the other for injury done him, the main inquiry is, what did both parties do? Where does the blame rest? And you inquire into the conduct of both men, and ascertain who is to blame.

"Now, the rule of law is that if the event—that is, the falling through the hole—occurred as the result of the negligence of both sides; that is to say, if this party was negligent, and if the negligence of both co-operating and concurring, like two streams running into one, causes the damage, then the law, gentlemen, leaves them where it finds them, and does not stop to apportion how much negligence one was guilty of and how much negligence the other was guilty of. That is the law, and that law is founded upon human experience. And the reason of it is this: Where an event has happened which is the result of wrongful conduct of two parties, it would be idle to stop and ascertain how much of it was caused by the wrongful act of one and how much of it caused by the wrongful act of the other, because human experience teaches us when we enter that field it is so abstruse that a jury could not ascertain with any reasonable certainty as to how the event occurred, and the law is that the jury shall stop their investigations then and there, whenever they conclude that the event happened by the concurring wrongful act of both parties. Now, how much care was require of the plaintiff in this transaction? The law is that she was only held to ordi-

nary care. Now, the answer says upon that that she quit the regular passageway, and that she climbed upon an obstruction around the hole. It sets up two acts of negligence on her part, and in the consideration of these two acts there are really four questions: In the first place, did she quit the regular way? In the second place, if she did quit it, was that an act of negligence on her part? Did she climb upon an obstruction, if there was an obstruction there, and, if she did, was that an act of negligence on her part? If you conclude that she did quit the regular way, or did climb upon an obstruction, and if you conclude that that, or either one of them, was an act of negligence on her part, which was a proximate cause of her falling into the hole, or one of the proximate causes, then you stop right there and find a verdict for the defendant. But if you conclude either that she did not quit the way, or that she did not climb upon the lumber, or if you conclude she did do that, and yet that that was not an act of negligence on her part, or, if it was, that it was not one of the sufficient and proximate causes of the injury to her, then you disregard the question of contributory negligence and revert to the negligence of the defendant, and the defendant alone.

"Now, gentlemen, if you find the issues for the plaintiff, if you find the facts for the plaintiff upon the issues I have submitted to you, then you go one step further, and inquire how much this lady has been damaged. As I told you in the outset, she sets down two elements of damage—one of $10,000 for actual damages to her. Now, how do you assess that, gentlemen? You know what actual damages are, and if I should attempt to go into a refined statement of what are the elements which enter into actual damages I should probably confuse you. The law is that she is entitled to such damages as she has sustained in her person, and you have heard the testimony, and it has become a question for a jury to estimate that damage, to estimate it as best you can from the lights before you, from your knowledge of the human frame, and from the testimony of the parties, and come to some sort of a conclusion as to how much this lady has been damaged in her person. She sets down in the complaint as among the elements of damage her doctor's bill. That can be included, if you find there is a doctor's bill. And she sets down among the elements of her damage the pain to her person. You can assess that, gentlemen, because one party has no right to inflict pain upon another party without just compensation therefor. Now, you cannot take and measure pain like you can a piece of bacon, in a scale, but you must have some sort of method for measuring it, and for ascertaining, first, how much this lady has been damaged in her person, how much has she suffered, how much has her usefulness in life been impaired, and whether or not the damage to her is permanent, or whether it is temporary. I know of only one rule to give

you, gentlemen, and that is the rule by which men ought always to be guided when they come to sit in judgment upon their fellowmen. That rule is, what is right under the testimony? Where does the truth lie? And that is the rule, gentlemen, and what you are set here to ascertain.

"Now, a second element of damage, as I stated to you in the beginning, was as to whether or not this railroad company should be punished $5,000 for punitive damages. And that means this, gentlemen: That where a corporation, or any other defendant, is charged with doing an act, and is charged with doing it willfully—that is, where the act proceeds out of the will and heart, where that was done which was expected to be done—that is called a willful act, and it is colored by the condition of the heart which prompts the party when it is done; and the law says that when the act proceeds out of a willful heart that the jury may award such damages as will punish the party guilty of the act. Or, gentlemen, if the act is not willful, if it is done out of a heart which indicates an utter disregard of law, which in law amounts to willfulness, because a party may either intend a specific act or be utterly and totally regardless of their conduct, and in that sort of a case it amounts to willfulness. Now, the question for you in this case is, because it is a matter to be proved like any other matter, are you satisfied from the testimony that what was done on this occasion proceeded from a willfulness on the part of the railroad company, or from such a disregard of law as amounted to willfulness?

"Now, when you come to find your verdict, the law does not require you to separate the amount, and say 'We find so much for actual damages, and so much for willful damages,' but allows you to lump them by saying, 'We find so much damages for the plaintiff.'

"I don't know that it is necessary for me to say anything further to you, gentlemen, except to pass upon the requests to charge made by the plaintiff, and those requests are five in number."

It should be stated that the appellant made no requests to charge. It seems to us that the charge itself is the best answer to appellant's criticism of it. There was no failure of the circuit judge when he charged that the appellant owed to the passengers the greatest care to save them from harm, nor did he fail to state the law when he declared that passengers were held only to the exercise of ordinary care. When the judge's charge is examined, it will be seen that the jury could not err as to these points, if they adhered to the duties laid down for their observance. As to these two exceptions, they must be overruled.

We will examine the third and fourth exceptions, relating as they do to alleged errors of the circuit judge in not ordering absolutely a new trial, but for ordering a new trial nisi. This matter of new trials, and the control of the same by the

circuit judge, has been considered by this court in many cases; notably that of Stuckey v. R. R. Co., 57 S. C. 400, 401, 35 S. E. 550, 20 Am. & Eng. R. Cas., N. S., 771, where a review of the authorities was made. We are not concerned in such cases by the reason assigned by the circuit judge for ordering new trials nisi so long as he adheres to the testimony. It is only when he errs as to points of law that we can supervise his ruling. There was no error of law here pointed out. We therefore cannot interfere. It was high time that these trials should end. These exceptions are overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

FORD v. EAST LOUISIANA R. CO.

(*Supreme Court of Louisiana, April 27, 1903.*)

[34 So. Rep. 585.]

Expulsion of Passenger—Payment of Fare in Cash.

Because a traveler on a railway train has no ticket, that, in itself, furnishes no warrant for putting him off the train. Though he have no ticket the right is his to pay the fare in cash. The demand upon him must be either for a ticket, or for payment of the fare in cash, and if he offer to pay, the railway company ejects him at its peril.

Same—Scalping Tickets on Train.

If a person, who is in the employ of a connecting railway company, and because of such employment is permitted to ride free on the trains of the other company, is warned not to traffic in the excursion tickets of the company, and disregarding this warning is detected in "scalping" tickets while on the train, it might possibly furnish justification to the conductor in stopping the train and putting him off, even though he offered to pay the fare.

Same—Ticket Scalping.

But, certainly, a person who "scalps" railway tickets other than on the train cannot be denied transportation over the lines of the railroads in whose tickets he traffics. He is a part of the general public, and railway companies, as common carriers, must, ordinarily, permit all who pay the regular fare to travel on their trains.

(Syllabus by the Court.)

Appeal from Twenty-Sixth Judicial District Court, Parish of St. Tammany; James M. Thompson, Judge.

Action by Alfred W. Ford against the East Louisiana Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Benjamin Moore Miller, for appellant.

Duncan S. Kemp and Thomas Marshall Miller, for appellee.

BLANCHARD, J. The plaintiff, a colored man, was employed as porter on excursion trains which ran twice a week over the New Orleans and Northeastern railroad from the City of New Orleans to Pearl River.

Sometimes, too, he did service as porter on passenger trains other than excursion trains. His employment, however, was not such as to occupy him each day.

At Pearl River the line of defendant company connects

with the New Orleans and Northeastern railroad, and extends thence to Covington, a town some twenty-five miles to the northwest of Pearl River.

Plaintiff made his home at Covington, his family consisting of himself, wife and daughter.

The excursion trains of the N. O. & N. E. R. R. were run in connection with defendant's railroad—Covington being the farthest point of the excursions. Excursion tickets were sold with coupons for each road.

Plaintiff had been in the employ of the N. O. & N. E. R. R. for seven or eight years, and because of the connection of that road with defendant company's road, he had been permitted to ride free, as a railway employee, over defendant's road, in passing to and fro between Pearl River and Covington, going to and returning from his work on the first named railroad.

It appears that he and others had been in the habit of trafficking in the return end of excursion tickets used over defendant's road. That is to say, doing on a small scale a kind of "scalper's" business—buying and selling tickets that had been partially used. This was forbidden by the rules of defendant company—the excursion tickets being stamped "not transferable."

A new manager having taken charge of defendant's road, plaintiff was questioned by him relative to his riding free over the road and his practice of buying and selling the unused portions of excursion tickets. Plaintiff admitted he had been doing this, but on being cautioned against it by the manager and warned that it was against the rules, he promised to discontinue the practice. He was permitted to continue to ride free.

Subsequent to this—perhaps a year or two later—it developed that trading in the unused parts of excursion tickets was still going on; the company was suffering considerable loss of revenue because of this; and the manager suspected the plaintiff as the party, or one of the parties, doing it.

The conductors were instructed to watch him as he passed to and fro over the road, but he was not detected. From other sources, however, information seems to have reached the manager which caused him to believe the plaintiff was guilty of the acts complained of, though the evidence fails to convict him, convincingly, therewith.

So believing, the manager, finding the plaintiff one day on the train of his company, going from Pearl River to Covington, had him called up to him and ordered him off the train.

The train had just gotten under way, being at the time some five or six hundred feet from the Pearl River station.

The manager was, at the time he gave the order for his expulsion, standing on the platform of one of the cars. Plaintiff was in that portion of the same car allotted to colored people. The conductor was sent by the manager to call him

out of the car to the platform. He came and was then ordered to leave the train. No explanation why he was ordered off was given. The conductor was directed by the manager to stop the train for the purpose of enforcing the order to leave. The manager, himself, called out to the engineer—the locomotive being immediately ahead of the car on whose front platform the manager was—to stop the train, and the conductor, too, gave the signal to stop.

The train was stopped, and though plaintiff offered to pay his fare to Covington, it was declined, and he was compelled to leave the train.

He was ill and suffering at the time. So ill was he that he had been unable to efficiently perform his duties on the N. O. & N. E. R. R. that morning, and was on his way to his home in Covington for rest and treatment.

He had a severe case of bleeding hemorrhoids. There is no doubt he was suffering greatly. He contends he informed the manager and conductor of his condition, urging it in support of his plea to be permitted to pay his fare and go on to his home. As to this the testimony is conflicting.

It is established that on account of his physical condition he requested a colored man—a friend of his—to accompany him to his home, and this friend agreeing, he (the plaintiff) bought a ticket for him from Pearl River to Covington, and this friend was on the car with plaintiff when the latter was ejected, and he (the friend) also left the train at the time plaintiff was put off.

It was in the early forenoon when this occurred, and plaintiff, in his suffering condition and unable to procure where he then was the services of a physician, was compelled to lie over at Pearl River station until five o'clock that afternoon, at which time a second train left the station for Covington. He purchased a ticket and took that train, arriving at his home that night.

The next morning he received medical attention, the testimony of the physician showing a condition of much seriousness and suffering. Later he went to a hospital in New Orleans for treatment.

A few days, or immediately following his expulsion as above from defendant's train, he was discharged from the service of the N. O. & N. E. R. R. Company.

An effort was made to show that this discharge came about through representations made to that company by the manager of defendant company, but the testimony offered for this purpose was ruled out.

The plaintiff brought this suit for damages on account of his expulsion from the train. He claims five thousand dollars as compensation for the pain and suffering he underwent and for the humiliation and disgrace of his public ejectment from the train.

He claims an equal amount as punitory damages because,

as alleged, of the wanton, reckless and oppressive conduct of the officials of defendant company, and their utter disregard of the rights and feelings of persons, like himself, in the humble walks of life.

The defense was a general denial.

The case was tried by jury who returned a verdict in favor of the plaintiff for one thousand dollars.

Defendant appeals and in this court plaintiff files answer asking an increase of the judgment to twenty-five hundred dollars.

Ruling.—On the statement of facts given, which sets forth our appreciation of the case as gathered from the evidence, we have concluded not to disturb the verdict of the jury.

The justification claimed for plaintiff's expulsion from the train is that he had violated the rules of the company and its rights in trafficking in excursion tickets, though that was not set up in the answer.

If he had been detected in doing this while on the train, the manager or the conductor might perhaps have been warranted in stopping the train and putting him off, even though he offered to pay his fare, though as to this no opinion is intended to be expressed.

But he was not so detected. He was doing nothing of the kind at the time of his expulsion. The train had just started. He was riding quietly in the car as any other passenger, and though he had no ticket he was there by permission of the company to travel free.

This permission, theretofore given and recognized for years, had not been withdrawn. He was not an employee of the defendant company. The manager and conductor had no right to treat him as an employee.

Even though he had no ticket, the right was his to pay his fare in cash. Because a traveler on a railway has no ticket, that, in itself, furnishes no warrant for putting him off the train. The demand upon him must be either for a ticket, or for payment of the fare in cash, and if he offers to pay, a railway company ejects him at its peril.

Here he was neither asked for a ticket, nor for payment of the fare in money.

Even if shown that he had been trafficking in the unused portions of excursion tickets, the company could not, because of that, have denied him the right to travel as a passenger on its trains, provided he paid the fare.

It could, of course, at its pleasure, have withdrawn, with or without cause shown, the permission given him to ride free, and it could have resorted to any of the means provided by the law to prevent the practice of buying and selling tickets and protect its rights from that kind of invasion.

But a man who "scalps" railroad tickets cannot, generally, be denied transportation over the lines of the railways in whose tickets he traffics. He is a part of the general public

and railway companies, as common carriers, must permit all who pay the regular fare to travel on their trains

Here the man was sick; he offered to pay his fare; it was denied him. He was angrily ordered off the train; the train was stopped in order to put him off; the manager directed the conductor to put him off.

This was the equivalent of force, even if actual force was not used, though as to that the testimony is conflicting, plaintiff claiming the conductor took him by the arm, led him to the steps of the platform and demanded of him to get off. The conductor denies that he put his hands on him, though he admits standing on the steps when Ford got off, and he followed him off, getting back on the car, himself, at the rear end as it passed on again. There is no denial by either the conductor or the manager that Ford was ordered off the car.

An examination of defendant's bills of exception taken to the admission of certain evidence over objection, and as to certain parts of the charge given by the Judge to the jury, has led to the conclusion that no reversible error was committed.

The same is true as to bills reserved to the refusal to give certain special charges asked, and as to a bill taken to a remark of plaintiff's counsel in argument.

Judgment affirmed.

CINCINNATI, N. O. & T. P. RY. CO. v. BELL.

(Court of Appeals of Kentucky, May 22, 1903.)

[74 S. W. Rep. 700.]

Carriers—Injury to Passengers—Alighting at Station.*

A passenger alighting in the dark at a station the platform of which was 23 inches below the lowest step of the car may recover for injury from a fall caused by the absence of the stool which she had been accustomed to find in place to shorten the distance, and of the porter whose duty it was to aid passengers in alighting.

Appeal from Circuit Court, Boyle County.

"Not to be officially reported."

Action by Annie K. Bell against the Cincinnati, New Orleans & Texas Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. H. Rodes and John Galvin, for appellant.

Robt. Harding and Rawlings & Voris, for appellee.

BARKER, J. Appellee, Annie K. Bell, who is a colored woman, residing in Junction City, Ky., instituted this action in the Boyle circuit court against the appellant to recover damages in the sum of $1,000 for the spraining of her ankle, caused, as she alleges, by the failure of appellant to afford her a safe method of alighting from its car when she arrived at

*See foot-note appended to Mayne v. Chicago, R. I. & P. Ry. Co. (Okla.), 6 R. R. R. 61, 29 Am. & Eng. R. Cas., N. S., 61.

her destination. The facts, as shown by the record, are substantially these: Appellee purchased a ticket from appellant to ride on one of its passenger trains from Danville to Junction City, a distance of about four miles. At the time she reached her point of destination it was dark, and when she attempted to step from the platform of the car to the ground she fell, spraining her ankle. The lower step of the car platform is 23 inches above the level of the station platform. Appellee claims that at the time she fell the porter of the train was not there to assist her in alighting, as was his duty, and there was no stool or box, such as is commonly used to shorten the distance from the lower step to the station platform. Appellee testified that she had often ridden upon appellant's train, and that always, prior to the accident, a stool or box had been placed on the station platform, so as to shorten the distance of the last step, and that she thought that this provision for her safety had been complied with; that, owing to the darkness, she did not observe its absence; and that her fall was caused by this omission of appellant, and the failure of its porter to be at his post of duty to assist her in alighting. She was thoroughly familiar with the station, and testified that the station platform was made of crushed stone, rolled hard and smooth. Appellant's evidence tended to show that no stool or box was ever used with the car for colored passengers, although this convenience was used in connection with the coach for white passengers. It was admitted that it was the duty of the colored porter, Frank Pursell, upon the arrival of the train at the station, to aid and assist the passengers to alight from the car. There is no error complained of in the instructions of the court, and the case appears to be one entirely of fact.

It was within the province of the jury to determine whether they would believe the evidence of appellant or that of appellee. Undoubtedly, it was the duty of appellant to afford its passengers a safe method of descending from its trains when they arrived at their destinations. The lower step of the car is shown to have been 23 inches from the surface of the station platform, and it can be readily seen that, if it was true that appellee had been accustomed to find a box or stool to shorten this distance when she alighted from the train, and that it was so dark she did not notice its absence on the occasion upon which she received her injury, she might easily have been injured in the manner complained of by stepping down this unexpected long distance.

We cannot recognize the right on the part of appellant to make the distinction between its passengers of having a stool or box to shorten the distance between the step of the coach for white passengers and not having the same appliance for the safety of its colored passengers. It was clearly the duty of the porter, Frank Pursell, to have been present at his post when the car stopped at Junction City, and to have aided the

appellee in alighting. That it was his duty to do so he admits in his testimony, and, while he denied that he was absent from his post at any time when his duty required him to be there, this was an issue for the jury to decide under all the testimony bearing upon it.

The verdict of $300 is not excessive, and we cannot say that it was contrary to the weight of the evidence.

Wherefore the judgment is affirmed.

MURRAY v. PAWTUXET VALLEY ST. RY. CO.

(Supreme Court of Rhode Island, May 28, 1903.)

[55 Atl. Rep. 491.]

Carriers—Injuries to Passenger—Absence of Negligence—Evidence—Sufficiency.

In an action against a street railway for injuries to a passenger caused by the breaking of an appliance underneath the car, where defendant's evidence showed, not only that it purchased the appliance from a reputable dealer, but also that it had made daily inspection of the same by an expert employed for that purpose, and plaintiff offered no evidence in rebuttal, relying wholly on the doctrine of res ipsa loquitur, a verdict for defendant was supported.

Action by Alice G. Murray against the Pawtuxet Valley Street Railway Company. Verdict for defendant. Heard on plaintiff's petition for new trial, and petition denied.

Argued before STINESS, C. J., and DOUGLAS, and DUBOIS, JJ.

Page & Page, for plaintiff.
Walter B. Vincent, for defendant.

DUBOIS, J. The plaintiff, while a passenger in one of the defendant's electric cars, was thrown from her seat and injured by its sudden stop through accident. It appears that the motor underneath the floor of the car was attached thereto by two bearings upon an axle which held its principal weight, while a bolt or pin on its front end passed through a hole in the center of a wrought-iron suspension bar placed edgewise in front of the motor from side to side of the truck, and steadied it and supported the remainder of its weight. This bar, a part of the car truck, was about four feet long, five-eighths of an inch thick, and was five inches wide, excepting that in the middle about the hole the width had there been increased to preserve its strength. The accident was due to the breaking of this suspension bar. The break occurred in the center, from the hole downward, allowing the pin to drop out and the forward end of the motor to fall upon the ground, causing the car to stop suddenly.

The burden of proving that the plaintiff was in the exercise of due care at the time of the accident was maintained by evidence that she was quietly sitting in the car at the time.

In such a position she could not have contributed anything to cause the breaking of the suspension bar beneath the floor under her. The burden of proving that the accident was due to the negligence of the defendant was sustained by the presumption of negligence arising out of a consideration of the cause of the accident itself. The mere fact that the bar broke and let the motor fall is inferentially evidence of negligence on the part of the defendant. "Res ipsa loquitur" is the maxim applicable to cases where the cause of injuries to passengers arises from the breaking down of apparatus wholly under the control of the common carrier. "It is a presumption raised by the law on grounds of public policy, which makes out a prima facie case against the carrier unless it is rebutted to the satisfaction of the jury." Thompson on Negligence, § 2773. The plaintiff having thus presented a prima facie case, the burden was cast upon the defendant to rebut the presumption to the satisfaction of the jury.

The defendant offered evidence to the effect that the car truck, of which the suspension bar formed a part, was manufactured by the Franklin Foundry Company, of Providence, a reputable concern in that line of business, under the Munier patent; that it was purchased directly from the Franklin Foundry Company, and came all ready to place under the car; that the truck was a new one, and had never been in use upon any other car; that the cars of the defendant company were inspected to discover defects every day when in use; that this car in which the plaintiff sustained injury was placed over a pit and inspected by an expert of 10 years' experience on the afternoon before the accident, and was found to be in good order; all the bars, nuts, and bolts were tested with hammer and wrench, and everything was found to be sound; that the car was not run after the inspection until the morning of the accident, when it was subjected to a slight inspection by the motorman who ran it; that after it had been run about 18 miles, and about 150 feet beyond a sharp curve which the car had rounded, the suspension bar broke; that the break was clean and fresh, and did not even show a flaw, and that the cause of the breaking was in no way apparent; that the speed of the car at the time of the accident was six or eight miles an hour. In the opinion of the foreman of the defendant's repair shop, the suspension bar was broken either by the weight of the motor upon it, or the jar of the motor—the rise and drop of it. No evidence in rebuttal was introduced by the plaintiff, and the case was submitted to the jury, who found for the defendant, and the plaintiff petitioned for a new trial upon the ground that the verdict was against the evidence and the weight thereof.

The defendant having satisfied the jury by evidence, not only that it purchased the broken appliance from a reputable maker and dealer in such commodities, but had made daily inspections of the same by an expert employed for that pur-

pose, without any attempt upon the part of the plaintiff to meet it with evidence tending to show that the bar was unlike or inferior to other bars in use for like purposes, or that it was too thin, too narrow, or too weak, and without offering evidence tending to throw discredit upon the kind of inspection that was made, or upon the competency of the inspector, the jury was justified in arriving at a verdict for the defendant. "It is the general rule that, where unimpeached witnesses testify distinctly and positively to facts which are uncontradicted, their testimony suffices to overcome a mere presumption." Robinson v. N. Y. Central R. R. Co. (C. C.) 9 Fed. 877.

Petition for a new trial denied, and case remanded to the common pleas division with direction to enter judgment for the defendant.

BOSWORTH v. UNION R. CO.

(Supreme Court of Rhode Island, May 13, 1903.)

[55 Atl. Rep. 490.]

Carriers—Approaching Place of Danger—Care Required.

In approaching any place of danger—as in attempting to run its cars through a mob—it is the duty of a common carrier to use the utmost care to protect its passengers from injury.

Action by Benjamin B. Bosworth against the Union Railroad Company. Demurrer to declaration overruled.

Argued before STINESS, C. J., and TILLINGHAST and DUBOIS, JJ.

John W. Hogan and Henry E. Tiepke, for plaintiff.
David S. Baker, for defendant.

DUBOIS, J. This is an action of trespass on the case for negligence. In the second count of his declaration the plaintiff alleges that it was the duty of the defendant to exercise the utmost vigilance and care in guarding and protecting him, as and while a passenger, against violence and risk of injury; and that the defendant was negligent in not exercising proper and adequate care and vigilance in guarding and protecting him, while he was its passenger, against mob violence, and in attempting to run its car through a mob without warning the plaintiff of the dangers to which he was being exposed thereby, in consequence of which he sustained the injury complained of. The defendant demurs to such statement of its duty. We have heretofore, in Boss v. Prov. & Wor. R. R. Co., 15 R. I. 149, 1 Atl. 9, 21 Am. & Eng. R. Cas. 364, thus stated the law: "In regard to the degree of care which the law imposes upon common carriers of passengers, it is settled by a long and uninterrupted line of adjudication that they are bound to exercise the utmost care and skill which prudent men would use under similar circumstances; and they are liable for

injuries resulting from even the slightest negligence on the part of themselves or their servants;" and later, in Elliott v. Newport St. Ry. Co., 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208, as follows: "Common carriers of passengers are required to do all that human care, vigilance, and foresight reasonably can, in view of the character and mode of conveyance adopted, to prevent accident to passengers." The defendant, though not denying the foregoing to be the general rule applicable to common carriers of passengers, claims that it particularly applies to its running appliances, for the reason that defects therein are likely to occasion accidents resulting in great injury and loss of life to passengers; and also calls our attention to another rule, relating to its approaches to trains, concerning which it is bound to use only ordinary care. We recognize the distinction in the law between the degree of care to be used in its stationary and in its locomotive appliances. The more stringent rule is established for the protection of passengers while in transit. During their passage they are to be guarded not only against accidents resulting from defects in the running appliances, but also from dangers arising out of the recklessness or carelessness of the servants of the common carrier. With the best appliances it would be possible for a careless or reckless servant to propel a car into danger; as, for instance, into an open draw on a bridge, into a blazing station, or into a drove of infuriated cattle. In approaching any place of danger it is the duty of the common carrier of passengers and its servants to exercise the utmost care, caution, vigilance, and skill which prudent men would use under like circumstances. Whether the servants and agents of the defendant did exercise that degree of care and skill at the time and place alleged by the plaintiff is a question of fact, which must be determined by a jury.

Demurrer overruled, and case remanded to the common pleas division for further proceedings.

MAIRS v. BALTIMORE & O. R. CO. *et al.*

(*Court of Appeals of New York, June 23, 1903.*)

[67 N. E. Rep. 901.]

Carriers—Delivery of Goods—Bill of Lading—Fraudulent Alteration—Action by Transferee.

That a common carrier delivered goods without requiring surrender of bill of lading, which was not indorsed "Nonnegotiable," in violation of Pen. Code, § 633, so as to render it liable for the penalty attached to such failure, does not authorize a subsequent bona fide transferee of the bill, which had been fraudulently altered so as to make it negotiable, to sue a carrier to recover damages for its neglect, as the forgery was not the proximate result of such neglect.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Edwin H. Mairs against the Baltimore & Ohio Railroad Company and others. From an order of the Appellate Division (76 N. Y. Supp. 838) reversing a judgment for plaintiff, he appeals. Affirmed.

Howard E. White, for appellant.

Charles L. Kingsley and Albert B. Boardman, for respondents.

HAIGHT, J. This action was brought to recover damages which the plaintiff is alleged to have sustained by reason of the delivery by the defendants to the consignee of a quantity of corn meal without the surrender of the bill of lading under which the meal had been shipped. On the 22d day of December, 1896, there were delivered to the Norfolk & Western Railroad Company at Circleville, Ohio, 200 barrels of Sagamore corn meal, consigned to one James S. Day, of New York City, on which the company issued a nonnegotiable bill of lading, but without the words "Not negotiable" written upon its face. The meal was conveyed over the company's line to its intersection with the Baltimore & Ohio Railroad, and was then by that company transported to the city of New York, and on the 15th day of January, 1897, delivered to the steamship Madiana, pursuant to an order of the consignee, without requiring the surrender of the bill of lading. Thereafter, and on the 18th day of January, 1897, the consignee, Day, indorsed the bill of lading in blank, and delivered the same to the plaintiff as collateral to a loan previously made, but upon which other property held as collateral was released. At the time of its delivery to the plaintiff, it had been altered by the insertion of the words "Order of and notify" just before the name of the consignee, thus changing the bill of lading into a negotiable instrument. This was done without the knowledge of the transportation company that issued the bill, or of the company that delivered the property. The plaintiff was a member of the New York Stock Exchange, and had known Mr. Day for a good many years, and had been engaged in loaning him money upon bills of lading for about 10 years. He testified, in substance, that he always scrutinized the bills of lading brought in by Day, and knew that, upon a bill of lading upon which the words "Order of and notify" were omitted, the property could be delivered to the consignee without the surrender of the bill of lading; that he waited until the summer of 1898 before he went to the defendant's freight office to demand the goods, and was then informed by the person in charge that the goods had been delivered on the 15th day of January, 1897.

This action is based upon the provisions of section 633 of the Penal Code, which provides as follows: "A person mentioned in section 629, who delivers to another any merchandise for which a bill of lading, receipt or voucher had been issued, unless such receipt or voucher bears upon its face the words 'Not negotiable,' plainly written or stamped, or unless

such receipt is surrendered to be canceled at the time of such delivery, or unless, in the case of a partial delivery, a memorandum thereof is indorsed upon such receipt or voucher, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both." The persons mentioned in section 629 of the Code include railways, express or transportation companies and other common carriers. These provisions of the Code were taken from chapter 326 of the Laws of 1858, as amended by chapter 353 of the Laws of 1859 and chapter 440 of the Laws of 1866. Under the statute, all persons aggrieved by a violation of the act were given the right to maintain an action at law against the violators thereof to recover the damages suffered; but, when some of the provisions of the act were transferred to the Penal Code, that pertaining to the civil remedy was omitted, and disappeared from our statute law by a repeal of the statute. At common law the failure to take up a bill of lading did not furnish cause for action, and it follows that the only civil liability remaining exists by reason of the provisions of the Penal Code, which make the omission unlawful and criminal.

It may be that the offense complained of is a felony under the Code, but we are not convinced that damages resulting therefrom are merged in the punishment for the crime. Such was undoubtedly the rule of the common law, but as early as 1801 the Legislature of this state, by chapter 60 of the laws of that year, provided "that in all cases of felony heretofore committed or which may hereafter be committed, it shall and may be lawful for any person or persons injured or aggrieved by such felony, to have and maintain his, her or their action against the person or persons guilty of such felony, in like manner as if the offense committed had not been felonious, and in no case whatever shall the right of action of the party injured be deemed, taken or adjudged to be merged in the felony or in any manner affected thereby." This provision was continued in the Revised Statutes as follows: "The right of action of a person injured by a felony shall in no case cease or be merged in such felony, or be in any measure affected thereby" (2 Rev. St. [1st Ed.] p. 292, pt. 3, c. 7, tit. 3, § 2)—and in substantially the same form in our Code of Civil Procedure (section 1899). Section 716 of the Penal Code provides that "a person injured by the commission of a felony, for which the offender is sentenced to imprisonment in a state prison, is deemed the creditor of the offender, and of his estate after his death, within the provisions of the statutes relating thereto." It is thus apparent that actions for civil damages arising out of felonies are placed upon the same footing as those arising out of misdemeanors, and that the right to recover damages in a civil action is no longer merged in the felony. Gordon v. Hostetter, 37 N. Y. 99, 105. There, however, can be no recovery unless damages to the plaintiff

resulted from the illegal act. Where the Legislature prohibits or requires the doing of an act, and prescribes a punishment that shall be inflicted for a violation of its mandate, the punishment furnishes the exclusive remedy for the wrong, so far as the public is concerned, and the act cannot be made the basis of a civil action by an individual for the recovery of damages, unless he has been injured in his person or property, and the damages suffered are the direct and proximate result of the illegal act. In this case the defendant negligently omitted to take up the bill of lading when it delivered the goods upon the order of the consignee. The bill of lading did not have the words "Not negotiable" indorsed upon its face, and therefore the defendants may be technically guilty of a violation of the statute; but the bill of lading, in fact, was not negotiable, and under the law merchant the defendants would not have been required to take up the bill, had it not been for the provision of the statute. The plaintiff, as we have seen, was a member of the New York Stock Exchange, and had for a number of years dealt with bills of lading, and knew the difference between a negotiable and nonnegotiable bill. He knew that the property could be delivered to the consignee without the surrender of a nonnegotiable bill, and admits that he carefully scrutinized the bills of lading brought in by Day, the consignee. It is therefore apparent that the plaintiff could not have been induced to part with any property or make loans upon this bill of lading, had it remained in the form in which it was originally executed. He was induced to take it for the reason that it appeared to be negotiable. He was deceived by reason of the forgery, and for this the defendants were not responsible. The forgery was not the direct or proximate result of the omission to take up the bill of lading, but was the independent and felonious act of another person. For this reason, we think the plaintiff cannot recover. These views render it unnecessary to consider the question as to whether the provisions of the Penal Code are violative of the interstate commerce clause of the Constitution of the United States.

The order of the Appellate Division should be affirmed, and judgment absolute ordered for the defendants upon the stipulation, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, CULLEN, and WERNER, JJ., concur.

Order affirmed, etc.

YAZOO & M. V. R. CO. *v.* FAUST.

(*Supreme Court of Mississippi, May 4, 1903.*)

[34 So. Rep. 356.]

Carriers—Failure to Stop at Flag Station—Excessive Damages.

Defendant's train failed to stop for plaintiff at a flag station. She testified that her carriage had been sent back, and she was compelled to walk home about three miles in the rain; that she was taken sick, and compelled to go to bed, and was unable to sit up for six weeks, and suffered great pain, and knew she was in danger of dying, and suffered mental anguish: *held*, that $3,333 damages was excessive, and should be reduced to $2,000.

Appeal from Circuit Court, Wilkinson County; Jeff Truly, Judge.

Action by Mrs. M. E. Faust against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed conditionally.

This case was once before in the Supreme Court, and was reversed because the circuit court submitted it to the jury on instructions permitting them to award punitive damages. See 32 South. 9. The case was again tried, and is here on substantially the same evidence, and, although the court refused an instruction allowing punitive damages, there was a verdict and judgment for a larger amount than before. It is a suit for damages by appellee against appellant to recover damages for injuries alleged to have been sustained by plaintiff by reason of the failure of appellant's train to stop for her at a flag station. Plaintiff testified that she arrived in a carriage about two hours before the train came. The sitting room was cold and leaky, and the train came up and was flagged. The flagging was answered, but the train ran by, and was flagged to come back. It answered the backing signal, and then gave two whistles, and went on, and left her. That the carriage had been sent back, and she was compelled to walk home, about three miles, in the rain and cold. That it was a cold rain. That she was taken sick before she reached home, and was up and down for several days, and was then compelled to go to bed, and was unable to sit up for six weeks, and suffered great physical pain, and that she knew she was in danger of dying, and suffered great mental pain. There was no dispute on the part of defendant as to the signal being given, or as to its being seen by the engineer, or that he stopped in response to it. The explanation of how plaintiff was caused to be left was that there was a passenger on the train who desired to get off at the station, which the conductor knew, and instructed a brakeman to signal the engineer to stop. The lamp of this brakeman went out, and he ran some distance to another brakeman, and requested him to signal the engineer to stop, which was done. The engineer stopped the train as soon as he could after seeing the two signals. After stopping, the conductor, who did not know a

passenger desired to get on the train, signaled the engineer to go ahead as soon as the passenger got off. In obedience to this signal, the engineer, who thought the passenger who wanted to get on had done so, started the train. There were verdict and judgment for plaintiff for $3,333.33. Defendant's motion for a new trial was overruled, and it appealed.

Mayes & Harris, for appellant.
A. G. Shannon, for appellee.

WHITEFIELD, C. J. The only error maintainable is the one as to the extent of the award of the jury. If the appellee will remit to $2,000, the judgment will be affirmed; otherwise it will be reversed.

FRITZ v. SOUTHERN RY. CO.

(*Supreme Court of North Carolina, June 6, 1903.*)

[44 S. E. Rep. 613.]

Carriers—Injury to Passenger—Negligence—Nonsuit.

Plaintiff, attempting to alight from defendant's train, had reached the second step of the platform, when a heavy man caught hold of the car rail, swung himself up on the step, his valise striking plaintiff on the knee and injuring her. The conductor of the train and plaintiff's father were both standing near by. Plaintiff testified it could not reasonably have been anticipated the man was going to hit her. The conductor could have seen the man coming if he had been attending to his business. The rules of the company required conductors to give particular attention to women and children, etc.: *held*, that a motion for a nonsuit was properly granted.

Clark, C. J., dissenting.

Appeal from Superior Court, Guilford County; McNeill, Judge.

Action by Bertha Fritz against the Southern Railway Company. Judgment for defendant. Plaintiff appeals. Affirmed.

L. M. Scott and John A. Barringer, for appellant.
King & Kimball, for appellee.

CONNOR, J. This action is prosecuted by the plaintiff for the recovery of damages sustained by her on account of the alleged negligence of the defendant. The plaintiff alleges, and the testimony for the purpose of this appeal establishes the fact, that she was on the 12th of August, 1899, a passenger on the defendant's train, and that she purchased a ticket from Thomasville to High Point, reaching the last-named place about 9 o'clock at night. After the train stopped at the station, she, together with other passengers, left the car at the rear end, following the conductor, for the purpose of alighting. She had reached the second step, and the conductor was standing on the ground, his head turned back over his shoulder in the direction of the engine, in which direction there were some young ladies If he had been standing straight, he would have been facing the plaintiff. The plaintiff's father was standing behind the conductor about

three paces, and a little to the west of him. Quite a crowd were at the station. As the plaintiff reached the second step, a heavy man, with a valise in his hands, came rapidly down the side of the car in the direction of the engine, and, as he reached the step, caught hold of the car rail, and swung himself up on the step, his valise striking the plaintiff on the knee and injuring her. The train was stopped at the usual place. The conductor was in front of the steps. The man intended to board the train, and the conductor told him to stop. He noticed the man after he had gotten up, and told him to stand aside where he was, and the man did so. The plaintiff, in response to a question, testified: "I believe you said on a former trial that this man came rushing up very hastily in the direction of the engine, and made no stop? Answer. Yes." "You said that you could not have anticipated that he was going to hit you, and it could not have been reasonably anticipated? Answer. Yes." "And you say it now? Answer. Yes." When the man got up, the plaintiff came down, and when in reach of the conductor he took her hand. The plaintiff had no reason to believe that the man was going to hit her. The whole thing was quickly done. The conductor could have seen him coming from the direction of the engine if he had been attending to his business. The plaintiff's father was standing about three paces away. The car steps are 26 inches wide and 22 inches between rails. The plaintiff's father said that the man who struck her was a large, red-faced man; looked like he might have been a mechanic. The conductor helped the plaintiff down. The platform was a good one. The plaintiff introduced certain rules of the defendant company, and showed that they were furnished to conductors in its employ:

"Rule 408. Conductors must always be vigilant to foresee, and as far as possible to prevent, anything which might cause accident or delay to their trains."

"Rule 426. They must contribute, as far as they can, without being unduly officious, to the convenience and comfort of passengers, and must give particular attention to women and children who are unattended, and to all persons who are infirm, inexperienced, or otherwise unable to care for themselves."

"Rule 448. Passenger conductors should never lose sight of the fact that their duties are of a most delicate and responsible character, and demand unusual judgment, tact, and courtesy, and that the safety of their trains and passengers and the reputation of the road are dependent upon their discretion and care."

Upon the close of the plaintiff's testimony the defendant moved for a judgment of nonsuit, which was allowed, and the plaintiff appealed.

When this cause was before this court at the February term, 1902 (130 N. C. 279, 41 S. E. 532), the testimony was the

same as upon this appeal, except that the rules of the company had not then been introduced. Furches, C. J., speaking for the court, said: "After a careful examination of the evidence, we are of the opinion that the defendant's motion, at the close of the plaintiff's evidence, to nonsuit the plaintiff, should have been allowed. There is no evidence, in our opinion, showing negligence on the part of the defendant." The case was disposed of upon another question.

We are of the opinion that the ruling of this court should be affirmed. We do not think the rules of the company introduced by the plaintiff did more than declare the measure of duty which the defendant owes to its passengers. In Britton v. Railroad, 88 N. C. 536, 43 Am. Rep. 749, Ruffin, J., says: "According to the uniform tendency of these adjudications, which we admit as authorities, the carrier owes to the passenger the duty of protecting him from the violence and assaults of his fellow passengers or intruders, and will be held responsible for his own or his servant's neglect in this particular, when, by the exercise of proper care, the acts of violence might have been foreseen and prevented; and, while not required to furnish a police force sufficient to overcome all force when unexpectedly and suddenly offered, it is his duty to provide ready help sufficient to protect the passenger against assaults from every quarter, which might reasonably be expected to occur under the circumstances of the case and the condition of the parties." This rule we find fully sustained by the decisions of other courts and the textbooks. In Putnam v. Broadway & Seventh Ave. R. Co., 55 N. Y. 108, 14 Am. Rep. 190, it is said: "A railroad company has the power of refusing to receive as a passenger or to expel any one who is drunk, disorderly, or riotous, or who so demeans himself as to endanger the safety, or interfere with the reasonable comfort and convenience, of the other passengers, and may exert all necessary power and means to eject from the cars any one so imperiling the safety or annoying others; and this police power the conductor or other servant of the company in charge of the car or train is bound to exercise with all the means he can command, whenever occasion requires. If this duty is neglected without good cause, and a passenger receives injury, which might have been reasonably anticipated or naturally expected from one who is improperly received or permitted to continue as a passenger, the carrier is responsible." The Supreme Court of Iowa, in Felton v. Railroad Co., 69 Iowa, 577, 29 N. W. 618, 27 Am. & Eng. R. Cas. 299, held that upon a finding by the jury that the defendant ought not reasonably to have anticipated that an assault would be committed on the deceased the defendant was not liable. In Flint v. Transportation Co., 34 Conn. 554, Fed. Cas. No. 4,873, it is held that "carriers of passengers for hire are bound to exercise the utmost vigilance and care in maintaining order and guarding

those they transport against violence from whatever source arising, which might be reasonably anticipated or naturally expected to occur, in view of all the circumstances, and of the number and character of persons on board." There is no controversy in this case in regard to the relation which the plaintiff occupied toward the defendant. She was a passenger, having paid her fare, and at the time of the injury the contract of carriage had not come to an end. She was, therefore, entitled to demand of the defendant the degree of care for her protection prescribed by the law and the rules of the company. In the very excellent brief filed by the plaintiff's counsel many authorities are cited to establish this proposition. They also cite authorities to the effect that, if the conductor was negligent, and by reason of such negligence a third party—as, in this case, a fellow passenger—injured the plaintiff, the defendant would be liable. The question which lies at the threshold of this case is whether there is any negligence on the part of the conductor. It will be observed that in the cases cited the question of liability is made to turn upon a neglect of duty, as do all cases of negligence. The right to recover is dependent upon a failure on the part of the conductor to maintain such care as would prevent an injury which could be reasonably anticipated, or, as said by Justice Ruffin in Britton's Case, supra, "could have been foreseen and prevented." The plaintiff here testified expressly that the man who injured her was coming very rapidly, and that "you could not have anticipated that he was going to hit you, and it could not have been reasonably anticipated." Applying the principle which is to govern the case, this language of the plaintiff relieves the defendant of any actionable neglect. Her statement is sustained by the circumstances surrounding the transaction. She said, in reply to a question, that she had no reason to believe that this man was going to hit her. Her father, standing within three paces of the conductor, and seeing the man coming, did not anticipate any trouble. The man had a right, as a passenger seeking to board the train, to go to the step, and, so soon as he could safely do so, enter the car. The fact that he was coming rapidly was not calculated, in view of the conduct of men under such circumstances, to arouse in the conductor any apprehension that he would attempt to board the car in a rough and violent manner. He made no such impression on the plaintiff or her father. If the conductor had stopped him before he reached the step, the defendant would have been liable in an action for damages.

We do not intend to relax in the slightest degree the rules of the company or the high degree of care which the law requires of conductors in protecting their passengers. But we do not think that, in view of this testimony, these rules, applied to the conductor's conduct, show any negligence on his part. The general rule is that whenever a carrier, through

its agents or servants, knows or has opportunity to know of a threatened injury, or might have reasonably anticipated the injury, and fails or neglects to take the proper precautions or to use proper means to prevent or mitigate such injury, the carrier is liable. We have carefully examined the case of Sheridan v. B. & N. Ry. Co., 36 N. Y. 39, 93 Am. Dec. 490, cited by the plaintiff's counsel. There the plaintiff's intestate, a child of nine years, was compelled by the conductor of a crowded railroad car to stand upon the platform, and while there was thrown from the car by the hasty and careless exit of another passenger. The company was properly held liable, Mr. Justice Hunt saying: "For the present we are to assume that the deceased was upon the platform by the express requirement of the defendants, and against his own remonstrance, properly, so far as the defendants are concerned. If, by the motion of the cars, he had been thrown from this dangerous position, or by the continued pressure of the large crowd which the defendants had permitted upon their cars he had been pushed from his standing place, the defendants would have been liable. It does not alter this liability that the wrong of a third party concurred with their own in producing the injury. It may well be that the young man was not justified in rushing through the crowd and in aiding in throwing the deceased from the cars; but this does not relieve the defendant's wrong. If they had not removed the deceased from his seat, and compelled him to stand upon the platform, he would have been unaffected by this illegal act of the young man. It was his violence, concurring with the defendant's illegal conduct in overcrowding their cars and in placing the deceased upon the platform, that produced the disastrous result." The wrongful act of the defendant in that case was in compelling the plaintiff's intestate to stand upon the platform. In our case there was no wrongful act in respect to the plaintiff's being upon the second step in alighting from the car. There was no suggestion of overcrowding preventing her from leaving the car in the usual manner, nor is there any suggestion that the conductor was not in his proper place. The only suggestion made is that he was looking over his shoulder, with an intimation that his attention was attracted by some young ladies. It does not appear that he was prevented from seeing the man approach the car. On the contrary, the plaintiff testifies that immediately upon his swinging himself upon the step the conductor stopped him. While we fully recognize the very delicate duties imposed upon conductors in looking after their passengers, and would not lower the standard by which their duty is measured, we cannot fail to also recognize that as the train stops at the station the duty becomes exceedingly difficult in respect to passengers alighting and those desiring to enter the car. We would not be willing to say that the momentary attraction of the conductor's attention, even by young ladies, would constitute

negligence. In applying the rules of law to the conduct of men in the discharge of their various duties of life, we must recognize existing conditions; and, while we enforce a high degree of care between agents and servants of railroads and their passengers, we must not impose unreasonable requirements, or expect men to anticipate and provide against contingencies beyond the capacity of the human mind. It is certainly desirable that in public stations and in other places where people assemble more consideration for each other's welfare, safety, and comfort be observed. The conduct of the man who caused this injury was inconsiderate, and perhaps rude, but conductors, no more than other men, can be required to anticipate that men are going to act in a rude and inconsiderate manner towards ladies. While they must be upon the alert, they cannot be expected to anticipate conduct which the plaintiff herself says could not have been anticipated, and which did not attract the attention af her father, standing near by the conductor. While the injury sustained by the plaintiff is a source of regret, we cannot see that it is the result of any actionable negligence on the part of the defendant's conductor. In regard to the width of the steps, it is not suggested that they should be wide enough for two persons to pass. The rules of the company require that passengers entering cars shall await the exit of those leaving. This, we think, is a reasonable requirement.

Upon the whole evidence we are of the opinion that the judgment of nonsuit should be affirmed.

CLARK, C. J. (dissenting). The defendant owed the plaintiff a safe exit from its cars. The usual requirement nowadays, wherever there is much travel, is that outgoing passengers leave by one door of the car and incoming passengers enter at the other. This prevents any collision between the two streams of passengers, and it is negligence for a railroad company not to establish and enforce reasonable regulations, which are in general use, to prevent accidents by the strong trampling upon the weak, burly men running over weak and delicate women and children. The plaintiff was descending, and on the second step, when a strong, able-bodied man with a heavy, iron-bound valise in his hand caught hold of the iron stanchion to swing himself up. The conductor was standing by the step, and, if advertent to his duties, instead of allowing his attention to be attracted elsewhere, he could certainly have put out his hand more quickly than the man could swing his own weight and that of the valise up, and have made him wait until the lady and other passengers had gotten out. At least, this was evidence for the jury to consider; and this court, I think, should not hold as a proposition of law that it was not negligence for the conductor to permit the heavy man and his heavy valise to crowd up the steps, 22 inches wide, on which the lady was descending, and where she had the right of way. The lady

says she did not anticipate the man would strike her with the valise. If she had, it might have been contributory negligence, possibly, not to have called out, or shrunk back (if possible); but because, relying on the care of the defendant's servant, she was not thus guilty of contributory negligence, it is hard measure to hold that therefore the conductor was not negligent in not stopping the man, nor the company in not having safe regulations to prevent collision between incoming and outgoing streams of passengers. The conductor was at the foot of the steps, and should have seen, sooner than the lady or than her father, who was three steps away, that the heavy man with the heavy valise had laid hold of the iron rod to swing up on the crowded steps. The conductor's hand should have been instantly stretched out across the steps, and he should have told the man politely, but firmly, he could not go up till those on the steps had descended. If there was any reason to the contrary, the conductor should have gone on the stand, and have told what it was. Whether the conductor was attending to his duties or negligent in the premises was a matter of fact to be determined by the jury.

When the case was here on the former appeal (130 N. C. 279, 41 S. E. 532) this present question as to whether there was any evidence was not before the court, and could not be, for the appeal was by the plaintiff from the judgment below granting the new trial, and the court expressly so stated in the opinion. Besides, there was some additional evidence on the last trial. His honor in the second trial below was doubtless misled by the first headnote in the former appeal.

BEDFORD-BOWLING GREEN STONE CO. *et al.* v. OMAN *et al.*

(*Court of Appeals of Kentucky, April 28, 1903.*)

[73 S. W. Rep. 1038.]

Lease—Construction—Realty—Title to Railroad.

A lease of the right to work and use all the fine cutting stone contained on two certain tracts of land obligated the lessees to build or cause to be built a railroad from the quarry over the land of a third party to the line of a certain railroad company. There was no covenant in the lease for the conveyance of the railroad to the lessors at its expiration: *held* that, in the absence of a stipulation governing the matter, the railroad, being part of the realty, became the property of the owners of the soil to which it was affixed, and a grantee of one of the lessors had no interest therein.

Deed—Construction.

A commissioner's deed, stipulating that "that which is conveyed is the interest of F. in the cutting stone on the land aforesaid, being one-third interest," conveys only an interest in the cutting stone, and no interest in a railroad switch connecting the quarry with the line of a railroad company.

Duty to Receive and Carry Freight.*

A railroad corporation which had the control and management of

*See monograph appended to Carter v. Wilmington & W. R. Co. (N. Car.), 1 R. R. R. 131, 24 Am. & Eng. R. Cas., N. S., 131.

a switch running from its line to appellant's quarry could not lawfully refuse to receive and transport freight belonging to appellees, owners of a near-by quarry, to and from such reasonable points along the line at which they could lawfully ship or receive it.

Right to Take Out Cutting Stone.

The right to take cutting stone from a tract of land necessarily carries with it such reasonable use of the surface over the stone as is necessary to make the right available.

Appeal from Circuit Court, Warren County.

"To be officially reported."

Bill by John Oman and others against the Bedford-Bowling Green Stone Company and the Louisville & Nashville Railroad Company. Decree for plaintiffs, and both defendants appeal. Affirmed on appeal of railroad company. Reversed on appeal of stone company.

Bodley, Baskin & Morancy and John E. Du Bose, for appellant Bedford-Bowling Green Stone Co.

Jas. E. Mitchell, Mitchell & Du Bose, E. W. Hines, B. D. Warfield, and Thos. B. Harrison, Jr., for appellant Louisville & N. R. Co.

L. McQuown, for appellees.

BARKER, J. This action involves the rights of appellees to the use of a railroad switch which runs from the Memphis Junction of the Louisville & Nashville Railroad Company's line in Warren county, Ky., about 3½ miles, to the quarry of the appellant Bedford-Bowling Green Stone Company. It is not necessary, for the purpose of this case, to set forth the statements in the pleadings with any minute particularity. It is sufficient to say that the Bedford-Bowling Green Stone Company claims to be the exclusive owner of the switch in question; and, on the other hand, the appellees claim a part ownership, with the right to its use, and, if that be not so, that it is a part of the railroad system of the appellant Louisville & Nashville Railroad Company, and, as such, they have the right of shipment over it, and that the Louisville & Nashville Railroad Company has no legal right, as a common carrier, to refuse to transport freight along its line, and that the pleadings properly present these issues for adjudication. Upon the trial below, the learned chancellor held that the appellees were part owners of the switch in question, and enjoined the Bedford-Bowling Green Stone Company from interfering with their rights to its use, and required, by a mandatory injunction, the appellant Louisville & Nashville Railroad Company to transport appellees' freight over it to their quarry, at or near the end of the line. From this judgment an appeal has been prosecuted to this court.

In 1870 Hugh F. Smith and his wife, Lydia A. Smith, were the owners in fee simple of a tract of land in Warren county, Ky., known as the "Howarth Tract"; and they and one B. C. Sanders, together, owned the perpetual right to quarry the fine cutting stone in an adjoining tract, known as the "Lov-

ing Land." Smith and wife owned an undivided two-thirds interest, and B. C. Sanders an undivided one-third interest. Sanders had no interest in the Howarth land. On the 22d day of January, 1870, Smith and wife and B. C. Sanders entered into a written lease with Owen McDonald & Co., whereby they leased to them for a term of 30 years the right to work and to use all the fine cutting stone contained on the two tracts of land. In consideration of this lease, Owen McDonald & Co. bound themselves to build, or cause to be built, within three years from the date of the lease, a railroad from the quarry on the land to the Memphis Branch of the Louisville & Nashville Railroad Company, and to commence operations in the quarry within three years from the date of the lease; and it was stipulated that unless this was done the lease was to be null and void. Owen McDonald & Co. were also to pay to the lessors, as a royalty, $1 for each 100 feet of all stone suitable for cutting or dressing quarried by the lessees during the term of the lease, and covenanted to keep their books open to the inspection of the lessors, so that they might settle between themselves as to their rights in the royalty. At the expiration of the term of the lease, it was stipulated that the lessees could remove all the tools and machinery, unless the lessors paid a fair price for them. Afterwards Owen McDonald & Co. conveyed their interest in the lease to the White Stone Quarry Company, which acquired the right of way from the stone quarry to the Memphis Junction of the Louisville & Nashville Railroad Company, and built thereon the railroad switch involved in this litigation, since which time the interests originally acquired by Owen McDonald & Co. have passed in regular succession from the White Stone Quarry Company to the Belknap & Dumesnil Stone Company, and from it to the Bowling Green Stone Company, and from it to the Columbia Finance & Trust Company, which conveyed it to the Bedford-Bowling Green Stone Company. In 1888 the Belknap & Dumesnil Stone Company purchased all the interests of the Smiths in both the Howarth and the Loving tracts, and thus became the owner in fee simple of the first, and the owner of a two-thirds interest in the cutting stone in the latter, tract. In 1878 B. C. Sanders, being indebted to Milton Feland and McElwain, conveyed to them his interest in the cutting stone in the Loving tract. Feland having died, in a suit to settle his estate his interest in the cutting stone was sold, and bought by appellee John Oman. McElwain in 1885 sold his interest in the cutting stone to Sallie M. Smith, and she sold it to the Belknap & Dumesnil Stone Company in 1888, so that at the expiration of the lease, in 1900, John Oman was the owner of a one-third interest in the cutting stone in the Loving tract, and the Bedford-Bowling Green Stone Company was the owner in fee simple of the Howarth tract, and of an undivided two-thirds interest in the cutting stone in the Loving tract. Between them, and

in the proportions mentioned, they were the owners of all the property demised by the lease of 1870. After the expiration of the lease the Columbia Finance & Trust Company, appellant's vendor, and the appellee John Oman, in an action that was pending in the Warren circuit court between John Oman and the Bowling Green Stone Company, etc., entered into an agreement by which that case was settled, and a division made between the parties at interest as to their rights in the cutting stone in the Loving tract. In pursuance of this agreement, commissioners were appointed to divide the interests of the parties in the cutting stone, which having been made, the commissioner of the court conveyed to each party to the settlement their respective portions. This deed having been put to record, there is now no dispute as to the rights of the parties to this litigation on this question.

John Oman, having opened a quarry on the Loving tract, set apart to him, very near the quarry operated by the Bedford-Bowling Green Stone Company, is naturally very anxious to use the switch in transporting his machinery to his quarry, and in transporting his stone to the main line of the Louisville & Nashville Railroad; it being impracticable to haul such heavy freight for so long a distance in any other way. We do not think, however, he has any interest in the switch in question. It was built by the White Stone Quarry Company, a remote vendor of appellants, under the lease of 1870, and that instrument contains no covenant for its conveyance to the lessors at its expiration; at which time, being a part of the realty, in the absence of any stipulation governing the matter, it became the property of the owners of the soil to which it was affixed. In order for appellee Oman to prove himself entitled to an interest in the railroad switch involved in this litigation, it was incumbent upon him to exhibit some muniment of title by which he acquired an interest in it. This he has wholly failed to do. Even should it be held that his remote vendor, B. C. Sanders, acquired an interest by the terms of the lease of 1870, it would still be necessary for him to show some transmission of that right to him. He purchased the interest he holds at a judicial sale in the settlement of Milton Feland's estate, and the deed of the commissioner of the court in that case to him, after describing the land containing the cutting stone to be conveyed, contains this stipulation: "That which is conveyed is the interest of M. C. Feland in the cutting stone on the land aforesaid, being one-third interest." So that all he purchased was an interest in the cutting stone, and not an interest in the railroad switch.

The railroad switch involved in this litigation was built by the White Stone Quarry Company, and in so doing they entered into a contract with the Louisville & Nashville Railroad Company, by which it leased or hired all of the material which went into it, from the railroad company, upon a stipu-

lated rent, to be equal to 6 per cent. per annum on the value of the material furnished; the quarry company to keep the roadway in good condition, either by doing the work itself, or paying the railroad company for what it might do in this regard. Afterwards, on the 23d day of May, 1893, the property having passed into the ownership of the Bowling Green Stone Company, a new contract was made between it and the railroad company, in which all of the terms and conditions of the original contract concerning material furnished by the railroad company, and the rental therefor due from the quarry company, were recited, and further that, "whereas, said Bowling Green Stone Company wishes to increase its business and has represented to said Louisville & Nashville Railroad Company that if it should be relieved from the payment of said rent and for said repairs, it could largely increase its business, which would result in an increase of traffic for said Louisville & Nashville Railroad Company: Now therefore, in consideration of the premises, the said Louisville & Nashville Railroad Company, from and after this date, releases the said Bowling Green Stone Company from the payment of rent on said material, and also agrees to keep said track in repair during the continuation of this contract without cost to said Bowling Green Stone Company, reserving the right, however, to discontinue doing so, and the right to cancel this contract on 60 days' notice in writing to said Bowling Green Stone Company whenever and at any time in the opinion of the management of said Louisville & Nashville Railroad Company the shipments from said quarries to points on and reached via said Louisville & Nashville Railroad Company's lines are not sufficient to justify the maintenance of the track by said Louisville & Nashville Railroad Company." This contract, and other evidence in the record bearing upon the question, show that the Louisville & Nashville Railroad Company, during the continuance of this last contract, has the control and management of the railroad switch. It owns, controls, and operates the engines and other rolling stock which pass over the line. It keeps the roadbed in repair, and owns all of the material which goes into it. So far as this record shows, it exercises the same control and dominion over this line that it does over any other part of its system; and we think, by the terms of the contract in question, the switch, during the continuance of the contract, at least, becomes a part of the general system of the Louisville & Nashville Railroad Company. This being so, it cannot lawfully refuse to receive and transport freight belonging to appellees to and from such reasonable points along the line at which they may lawfully ship or receive it. This is clearly settled by the opinion of this court in the case of the Louisville & Nashville Railroad Company v. Pittsburg & Kanawha Coal Company, 64 S. W. 969, 23 Am. & Eng. R. Cas., N. S., 332, 55 L. R. A. 601, in which it is said: "Railroad companies are quasi public corporations,

created for the purpose of exercising the functions and performing the duties of common carriers. These duties are defined by law, and in accepting their charters they necessarily take with them all the duties and liabilities annexed; and they are required to supply, to the extent of their resources, adequate facilities for the transaction of all business offered, and to deal fairly and impartially with their patrons. McCoy v. C., I., St. L. & C. R. R. Co. (C. C.) 13 Fed. 5; Munn v. Illinois, 94 U. S. 126, 24 L. Ed. 77. And they have no right to contract with a corporation or individual to give exclusive rights to transfer any commodity over any part of their line. * * * The contention is made for the railroad company that appellee is not entitled to a mandatory injunction requiring them to fulfill their corporate obligations to furnish impartial service, because they have adequate relief in a court of law by suit to recover damages for the wrong done. Undoubtedly this remedy exists, but it is not the only means of relief which the law provides. By accepting its charter the railroad company assumed obligations to the public, and the duty of enforcing these obligations, in the absence of some statute providing a different remedy, necessarily devolves upon courts of equity. Their jurisdiction to grant relief of this sort has been well established and defined. Hays v. Pennsylvania Co. (C. C.) 12 Fed. 309; also the Express Case, decided by Justice Miller and Judge McCreary (C. C.) 10 Fed. 869, and the case of the State v. The Hartford & New Haven Railroad Co., 29 Conn. 546. It is plainly laid down in these and other cases that a railway company may be compelled by a mandatory injunction to carry out the object for which they were created, and to impartially and without discrimination serve the public."

While it is the duty of the railroad company thus to receive and transfer freight for appellee, this can be done only at points along the line of the railroad switch in question at which appellee may lawfully receive or ship it. He has no right to trespass upon the private property of appellants in order to reach the road. We think, under his right to the cutting stone, as now fixed by contract, appellee is entitled to ship and receive freight at any reasonable point along the road, as now constructed, which lies upon any part of the Loving tract, which was set apart and conveyed to him in the settlement had between him and the Columbia Finance & Trust Company. Although the part of the Loving tract upon which the railroad switch lies (being No. 4 on the plat) is now owned in fee by appellants Bedford-Bowling Green Stone Company, the right to take the cutting stone which belongs to appellee necessarily carries with it such reasonable use of the surface over the stone as is necessary to make appellees' interest in the land available. If it should be found impracticable, from the topography of the land, to reach the railroad on tract No. 4, then appellees may acquire the right of way by contract with appellants, or condemnation under section

815 of the Kentucky Statutes, to any practicable point on the line which will not unnecessarily interfere with appellants' quarry as now operated.

For the reasons herein given, this case is affirmed as to the Louisville & Nashville Railroad Company, and reversed as to the Bedford-Bowling Green Stone Company, for proceedings consistent with this opinion.

SETTLE, J., not sitting.

MEMPHIS ST. RY. CO. v. SHAW.

(*Supreme Court of Tennessee, June 9, 1903.*)

[75 S. W. Rep. 713.]

Passenger Carried beyond Destination—Evidence.

Plaintiff's contention, in an action against a street railway for injuries, was that she was negligently carried beyond her destination on the trip out from the city to her home, and to the terminus of the road; that on the trip back she was wantonly carried beyond her stopping place again; that the conductor treated her rudely on the trip out and back; and that she was injured in attempting to get off at a place beyond her destination, where the car stopped on the return trip: *held*, that evidence of what was said and done by the conductor and plaintiff was not only competent, but constituted the gist of the action.

Instructions.

Though the charge of the court, in an action against a street railway for injuries, to the effect that defendant would not be liable if plaintiff's negligence was the sole cause of the injury, was erroneous, defendant is not in a position to complain, where it did not ask for any other or additional charge.

Contributory Negligence—Instructions.

Where the record on appeal in an action against a street railway for injuries shows that defendant insisted that the facts adduced at the trial presented a case of sole negligence on the part of defendant, or sole negligence on the part of plaintiff, depending on whether plaintiff's or defendant's theory of the facts be adopted, and that no charge on contributory negligence was requested, defendant cannot complain of the court's failure to charge that it would not be liable, though negligent, if plaintiff's negligence contributed to her injury.

Street Railways*—Care Due Alighting Passengers.

It is the duty of a conductor in charge of a street car to see that no one is in the act of alighting when he starts his car after having stopped to discharge or take on passengers at a regular stopping place.

Same—Care Due Aged Passenger.

It is the duty of those in charge of a street car to give greater care and consideration to aged and infirm passengers, whose age or infirmities are apparent, than to other passengers, and, if necessary, to assist such passengers to alight from the car when they arrive at their destination.

Instructions.

Defendant in a civil action cannot complain of the trial court's action in stating plaintiff's theory in the charge, when a correct statement of defendant's theory was also given.

Punitive Damages.

In an action by a passenger against a street railway for injuries, evidence *held* to justify punitive damages.

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*See monograph appended to Phillips v. St. Charles St. R. Co. (La.), 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

Appeal from Circuit Court, Shelby County; J. P. Young, Judge.

Action by Mrs. Kate Shaw against the Memphis Street Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wright, Peters & Wright, for appellant.
Carroll, McKeller & Bullington, for appellee.

WILKES, J. This is an action for damages for personal injuries. It was tried before a jury in the court below, and there was a verdict for $5,000. On motion for a new trial, $2,000 of this amount was remitted, and judgment was rendered for $3,000 and costs, and the street car company has appealed and assigned errors.

The substance of the complaint is that plaintiff was negligently carried beyond her destination on her trip out from the city to her home, and was afterwards carried on to the terminus of the road, and brought back, and again wantonly carried beyond her destination on her return.

It is said the court erred in admitting, over the objection of the company, evidence of what was said and done by the conductor and plaintiff on the trip out and the return. Plaintiff's contention is that she was carried negligently beyond her destination in going out, and that the conductor would not return with her to her destination; that he treated her rudely on the trip out and back, and negligently and wantonly on the return trip carried her beyond her stopping place. The case in this court must be viewed from the plaintiff's standpoint, and on her theory, and what was said and done on the trip out and back is not only competent, but constitutes the very gist of the action.

It is said the court erred in the following instruction to the jury: "The court further instructs you that a person who enters a street car to be transported to a certain place, and pays his fare, is a passenger, and that there is a corresponding obligation on the part of the passenger to act with prudence, and to use the means provided for his safe transportation with the same reasonable circumspection and care that is required on the part of the carrier, for the law does not prescribe a different rule or measure of care with respect of parties, and, if his negligent act solely contributes to bringing about the injury of which he complains, he cannot recover." The criticism is in the use of the word "solely," and the contention is that the court should have told the jury that, if both plaintiff and the company were negligent, the plaintiff could not recover. To give to the word "contribute" its legal signification would make the charge unintelligible, as one act cannot "contribute" solely to effect a given result, but only in connection with some other act; and there can be no sole contributory cause of an accident. We may assume, therefor, that the trial judge meant, if the negligent act of

the plaintiff produced or was the sole cause of the injury, she could not recover. There are two or more answers to this assignment, assuming that it was meant to charge the doctrine of concurrent negligence. One is that there was no request for any other or additional charge. Another is that the company insisted throughout the trial that there was and could be no contributory negligence or concurrent negligence, under the proof, but that the facts presented a case of sole negligence on the part of plaintiff, or sole negligence on the part of defendant, according to whether the jury adopted plaintiff's or defendant's theory of the facts. Counsel for the road stated that, if plaintiff's theory was true, then the road was guilty of negligence, to which, in the language of counsel, "we don't claim her negligence contributed." The jury evidently adopted the theory of plaintiff. The case of Nashville Street Railway Co. v. Norman, 108 Tenn. 331, 67 S. W. 479, is cited by counsel for the road, and relied on by him; but in that case there was a theory of concurrent negligence presented by the record, and the court was asked to charge the doctrine of concurrent or contributory negligence. The court in the present case, in his charge, did present the feature of contributory negligence, saying to the jury: "But if the passenger is injured by his or her own negligence or want of care, and without any negligence or want of care on the part of the carrier, then the carrier is not liable, and there can be no recovery." This was meagre, but there was no request for additional charge.

It is said the court erred in charging as follows: "You are also instructed that it is the duty of those in charge of the car, when signaled to stop at a regular stopping place to discharge passengers or to take on others, to await a sufficient length of time to allow the passengers—whether those giving the signal to stop, or those who are undertaking or attempting to alight—a sufficient length of time to alight in safety, by the exercise of reasonable diligence, and to see and know that no passenger is in the act of alighting when the car is again put in motion. And it is likewise their duty to give greater care and consideration to aged and infirm persons, whose age or infirmity are apparent from their appearance, than to other persons, and, if necessary, to assist them in getting off the car; and, if they fail to perform their duty in these respects, the employer is liable." One objection to this is that it requires the conductor absolutely to know and see that no passenger is in the act of alighting when the car is put in motion, and thus makes the company virtually an insurer that the conductor shall see the passenger if alighting. This doctrine is laid down in Booth on Street Railroads, § 349, in these words: "It is the duty of those in charge of the car, when signaled to stop for the purpose of discharging passengers, to ascertain who and how many of the passengers intend to alight at that place, to wait a sufficient length of

time to allow them to alight in safety by the exercise of reasonable diligence, and, in any event, to see and know that no passenger is in the act of alighting, or otherwise in a position which would be rendered perilous by the motion of the car when it is again put in motion." Booth on Street Railroads, § 349. Again, in Highland Co. v. Burt, 92 Ala. 29, 9 South. 410, 13 L. R. A. 95, it said: "It is the duty of the driver to wait a sufficient length of time to enable passengers to alight in safety by the exercise of reasonable diligence, and, in any event, to see and know that no passenger is in the act of alighting, or otherwise in a position which would be rendered perilous by a movement of the car." In Railroad Co. v. Mitchell, 98 Tenn. 31, 40 S. W. 72, no doubt citing from Booth on Street Railroads, it is said: "A common carrier is guilty of negligence if it fails to stop its trains at stations a sufficient length of time to enable passengers, including the aged and very young, by the exercise of due care and diligence, to leave the cars in safety and without hurry or confusion, or if, after having waited a reasonable time, it starts its train when it is known, or should by reasonable care have been known, that passengers were in the act of alighting from the cars. As applied to a woman aged 76 years, and weighing 200 pounds, the following instruction, taken as a whole, is not erroneous, to wit: 'It was the duty of the defendant company to use all reasonable care and diligence for her safety while on and getting off of the train, and to give a reasonable time on arriving at the depot [her destination] to alight from the train in safety; and it was the duty of the company, or some agent or employee of defendant in charge of the train, to see that sufficient time was given for that purpose, and, if necessary, to assist in making her exit.'" In Nellis on Street Surface R. R.'s, p. 479, notes, it is said: "The conductor must be alert to see that no one is alighting or attempting to alight before he starts his car." Citing Gilbert v. Street Railway, 160 Mass. 403, 63 N. E. 60; Losee v. Street Railway, 63 Hun, 405, 18 N. Y. Supp. 297. While we think that the language of the trial judge, when taken in its connection, and in view of other portions of the charge, does not make the company an insurer, and was not so intended, we cannot, in case of street railways, when a conductor has only one car, or, at most, two or three cars, to watch, consider it too high a degree of care that he should be required to see and know that no one is in the act of alighting when he starts his car. The whole length of the car, and every passenger on it, can be brought under his notice at a glance, and they all alight on one side or at one end; and, by the exercise of any reasonable degree of care and caution, he may see and know. We do not mean to apply to commercial cars, where there are several coaches in a train, under one conductor. As to the duty of the conductor to look after the safety and care of aged and infirm persons, and, if necessary, assist them in

alighting, the instruction given in this case does not go beyond the rule of duty laid down in Railroad Co. v. Mitchell, 98 Tenn. 31, 40 S. W. 72. This does not mean that it is the duty of the conductor to assist passengers generally to alight.

The sixth assignment complains of the fact that the trial judge gave plaintiff's theory of the case to the jury. We find that it was immediately followed by a statement of defendant's theory, and both are stated with substantially and virtually exact correctness. We do not find in the learned judge's statement any fact stated hypothetically which was not brought out by some of the witnesses, and plaintiff's theory is correctly set forth, as well as that of defendant.

It is said that the trial judge should have given no charge upon the subject of exemplary damages; that the case presented is not one for punitive damages, and hence the verdict and judgment are excessive, and so much so as to evince passion, prejudice, or caprice, caused by the charge upon the subject of exemplary damages. In considering this assignment, we must, of course, take plaintiff's version of the matter, as the jury evidently credited her, and gave the weight of their verdict in her favor, and there is no assignment that there is no evidence to support the verdict. If the case is one which calls for exemplary damages, then the court should have charged the jury upon that feature. In American Lead Pencil Company v. Davis, 108 Tenn. 254, 66 S. W. 1129, this court approves the language of Sutherland on Damages, when he says that punitive damages are allowed when a wrongful act is done with a bad motive, or so recklessly as to imply a disregard of social obligations, or when there is negligence so gross as to amount to misconduct and recklessness. Continuing, the court says: "The authorities affirm that what amounts to gross negligence under the facts of the case, or to a disregard of the safety of the person injured, is a discretionary ground for exemplary damages." This court has also said, in The Traction Co. v. Lane, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549: "A contract to carry passengers is not one of mere toleration and duty to transport the passengers on its cars, but it also includes the obligation on the part of the carrier to guaranty to its passengers respectful and courteous treatment, and to protect them not only from violence and insult from strangers, but also from violence and insult from the carriers' own servants." In Telegraph Co. v. Shaw, 102 Tenn 318, 52 S. W. 163, it is said: "There need not be positive proof of malice or oppression, if the transactions, or facts shown in connection therewith, fairly imply its existence, and it is left to the jury to look at all the circumstances in order to see whether there was anything in the conduct of the defendant to aggravate the damages." Tested by these rules, we advert to the facts of the case as given by plaintiff and her witnesses: Plaintiff was a German lady, 73 years of age. She entered a car in the city to go to her home, in the suburbs. She desired to get off at Orleans street, and so told the conductor at the

next crossing before reaching Orleans. It seems the conductor and another one, not on duty, and a young man friend, were on the rear of the car, talking. He, being engaged in conversation, did not give the signal to stop at Orleans, and plaintiff hallooed at him, but he ran on to Richland avenue; and plaintiff declined to get off there, and demanded to be carried back, but the conductor refused, and notified her that he would take her to the end of the line, which he did. On the way back, the conductor demanded of her another fare, which she refused. She says he "fussed" at her, and she demanded to be put off at Orleans street, when the conductor threatened to carry her on to town again. Before reaching Orleans, the conductor and motorman were in conversation, looking back at her and laughing, and, as a young lady passenger stated, evidently making fun of plaintiff. He did not stop at Orleans, but ran by that crossing very rapidly, and only stopped at the next, which was Lauderdale street, in order to take on three ladies. Plaintiff, when the three ladies got on, attempted to alight; and while on the step, and in the act of putting her foot to the ground, the car was started suddenly, and threw her violently to the ground, bruising her, breaking one rib, and otherwise injuring her. There is a conflict as to whether the car had stopped when she tried to get off, but her evidence, and we think the decided weight of testimony, is to the effect that it had. The fact that three other ladies entered the car is strongly persuasive, if not conclusive, that the car did stop. That it started up before she alighted appears very clearly from the testimony of the policeman, who picked her up about six feet beyond the stopping point where the ladies entered the car, and beyond the regular crossing. This version, as well as the plaintiff's entire theory of the case, is fully sustained by Miss Taylor in its most important details.

A summary of the facts bearing upon this feature of punitive damages is that the conductor had only two passengers to look after. He was asked in ample time to stop the car at Orleans street. He neglected to do it, presumably because engrossed by the conversation of his companions. He carried her to the end of the line, and became angry and quarreled with her on the return, demanding additional fare. He threatened to take her back to town, and joined the motorman in laughing at her, or in such manner as to indicate it to her and to Miss Taylor, her fellow passenger. He carried her again by her stopping place on the return, at a high rate of speed, laughing with the motorman at her discomfiture. He stood and saw her attempt to get off, and started his car before she was safely on the ground, throwing her violently, and seriously injuring her. We think these facts are sufficient not only to call for a charge upon the feature of punitive damages, but also to justify the jury in giving them, and, in view of these facts and the injury sustained, there is no error in the amount; and the judgment is affirmed, with costs.

LOUISIANA & NORTHWEST R. CO. *v.* CRUMPLER.

(Circuit Court of Appeals, Eighth Circuit, April 20, 1903.)

[122 Fed. Rep. 425.]

Carriers—Injuries to Passengers—Care Required.*

An instruction that a carrier was bound to exercise the highest degree of practical care to provide a safe roadbed, sound cross-ties, and safe cars to transport passengers, and if defendant was negligent in either of these respects, and plaintiff was injured in consequence thereof, he was entitled to recover, was proper.

Refusal of Requests.

Where, in an action for injuries to a passenger, the court charged that defendant could not be held accountable for a derailment that was occasioned by a defect, either in the track or car, against which defendant could not have guarded by the exercise of the utmost care, skill, and diligence, it was not error to refuse to charge that if the track, at the time of the derailment, was in good condition, defendant would not be liable on account of a defective track, and that if the derailment was occasioned by some defect in one of the trucks which could not have been discovered by the exercise of the "utmost care, skill, and diligence" defendant was not liable.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

W. B. Smith (J. M. Moore, on the brief), for plaintiff in error.

Hamilton P. Smead and Hamilton S. Powell, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is an action which was brought by J. F. Crumpler against the Louisiana & Northwest Railroad Company to recover damages which the plaintiff below sustained in consequence of the derailment of one of the defendant company's trains on which the plaintiff was riding as a passenger. The complaint alleged, in substance, that the derailment was occasioned by reason of the fact that the defendant company failed to provide the plaintiff with a safe car wherein to ride, in that the wheels or running gear of the car were so defective, for some reason unknown to the plaintiff, that they would not properly adhere to the rails; and that the defendant company failed and neglected to exercise proper care in providing a safe track upon which the plaintiff was to be carried, in that the roadbed where the derailment occurred was unevenly graded, that the ties upon which the rails rested were placed at an unsafe distance apart, and in that they were small, rotten, and otherwise defective and unfit for use. By its answer the defendant company admitted that the plaintiff entered one of its trains to be transported as a passenger from a station called Gibsland, on its road, to another station.

*As to the degree of care required of carriers of passengers, see footnote appended to Larkin *v.* Chicago & G. W. Ry. Co. (Iowa), 6 R. R. R. 852, 29 Am. & Eng. R. Cas., N. S., 852.

termed Brister, in the state of Arkansas. It admitted that the train was derailed, but denied all of the allegations of negligence that were contained in the complaint, and alleged that the derailment of the car was occasioned by unavoidable accident. The evidence in the lower court is not set out in full in the record, but it is conceded that it tended to show that the derailment of the train was caused by the bad condition of the roadbed at the place where the cars left the track; that many of the ties at that place were rotten; and that many of the spikes that fastened the rails to the ties were loose. It is likewise conceded that there was testimony to the contrary, which tended to show that the track where the derailment occurred was in a reasonably safe condition, and that the derailment might have been occasioned by reason of the fact that the trucks of one of the cars were new or stiff, being very little worn, and that this car first left the track as the train was moving around a curve and was approaching a trestle. At the conclusion of the testimony the court charged the jury to the following effect: That while the duty rested upon the defendant company, as a carrier of passengers, to exercise the highest practical care to provide a safe roadbed, sound ties, and strong rails securely laid, and safe cars wherewith to transport the plaintiff, and that if it was guilty of negligence in any one or in all of these particulars the plaintiff might recover, provided the injury of which he complained was the direct result of one of such acts of negligence, yet that the duty resting upon the defendant as a carrier of passengers did not compel it to exercise all the care and diligence the human mind could conceive of, nor such care as would render the transportation of passengers free from any possible danger to them, nor such as would drive the carrier out of business; that the carrier, for instance, was not required to lay iron or granite cross-ties simply because such ties were less liable to decay, and hence safer than wood; that it was required to exercise the highest degree of practical care, diligence, and skill, but that there were some casualties which human sagacity could not guard against and foresee, and that every passenger must make up his mind to meet the risks incident to the mode of travel which he adopts, that cannot be avoided by the highest degree of care and skill in the preparation and management of the means of conveyance, and to submit to the privations and restraints and conform to the provisions which might be made and enforced for his safety and protection. It further charged the jury that when a train of cars on which a person is riding leaves the track, or is derailed, such an occurrence creates a presumption that the carrier has been in some respects negligent, and entitles the passenger to recover for such injuries as he may have sustained in consequence of the derailment, unless the presumption of negligence is overcome by proof to the contrary introduced by the carrier. After giving these general directions, the trial judge instructed the

jury that the question whether the defendant company had been guilty of culpable negligence as charged by the plaintiff was a question of fact, which the jury must determine in the light of all the evidence in the case.

The defendant company took no exception to the aforesaid charge except to the paragraph which declared that the duty rested upon it to exercise the highest degree of practical care to provide a safe roadbed, sound cross-ties, and safe cars to transport the plaintiff, and that if the defendant was negligent in either of these respects, and the plaintiff was injured in consequence thereof, he might recover. This exception is not argued in this court, nor could the principle of law announced be seriously challenged, since the same doctrine was enunciated in Indianapolis, etc., Railroad Co. v. Horst, 93 U. S. 291, 296, 297, 23 L. Ed. 898, from which the charge of the trial court seems to have been compiled.

The defendant company complains principally because the trial judge declined to give two instructions that were asked in its behalf. One of these was an instruction to the effect that if the roadbed was in good condition where the first car jumped the track, that if the rails did not spread and the ties were not broken, and if the track at that place was intact after the wreck, then the jury could not find that the track was defective. The other was an instruction to the effect that if the wreck was caused by some defect in the car which first left the track, such as a stiff truck, and that the defendant, in the exercise of the utmost care, skill, and diligence, could not discover such defect or anticipate that the car might leave the track, then the jury should find for the defendant, unless the jurors believed that the defendant was running its train at a fast and unusual rate of speed.

We are of opinion that no error was committed in the refusal of either of these requests, as they were comprehended in substance by the instructions that were given by the court of its own motion. The first of these instructions stated a mere truism, namely, that if the track, at the time of the derailment, was in good condition, then there could be no finding against the defendant on account of a defective track. The other instruction, to the effect that if the derailment was occasioned by some defect in one of the trucks, which could not have been discovered by the exercise "of the utmost care, skill, and diligence," then the defendant was not liable, was a direction which was practically given by the court as heretofore shown. In other words, the jurors were instructed that the defendant company could not be held accountable for a derailment that was occasioned by a defect either in the track or car, against which the defendant could not have guarded by the exercise of the utmost care, skill, and diligence. We think that the case was submitted to the jury under instructions as to the law that were substantially correct, and that no

occasion exists for granting a new trial. It is highly probable that the jurv were of opinion that the defendant company had not succeeded in overcoming the presumption of negligence which was raised by the fact that while the train was moving at a usual rate of speed it left the track and rolled down an embankment.

The judgment below is accordingly affirmed.

ILLINOIS CENT. R. CO. v. VINSON.

(Court of Appeals of Kentucky, May 26, 1903.)

[74 S. W. Rep. 671.]

Instructions.

An instruction in an action for injury to a passenger should not charge that it was defendant's duty to have cars free from defects endangering the lives of passengers, and competent men to operate the train; there being no claim of defective cars and incompetent men, and the attention of the jury being thus diverted to questions not relied on.

Mixed Trains—Sudden Jerks—Assumption of Risk by Passenger.*

A passenger on a mixed train assumes the risk incident thereto from sudden jerks, under proper management, not incident to passenger trains.

Appeal from Circuit Court, Marshall County.

"Not to be officially reported."

Action by James Vinson against the Illinois Central Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

Reed & Oliver, W. Mike Oliver, J. M. Dickinson, and Pirtle & Trabue, for appellant.

Hendrick & Miller, for appellee.

BURNAM, C. J. This is a suit for damages resulting from personal injuries. The plaintiff, James Vinson, alleged that he purchased a ticket for transportation over defendant's road from Cairo, Ill., to Gilbertsville, Ky., and that, while endeavoring to alight from the defendant's train at his point of destination, he was, by the gross negligence of defendant's servants, thrown violently against the iron railing in front of the platform, thereby receiving serious injuries. The defendant, in its answer, denies that plaintiff's injuries were due to the negligence of its servants in charge of the train, and alleges that when plaintiff purchased his ticket he was informed that he would have to travel on a mixed train from Paducah to Gilbertsville, which was more dangerous to travel upon; that plaintiff's injury was received at a time when defendant's agents in charge of its train were exercising the highest degree of care that could be exercised in operat-

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*As to the liability of carriers for injuries to passengers by jerks and jolts of trains or cars, see foot-note appended to Davis v. Seaboard Air Line Ry. (N. Car.), 6 R. R. R. 790, 29 Am. & Eng. R. Cas., N. S., 790.

ing trains of that character; and it also relies upon a plea of contributory negligence. Plaintiff, in his reply, denies that defendant was exercising the highest degree of care in the operation of the mixed train on which he was traveling, or that his injuries were due to contributory negligence on his part. The testimony for plaintiff conduces to show that, after defendant's train had stopped at Gilbertsville, he arose from his seat and went forward to the front platform of the car on which he was traveling, for the purpose of alighting therefrom, and that the train, unexpectedly to him, started forward, and then suddenly stopped, which resulted in a violent concussion between the passenger coach and the platform on which he was standing and the freight car in front of it, which threw him against the iron railing surrounding the platform, with great violence, thereby inflicting serious injury. The testimony of the defendant conduces to show that the plaintiff was informed at Cairo, Ill., when he purchased the ticket for Gilbertsville, that if he went on a particular train it would be necessary for him to travel on a freight train, with a passenger coach attached, from Paducah to Gilbertsville, in order to reach his destination on that day; that, owing to the great number of cars on trains of this character, they were much more difficult to handle than regular passenger trains; that, when defendant's train approached its destination, immediately after the conductor had announced the name of the station of Gilbertsville, and while the train was still in motion, the appellee negligently left his seat and walked to the front of the coach on which he was riding, and that when the train was stopped the necessary and unavoidable concussion of the car in which he was riding with the freight car in front caused him to lose his balance and fall against the iron railing; that, if he had remained in his seat until the train had stopped, he would have escaped injury. The trial resulted in a verdict and judgment for plaintiff, and defendant has appealed.

The principal ground relied on for a reversal is that the trial court erred in instruction No. 3 given to the jury, and in refusing instruction "u" offered by the defendant.

Instruction No. 3 reads as follows: "The court further instructs the jury that, when plaintiff went on board defendant's train to go to Gilbertsville, it was then the high duty of the defendant company for its said cars to be free from defects which endangered the lives of passengers or their safety, and to have had competent men on board to operate and manage the train, and for the safety of the passengers. The defendant company was bound to exercise the highest degree of care and diligence in the management and operation of its train in transporting plaintiff to Gilbertsville, and landing him safely upon the depot platform of the company at that place. But the court further instructs the jury that the defendant was not liable for casualties, if any, which human sagacity could not foresee, and against which prudence could not provide." There is no claim in plaintiff's petition of any defects in the

defendant's cars which endangered the lives or safety of its passengers, or that it did not have competent men on board to operate and manage the train. No such issues as these were made either by the pleadings or the proof, and it is one of the fundamental rules of jury trials that the instructions should be based upon the issues raised by the pleadings and supported by the evidence, and should not divert the attention of the jury to questions not relied on by the parties. See En. of P. & P. vol. 11, p. 158. This instruction was an invitation to plaintiff's counsel to discuss questions not made by the pleadings or raised by the proof, and was therefore calculated to divert the attention of the jury from the real issues in the case. Travelers take the risks incident to the character of conveyance which they select, and the party furnishing the conveyance is only required to adopt the care, vigilance, and skill necessary to the management of the particular mode of transportation. Mr. Elliott, in his work on Railroads, vol. 4, p. 1629, in discussing this question, says: "In a general sense, it may be said that, where a railroad company carries passengers on freight or mixed trains, it must exercise the same high degree of care for the safety of its passengers as in other cases. But we do not mean that its duty and the precaution it must take are absolutely the same with respect to the operation of such trains as with respect to regular passenger trains. As to its roadbed, bridges, and the like, it would seem that the duty is absolutely the same, but it is obvious that the risk is greater in riding on freight trains; that the same appliances cannot be used, and the same speed and comparative freedom from sudden jerks attained. The duty of the company is therefore modified by the necessary difference between freight and passenger trains, and the manner in which they must be operated. And while the general rule that the highest practicable degree of care must be exercised holds good, the nature of the train and the difference in its mode of operation must be considered; and the company is bound to exercise only the highest degree of care that is usually and practically exercised, and consistent with operation of trains of that nature. So a passenger riding on a freight or mixed train must be deemed to assume all the inconveniences and risks usual and reasonably incident to travel upon such trains. He must exercise ordinary and reasonable care to guard against injuries from such risks, and must not voluntarily take a position where he is likely to be injured by a sudden jerk of the car, resulting from taking up slack in the ordinary way, or the like." The doctrine is also supported by Mr. Hutchinson in his work on Carriers, and in numerous decisions of courts. We are therefore of the opinion that the defendant was entitled to an instruction on this point.

For reason indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

ZIMMER *v.* FOX RIVER VALLEY ELECTRIC RY. CO.

(*Supreme Court of Wisconsin, July 3, 1903.*)

[95 N. W. Rep. 957.]

Injury to Passenger Riding around Curve—Negligence.

In an action against a street railway to recover for an injury sustained by plaintiff in falling from a car as it was going round a curve, the evidence examined, and *held* to sustain a finding that the accident was caused by defendant's negligence.

Case at Bar.

Evidence examined, and *held* to sustain a finding that plaintiff was not guilty of contributory negligence.

R ding on Platform—Contributory Negligence.

The special verdict prescribed by Rev. St. 1898, § 2858, was not designed to elicit from the jury a mere abstract of the evidence.

Special Verdict.

There was no error in refusing to submit requested questions to the jury which were covered fully or in substance in charging the jury under other questions submitted.

Contributory Negligence—Riding on Platform of Crowded Street Car.*

A passenger on a street car, required to ride on the platform because of its crowded condition, cannot be said as a matter of law not to have assumed any increased risk.

Proximate Cause—Instruction.

A charge that, in order to determine that defendant's negligence was the proximate cause of plaintiff's injury, the jury must "find from the testimony that the circumstances and conditions were such that the defendant ought to have known that its conduct might produce the injury which the plaintiff sustained, or to anybody else standing in the same relation he did," was vague, uncertain, and calculated to confuse the jury.

Appeal from Circuit Court, Outagamie County; John Goodland, Judge.

Action by Waldemar Zimmer against the Fox River Valley Electric Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

This is an action to recover damages for injury sustained by falling from a street car while riding thereon as a passenger for hire. The defendant answered by way of admissions, denials, and counter allegations. At the close of the trial the court found, by consent of counsel, that the plaintiff was injured by falling from a street car at the time and place described in the complaint, and the jury returned a special verdict to the effect (2) that such injury to the plaintiff was caused by the negligence of the defendant; (3) that such negligence consisted—"caused by the rapid motion of the car around a curve at the point where the accident occurred"; (4) that the negligence of the defendant was the proximate cause of the plaintiff's injury; (5) that there was no want of ordinary care on the part of the plaintiff at the time the accident happened which contributed to the injury he received;

*See foot-note appended to Williams *v.* International & G. N. R. Co. (Tex. Civ. App.), 3 R. R. R. 778, 26 Am. & Eng. R. Cas., N. S., 778.

(6) that the amount of damages sustained by the plaintiff by reason of the injury so received was $800. From the judgment upon such verdict in favor of the plaintiff for the amount stated, the defendant brings this appeal.

J. C. Kerwin, for appellant.

Eaton & Eaton (H. I. Weed, of counsel), for respondent.

CASSODAY, C. J. (after stating the facts). It appears that the plaintiff got onto the defendant's street car while standing on Main street, opposite the Menasha Bank, in the city of Menasha, August 6, 1899. The track at that point ran in a northeasterly and southwesterly direction. At a point 214 feet northeast of the place where the plaintiff got onto the car the track began to turn, and finally went directly east. While rounding the curve, the plaintiff fell off the car and was injured.

1. It is claimed that the case should have been taken from the jury for the reason that the evidence is insufficient to sustain a finding of negligence on the part of the defendant. Negligence is not a conclusion to be testified to by witnesses, but an inference to be deduced from the facts and circumstances disclosed by the evidence. Kaples v. Orth, 61 Wis. 533, 21 N. W. 633. Negligence is "an inference to be deduced from the facts and circumstances disclosed by the evidence. * * * When such facts and circumstances, though undisputed, are ambiguous, and of such a nature that reasonable men, unaffected by bias or prejudice, may disagree as to the inference or conclusion to be drawn from them, then the case should be submitted to the jury." Id.; McDougall v. The Ashland Sulphite-Fibre Co., 97 Wis. 392, 73 N. W. 327. Of course, in support of the verdict in favor of the plaintiff, on this appeal, we are required to consider the evidence in his behalf in the most favorable light it will legitimately bear. Nelson v. Shaw, 102 Wis. 277, 78 N. W. 417; Renne v. The U. S. Leather Co., 107 Wis. 320, 83 N. W. 473. In the case at bar the plaintiff testified to the effect that when he got onto the car it was full; that he at first stood on the lower step, and then on the upper step or platform, and held himself to the iron railing—the brass railing—on the back end, at the window, close to the door; that the car was overcrowded; that when the conductor came around and collected fare he put his hand in his side pocket and took out the money to pay his fare; that when he got at the curve the twist and fast driving around the curve threw him off and injured him; that his pocketbook was not fastened, and a part of the contents went on the ground and a part on the car. Other witnesses testified in his behalf, among other things, to the effect that the plaintiff fell off the rear platform, head first, just as the car got past the curve; that the car was running perhaps five miles an hour, and as it came to this curve it gave a twist, and threw him off—he fell off; just before falling he had hold of the railing at the side or end of the car; that others were

standing on the platform; that the car was overloaded—that is, people could not get off from the platform into the car; that the car went onto the curve just as it came down the main track; that the curve was sharp, and the car naturally gave a twist. Another witness, who was at or near the curve at the time, testified to the effect that as the car struck the curve it gave a very sudden lurch, and turned very sharply; the back end of the car came in view very suddenly; that the car came about the usual speed for it on Main street; that he did not notice any slackage at all; that it seemed to turn unusually quick; that he saw the plaintiff standing on the rear platform while coming, and afterwards saw him on the ground, but did not see him fall. Another witness on behalf of the plaintiff gave testimony of a similar import; and, among other things, to the effect that the car was crowded; that it came down on the main line from the bank without any perceptible stop or slackening of speed as it struck the curve; that it made an unusually sudden turn at the curve.

Viewing such testimony in the most favorable light for the plaintiff it will legitimately bear, and we are unable to say, as a matter of law, that the finding of the jury that the injury to the plaintiff was caused by the negligence of the defendant is not sustained by evidence. The same is true as to finding of the jury as to the absence of any contributory negligence on the part of the plaintiff.

2. Error is assigned because the court did not submit to the jury the 13 questions requested by the defendant. Such questions were mostly of an evidentiary character, the determination of which would settle nothing except the existence or nonexistence of certain items of evidence. This court has repeatedly held that the special verdict prescribed by the statute was never designed to elicit from the jury a mere abstract of the evidence. Section 2858, Rev. St. 1898; Heddles v. The C. & N. W. Ry. Co., 74 Wis. 258, 42 N. W. 237; The Montreal L. Co. v. Mihills, 80 Wis. 551, 50 N. W. 507; Mauch v. Hartford, 112 Wis. 54–58, 87 N. W. 816. These adjudications, and many others which might be cited, justified the court in refusing to submit most of such questions.

But counsel insists that the court improperly refused to submit certain "particular physical facts directly put in issue by the pleadings," and relies in support of such contention upon Lee v. The C., St. P., M. & O. Ry. Co., 101 Wis. 352, 77 N. W. 714. In that case the only evidence in support of the verdict was the testimony of the plaintiff himself, and that was contradictory and in direct conflict with the testimony of a large number of other witnesses, and the determination of the physical facts put in issue by the pleadings was essential to determine the truth of the transaction; and so it was in effect held that, under the circumstances of the case, it was an abuse of the discretion vested in the trial court not to submit such questions to the jury. See pages 355, 356, 362, 101

Wis., pages 715, 717, 77 N. W. In following that case it has since been said by this court that "the form of the questions must rest largely in the discretion of the trial court, and, as in other cases of discretionary action, the ruling of the court below will not be reversed, save for abuse of such discretion." Ward v. C., M. & St. P. Ry. Co., 102 Wis. 221, 78 N. W. 442. See, also, Baxter v. C. & N. W. Ry., 104 Wis. 315, 80 N. W. 644; Sladky v. Marinette L. Co., 107 Wis. 257, 83 N. W. 514. Particular objection is made because the court did not in form, as requested, submit to the jury the question whether the car was going at an unreasonable and dangerous rate of speed when the plaintiff fell off. The question was substantially covered, and almost in the language requested, in charging the jury under the second question submitted, and it was necessarily determined by the jury in answering that question. The charge in that respect is unobjectionable. Counsel insists that the court should have submitted to the jury the question requested as to whether the defendant ought to have foreseen, in the light of the attending circumstances, that an injury to passengers would be the natural and probable result of operating the car as it was operated when the plaintiff fell off. The question was fully covered by the charge under the fourth question submitted. We must hold that the special verdict covers all the facts put in issue by the pleadings, and that there was no error in refusing to submit questions to the jury.

3. Error is assigned because the court, at the request of the plaintiff, charged the jury on the question of contributory negligence as follows: "If you should find from the evidence that this car was crowded, and that the plaintiff was required to stand upon the platform, he was entitled to just as much care for his safety as though the car was not crowded, and in riding upon the platform he assumed the inconvenience resulting from the crowded condition, but did not assume any increased risk." This is sought to be justified by what was said by this court in Ward v. C., M. & St. P. Ry. Co., 102 Wis. 220, 221, 78 N. W. 442. But it will be observed that the refusal to give the instruction there requested was justified on the sole ground that the instruction was capable of being construed as stating "that a passenger on an excursion train is not entitled, as a matter of law, to expect just as much care to be exercised for his safety as a passenger upon a regular train." True, the court then said: "Doubtless a passenger, when he rides upon a crowded train, assumes the inconveniences resulting from its crowded condition, but he cannot properly be said to assume any increased risk; nor can the company be held to any less degree of care from the mere fact that the train is crowded, or the fact that it is an excursion train, and not a regular train." The trial court was manifestly induced to give the instruction so requested by reason of the statement in that opinion to the effect that a passenger

on an "excursion train" or a "crowded train" "cannot properly be said to assume any increased risk"—meaning thereby to assume any increased risk "as matter of law," as stated in the previous sentence—but the expression was unfortunate. Undoubtedly, a passenger upon a crowded car is required to exercise that degree of care which ordinarily prudent persons are accustomed to exercise under like circumstances. 1 Thompson's Com. Law Neg. § 2. Undoubtedly, the law requires a higher degree of care, attention, and diligence in some situations than in others. Id. The standard of care is what a reasonable and prudent man would ordinarily do under the circumstances of the particular case. Id. This court has held that "the test of negligence in such a case is the presence or absence of that degree of care which ordinarily prudent persons are accustomed to observe about the same or similar affairs, in similar circumstances." Guinard v. The Knapp-Stout & Co. Company, 95 Wis. 482, 70 N. W. 671; Nass v. Schulz, 105 Wis. 146, 81 N. W. 133. We must hold that the giving of the instruction quoted was reversible error.

4. In charging the jury upon the question of proximate cause, they were told that, in order to answer the question in the affirmative, they must "find from the testimony that the circumstances and conditions were such that the defendant ought to have known that its conduct might produce the injury which the plaintiff sustained, or to anybody else standing in the same relation he did." Counsel contends that this was vague, uncertain, and calculated to confuse the jury. We must concur in this contention. The rule on the subject has been considered so often as not to require repetition. Sheridan v. Bigelow, 93 Wis. 426, 67 N. W. 732; Andrews v. C., M. & St. P. Ry. Co., 96 Wis. 348, 357, 71 N. W. 372; Deisenrieter v. The Kraus-Merkel Malting Co., 97 Wis. 279, 72 N. W. 735; McFarlane v. The Town of Sullivan, 99 Wis. 361, 364, 74 N. W. 559, 75 N. W. 71; Dehsoy v. The Mil. El. Ry. & L. Co., 110 Wis. 415, 85 N. W. 973.

Other questions raised are not regarded of sufficient consequence to call for discussion.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

GREENFIELD v. DETROIT & M. RY. CO.

(Supreme Court of Michigan, June 23, 1903.)

[95 N. W. Rep. 546.]

Passengers on Freight Trains.

Railroad companies may prescribe the conditions on which passengers may ride on freight trains.

Same.

Plaintiff was not a passenger on defendant's freight train, if he rode

by arrangement with the conductor, contrary to a rule of the company known to both.

Same—Permits to Ride—Waiver.

A railroad may waive a rule that a person without a permit cannot ride as a passenger on a freight train, by a long-continued disregard thereof.

Same—Same—Same.

In an action for injuries received while riding on defendant's freight train, plaintiff testified that at one time he knew permits were required, but did not know that imperative instructions were given to require such permits; that he frequently rode without them, and had so ridden when defendant's train master was aboard; that others rode without them; that he had not obtained a permit for a year and a half before the accident, and had never been refused passage. Others testified that it was customary to ride without them on payment of fares. The fares and mileage collected were reported to the company: *held* to warrant instructions as to whether the company had waived a rule requiring persons riding on freight trains to have permits.

Remarks of Counsel.

In an action for injuries to a person riding on defendant's freight train, the defendant's attorney asked plaintiff's attorney to admit that the conductor was killed in the same accident; and plaintiff's attorney replied that "there is no question about that, and it is a fact that the railroad company settled with the widow": *held*, that as the trial court, on exception by defendant, immediately stated that the remark was improper, ought not to have been made, and must not be considered by the jury, the judgment would not be reversed therefor.

Loading Freight Trains.

In an action for injuries to a passenger on a freight train, occasioned by a derailment caused by a log falling from a forward car, the evidence examined, and *held* that it could not be said, as matter of law, that logs not chained were properly loaded.

Defect in Car Wheels.

In an action for injuries to a passenger on a freight train, caused by a derailment of a car, the evidence examined, and *held* to justify submitting to the jury whether a defect in a car wheel was an essential element in causing the accident, and whether it could have been observed by proper inspection.

Instructions.

Refusal to instruct that "if the plaintiff was a passenger on defendant's log train, and the accident which caused his injury occurred while the train in question was being operated in the usual manner in which log trains are operated upon well-managed railroads, and the train was such a train as is usually run for the purpose of carrying logs on well-managed railroads, the defendant [plaintiff] could not recover," was not prejudicial error, in view of explicit instructions given on defendant's negligence, and the jury being told that if the logs were properly loaded, or were liable to fall off when so loaded, plaintiff could not recover.

Error to Circuit Court, Alpena County; Frank Emerick, Judge.

Action by William Greenfield against the Detroit & Mackinac Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Defendant did a large business transporting logs on its road north of Alpena. Plaintiff was a lumber scaler, and attended to the purchase and shipment of logs over the road. He had been so employed during the seasons for lumbering for about 4½ years previous to January 21, 1900, when he was injured.

He testified that he was thus occupied for about 27 months, and that he then rode on these log trains on an average of 10 times per month. On January 21, 1900, defendant sent a train of 21 cars, with a competent crew, to Miller's Spur, on the Cleveland Branch of its road, to be loaded with logs. Some of the cars were loaded with maple logs, and others with peeled hemlock logs. Plaintiff entered the caboose for carriage to Alpena. During the run a log fell from one of the cars in front of the caboose. The forward end struck a stump, and the other end struck the axle of one of the wheels under the caboose, derailing it. Plaintiff immediately went on the flat car in front, which had only one tier of logs on the forward end. It was necessary to leave the end of the car next to the caboose free, in order to use the brakes there if circumstances required. When the caboose struck the switch, it was overturned, and carried the car in front with it, injuring the plaintiff. The defendant carried passengers, and had mixed trains for that purpose; that is, freight trains with a passenger coach attached, and running on schedule time. Plaintiff brought suit for damages, claiming negligence on the part of defendant. The negligence relied on to sustain the judgment is the improper loading of the logs, and a defective wheel under the caboose. The record presents three questions for determination: (1) Was plaintiff a passenger? (2) Should the judgment be reversed for the improper language used by plaintiff's attorneys upon the trial? (3) Was the defendant guilty of negligence? The facts, so far as essential, are stated in connection with each question discussed.

Dafoe & Scott and W. H. Simpson, for appellant.

Charles R. Henry and T. A. E. & J. C. Weadock, for appellee.

GRANT, J. (after stating the facts). The important question in the case is the first one.

1. The defendant had verbally instructed the conductors of its log trains to carry no passengers thereon without a permit, and the court so instructed the jury. The contention of the defendant is that plaintiff had knowledge of this instruction, and knew he had no right to ride upon this train as a passenger. The contention of the plaintiff is that he did not know it. It is true that plaintiff at one time knew permits were required, for he admits that he obtained at least 30. He, however, testified that he did not know that imperative instructions were issued to that effect; that he frequently rode without permits, and had so ridden when defendant's train master was aboard—sometimes paying his fare in money, and again by mileage; that others did so, and that he had not obtained a permit for a year and a half before the accident; that he had never been refused passage by any conductor; and that he entered the caboose, intending to pay his fare. There was also evidence from other witnesses that it was

customary for persons to ride on these trains without permits, upon payment of fares. The fares and mileage collected were reported to the company. There is no doubt as to the law. Railroad companies may prohibit the carriage of passengers upon their freight trains, or prescribe the conditions upon which they may ride thereon. Thomas v. Railway Co., 72 Mich. 355, 40 N. W. 463; Randall v. Chicago, etc., R. Co., 113 Mich. 115, 71 N. W. 450, 38 L. R. A. 666. Plaintiff could not become a passenger by making an arrangement with the conductor to permit him to ride, contrary to a rule of the company known to both. McVeety v. St. Paul, etc., R. Co., 45 Minn. 268, 47 N. W. 809, 11 L. R. A. 174, 22 Am. St. Rep. 728. The theory upon which this case was submitted to the jury was that the defendant had waived this rule, and that plaintiff was justified in so believing. That railroad companies may, through a long-continued, open, and notorious disregard of their rules by their employees, waive their enforcement, is well established. The instructions of the court upon this question were full and explicit, and it is not necessary to quote them. Counsel do not criticise them, their sole claim being that there was no evidence upon which to base such instructions. We think the question was properly submitted to the jury.

2. The conductor of the train was killed in the same accident. For the purpose of laying the foundation for objecting to testimony as to facts equally within the knowledge of plaintiff and the conductor, the defendant's attorney upon the trial asked the plaintiff's attorney to admit that the conductor was killed, to which plaintiff's attorney replied: "There is no question about that, and it is a fact that the railroad company settled with the widow afterwards for it." Defendant's counsel excepted to the remark, and the judge immediately stated that it was improper, ought not to have been made, and must not be considered by the jury. Defendant's counsel urge this as reversible error. If the presiding judge had not promptly and emphatically censured the plaintiff's attorney for making the remark, and told the jury that they must not consider it, it would have been error, within many decisions of this court. Such remarks are designed to prejudice the jury, else they would not be made. My Brethren are of the opinion that, under the circumstances, the case should not be reversed for this error, and I reluctantly assent to their opinion.

3. Defendant's counsel insist that the evidence conclusively establishes the fact that the logs were properly loaded. Experienced lumbermen, and other experienced persons in transporting logs by cars, witnesses for the defendant, testified that there were two methods of loading cars—one with the use of chains, and the other without chains; that there is no difference between the two in respect to safety; and that the main object in using chains is to carry larger loads. The chains are bound over the top of the logs, and then other logs

are placed loose on top of them to bind the load. They also testified that logs, when properly loaded, sometimes fell off. One of the defendant's witnesses testified that, "if loaded properly, they should be chained. Q. Are chains always used? A. No, sir. Q. What other way is there for loading properly? A. Well, they put in stakes of proper lengths, and proper kind of wood; and then, of course, in loading with stakes, without chains, they could not be loaded so heavy. Q. What is the purpose of using chains? A. Well, to put on a bigger load." Defendant also introduced evidence that at the time of the trial chains were no longer used. The hemlock logs upon this train—at least, those on the car immediately in front of the caboose—were peeled. It is manifest that in case of a sudden jar, upon stopping or starting the train, they would slip more readily than when chained, and more readily than would logs with bark on them. In view of this fact, and the testimony above quoted, we are not prepared to hold, as an undisputed fact, that these logs were properly loaded.

4. There was testimony introduced by plaintiff tending to show that a piece of the flange, about 19 inches in length, was broken out of one of the wheels under the caboose, and that there was an old crack in the outer rim at the place where the break occurred. One of the witnesses, who examined the wheels about 12 hours after the accident, testified: "I noticed one wheel that was broken. It was nearest to the switch toward Onaway. It had the appearance of being the first one that went off. It came off the rear end of the way car. The flange to it was broken off. There was about 19 inches broken off. Q. State how it was broken, and, after it was broken, how it left that part of the wheel? A. Well, on the flange it had about three-quarters of an inch of rust on it; looked like an old crack; and it struck something and knocked the rest of it. Q. After it was broken off the wheel, how did it leave the wheel itself? A. Left the wheel so it had no flange to hold it on the rail for nineteen inches. Q. You examined the wheel, did you? A. Yes, sir. Q. Could you find the flange? A. No; we looked for it, but couldn't find it. Q. As it was broken off on the wheel, how was the break? State how it looked? A. Well, it looked as though it was a crack in it, and it got rusted by the weather, or something made it rusted three-quarters of an inch deep. * * * The rest of the break was bright." The court instructed the jury that if this "was an essential element in the happening of the accident, and that it would not have happened without it, and that it could have been observed by a proper inspection, the defendant would be negligent in that regard." We think there was evidence justifying the submission of this question to the jury.

5. Complaint is made of the refusal of the court to give the following instruction: "If the plaintiff was a passenger upon the defendant's log train, and the accident which caused his

injury occurred while the train in question was being operated in the usual manner in which log trains are operated upon well-managed railroads, and the train was such a train as is usually run for the purpose of carrying logs on well-managed railroads, the defendant could not recover." As a general statement of the law, the request is sound. It is subject to criticism, in that it omits any reference to the specific acts of negligence alleged and relied upon. In view of the explicit instructions of the court upon the subject of the defendant's negligence, we think the refusal to give this request not prejudicial. The court distinctly instructed the jury that if the logs were properly loaded, or if they were liable to fall off when so loaded, plaintiff could not recover. There was no question about the equipment of the train or the method of operating it. The sole acts of negligence charged were the two, and to these alone the jury were specifically directed.

Judgment affirmed. The other Justices concurred.

LOUISVILLE RY. CO. v. HARTLEGE.

(Court of Appeals of Kentucky, June 4, 1903.)

[74 S. W. Rep. 742.]

Carriers of Passengers—Degree of Care.

In an action for injuries to a passenger by the derailment of a street car, an instruction that, if the injury and derailment of the car were by reason of some unknown cause, plaintiff could not recover, was properly refused, since defendant, as a carrier of passengers, was required to exercise the highest degree of care to ascertain and remove causes which might result in derailment and injury to passengers.

Physical Examination.

Where, in an action for injuries to an unmarried female, a physical examination of her person, demanded by defendant, could not have been had without exposure and an exploration of her vagina, which would have resulted in severe pain and in the loss of her hymen, which her physicians testified was then intact, and her clinical history, and symptoms were fully developed, a refusal of the trial court to order such physical examination is not ground for reversal of a judgment in her behalf.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"Not to be officially reported."

Action by Cora Hartlege against the Louisville Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Fairleigh, Straus & Fairleigh, for appellant.
W. O. Bradley, for appellee.

NUNN, J. The appellee claimed that she was a passenger on one of appellant's cars—a trailer car—and that while going over the intersection of the streets at a curve the car

jumped the track, and ran some distance off the track, throwing her against a seat and on the floor of the car, thereby injuring her hip and side. The appellant denied all negligence, and, in effect, pleaded that it was an unavoidable accident that caused the derailment of the car, and that the injuries the appellee sustained, if any, were unavoidable. The evidence was heard; the court gave to the jury instructions in apt language, and altogether unobjectionable; and the jury returned a verdict in favor of appellee for $500.

The appellant complains of the action of the court in failing to give two instructions which it offered. One of the instructions was embodied in the instructions given by the court. The other one did not contain the law of the case, and the court properly refused to give it. If the court had given it, the jury would have been told that if the injury and derailment of the car were by reason of some unknown cause, etc., then they should find for appellant. Appellant's counsel appear to overlook the fact that the law requires carriers of passengers by rail to know, or exercise the highest degree of care consistent with the proper and prudent conduct of their business to ascertain, and remove, causes which might derail their cars and injure their passengers, and this instruction would have been misleading to the jury in this respect.

The only other alleged error complained of by appellant is that the lower court refused to compel appellee to submit to a physical examination by a competent surgeon or surgeons, to ascertain the extent of alleged internal injuries. The appellant made a motion in the lower court to this effect, and in support thereof filed an affidavit of its superintendent, in which he stated that it was important to the ends of justice that the plaintiff submit to a personal and physical examination by competent surgeons. He stated that the plaintiff was claiming serious internal injuries, which could not be determined except by a physical examination. He stated that the examination could be had without any injury to the plaintiff, or causing her any pain, and that his company would pay the expenses therefor. In opposition, appellee filed the following affidavit: "Affiants, George C. Leachman and Jos. E. Bland, say that they are physicians and surgeons; that the injury to the plaintiff cannot be objectively determined by an examination of her person, except by exploring the vagina and breaking the hymen, which is now intact. Her injuries are to be determined by her clinical history and symptoms alone." And the same physicians made another affidavit, in which they stated that a physical examination could not be made of the appellee without injury to her, and would cause her pain, and could not be made without the exposure of her person. The substance of the evidence with regard to the injuries of appellee is as follows: That she suffered pains in her side and hip from the time of the injury until the trial;

that about a week after the injury she was compelled to go to bed on account of same, and there remained for two weeks or more, under the treatment of a physician, and his charge was $30; her medical bill was $10; that she was employed at $4 per week as saleslady in a store, and lost $8 on that account; that previous to her injury she had been in perfect health; that from and after the time she received her injuries to the time of the trial her menstruation periods had been prolonged from two to four or five days, which detained her from her work; that the flow was much greater and painful; and that she had not been troubled with it prior to the injury. Other lady witnesses corroborated her in these statements. The two physicians referred to, as well as two surgeons representing the appellant, were present, and heard all the testimony with reference to appellee's injuries, and the probable effects resulting therefrom. They testified—the two for appellee from their examination, and from the clinical history of the case as detailed by the witnesses—that this trouble with her menstruation was probably caused by the injuries received by her. The other two said that it could not have been so caused or produced. This question has been before this court within the last few years in the cases of Belt Electric Line Co. v. Allen, 102 Ky. 551, 44 S. W. 89, 80 Am. St. Rep. 374; Belle of Nelson v. Riggs, 104 Ky. 1, 45 S. W. 99; Ill. Cent. R. Co. v. Clark, 55 S. W. 699; L. & N. R. Co. v. Simpson, 64 S. W. 733; and Same v. McLain, 66 S. W. 391. From a review of all these cases, the weight of authority favors the right of defendant to demand a physical examination of plaintiff. The decisions, however, recognize that the defendant has no absolute right to have an order made to that end, but that a motion therefor is directed to the sound discretion of the court, and that its exercise will be reviewed on appeal, and corrected in case of abuse; that such an examination may be ordered when the facts can only be brought to light or fully elucidated in that way, and when it can be made without danger to the plaintiff's life or health, or without the infliction of severe pain or offending decency. The record discloses the fact that the extent of appellee's injuries were substantially disclosed by the means used, and that the drastic measures demanded by appellant were unnecessary to that end. The small verdict in this case is one evidence of that fact.

This court does not feel authorized, nor does it deem it proper, to reverse this case, and order another trial, and have appellee's person exposed, suffering humiliation and the loss of the evidence of her virginity, to relieve the appellant of so small a verdict, obtained under the circumstances shown in this record. Wherefore the judgment of the lower court is affirmed.

DOTSON *et al.* *v.* ERIE R. CO.

(*Court of Errors and Appeals of New Jersey, March 2, 1903.*)

[54 Atl. Rep. 827.]

Passenger's Right to Use Platform.

A passenger at a railway station may lawfully use the platform, or any part of it, for the purpose of exit to and from the company's trains, or for any other lawful purpose connected with his journey; but, in order to maintain a liability against the company for injury received from passing trains, his use of such platform must be limited to the purposes for which it is manifestly adapted.

Station Platforms—Construction—Degree of Care.*

It is the duty of the company to so construct its platform that it shall be reasonably safe for use by passengers, and to locate it in such proximity to the railroad tracks that it will afford a safe and convenient means of exit to and from its cars for its passengers, including those who may be aged and infirm.

Same—Care Required of Passenger in Using.

While trains are passing such platform, or are likely to pass, waiting passengers must keep such a distance from the edge of the platform next to the rail that they will not be struck by such projections as usually attach to ordinary trains. Under such circumstances, the edge of the platform is usually a place of danger, and if a passenger, while occupying such a place, is struck in this way, the injury cannot ordinarily be attributed to negligent construction by the company.

Same—Same—Contributory Negligence.

In the present case the plaintiff was walking along the platform, which was on a level with the top of the rails, toward the station, in order to purchase a ticket. She suddenly diverged in her course, toward the rail, so that she was struck from behind by the bumper of a slowly moving train just pulling into the station, on which she was to take passage, and was injured. The platform was constructed of crushed stone, which extended to the line of planking, 18 inches wide, along the nearest rail. The trial judge treated the outer line of the stone surface as the edge of the platform. The evidence showed that the bumper projected slightly over this edge of the platform, and it was left to the jury to say, in case they should find that plaintiff was walking within the line of the platform when she was struck, whether it was negligence in the company to have constructed its platform in such close proximity to the rail. It was *held*, in review, that no negligence was shown, and that the charge, in this respect, was erroneous.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Mary T. Dotson and husband against the Erie Railroad Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Corbin & Corbin, for plaintiff in error.

Warren Dixon, for defendants in error.

HENDRICKSON, J. This writ brings up for review a judgment of the Supreme Court entered upon a verdict rendered at the Bergen circuit. The defendants in error, who were the plaintiffs below, and are husband and wife, brought suit to recover damages for personal injuries to the wife, re-

*See monograph appended to Muhlhause *v.* Monongehala St. Ry. Co. (Pa.), 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131.

sulting from her being struck by the bumper of a locomotive engine of the defendant company at its station in Englewood, in the county of Bergen. For convenience, I will hereafter refer to her as the plaintiff below. The grounds of recovery averred in the pleadings were twofold. One was the negligent operation and management of the cars and locomotive of the defendant while running along the platform of the station, under the existing conditions, and the other was negligent construction of the platform, in locating it so near the tracks that its locomotives and cars would overlap the platform, and strike passengers walking along the same, so that on the occasion referred to the plaintiff was struck by one of the defendant's locomotives while she was walking along the edge of the platform, and was at the time in the exercise of due care. There were motions to nonsuit and to direct a verdict on the ground that no negligence was proved, and on the further ground of contributory negligence, which were overruled, and exceptions were allowed and duly sealed.

The learned judge, at the close of his charge, directed the jury that, in case they found a verdict for the plaintiffs, they should find specially whether it was based upon the negligent construction of the platform, or upon the negligence of the engineer in the management of his engine, or upon the negligence of both. In returning their verdict for the plaintiffs, the jury based their finding upon negligent construction, and not upon negligence on the part of the engineer. Thus all questions relating to negligent management of the company's train are eliminated from this discussion. We may appropriately deal with the other questions under the exceptions taken to the charge of the court, and to the refusal to direct a verdict.

Some facts should be stated, to properly illustrate the situation: The general direction of the road at this point was north and south. The station was on the easterly side of the tracks, the west-bound track being the nearer one to the station. The platform of the station was on a level with the top of the rails of the tracks. It consisted of flagging about the station, and then of crushed stone as it approached the track. Immediately along the rails was planking 18 inches wide, and within the rails and between the two tracks the crushed stone continued, so that the whole was on a level from the station to the east-bound track; thus serving as a means of ingress and egress to and from the trains on either of the tracks. The platform is thus extended to the east-bound track for a space up and down the tracks in front of the station of 300 feet. The whole platform is about 685 feet long, and south of the station there is a driveway for carriages along the platform, and 4 feet and a half below its level. The width of the platform at the station is about 50 feet, and at the south end of the station the rear line of the platform curves toward the tracks in a southerly direction until it is narrowed to a width

of 10.7 feet, and then runs southwardly of the same width, in rectangular form, along the tracks, a considerable distance. The accident occurred September 3, 1901, about 7:30 o'clock in the evening, and the place where it happened was well lighted by electric lights. The plaintiff came from the town, and entered the platform not far from its southerly end, and was on her way to the station to buy a ticket to her home, in Highwood, a station above. She had walked two or three hundred feet northwardly, and, when she reached a point variously estimated at from 50 feet to 200 feet from the station, she was struck by the bumper of the engine attached to the train she was about to take. It was moving slowly in the same direction she was walking, at the rate of 3 or 4 miles an hour; having slowed up to allow the east-bound train to pull out of the station ahead of it. The plaintiff was walking in about the center of the platform, until a few moments before she was struck, when she diverged in her course toward the rail. She testified that she was crowded toward the rail by passengers who alighted from the down train, but the other witnesses (her own as well as the company's) showed that in this she was probably mistaken. But the fact is not material to the points to be discussed. The engineer, upon seeing her turn toward the rail, gave the danger signal and put on the emergency brake, but too late to avoid the striking of the plaintiff about the hip, and throwing her down upon the platform, causing serious bruises and injuries. The bumper which struck the plaintiff is a square piece of timber, rounded over at the ends, to which the cowcatcher attaches; and it projects to the side far enough to cover the head of the cylinder, which it is intended to protect.

The learned trial judge had charged the jury that, if they found that at the time the plaintiff was struck "she was upon the planking alongside of this railroad, then the verdict should be for the defendant, because it is evident, and must have been evident to every adult person, that that planking was not intended for persons to walk upon," etc. He had further charged that "if she were not upon the planking, but were upon the gravel walk or platform, as it is called, then the question for you to decide would be whether or not she was guilty of negligence in going so near as that to the rail, under the circumstances of the case." It should be observed that there was no evidence in the case which characterized the platform as only extending to the planking next to the rail. Nor was there any evidence that the platform was not properly constructed, or that the planking was intended for a different use than the rest of the platform. The trial court further charged that, if the jury found upon both of these questions in favor of the plaintiff, then "was it negligence in the company itself to have that gravel platform approach so near to the rail that passengers would be likely to be endangered even if they exercised reasonable care in the use of the platform, and did

this accident spring out of that kind of negligence on the part of the company * * * ?" "Does the evidence satisfy you that the company failed to take proper care—and that means a high degree of care—for the safety of persons who came there as passengers, when they constructed that platform so close to the rails that there would be danger that persons in the prudent use of the platform would be struck by any part of the engine?" The jury was instructed that if they answered this question, as well as the previous questions, in favor of the plaintiff, then the verdict ought to be for the plaintiffs. Exceptions to these instructions were duly sealed, and error has been assigned thereon.

Even conceding for the present that the planking along the east rail was not a part of the platform, and that the graveled or stone surface along the planking is to be regarded as the platform proper, we are unable to concur in the view that any actionable negligence is shown by reason of its proximity to the tracks. Admittedly, it would then be a distance of 18 inches from the nearest rail. The evidence was that the engine in question was similar to the other engines used on the road, and that the projection of the bumper was the same in all of them. The engineer testified that the bumper extends a trifle beyond the planks (he could not say how much); that the plaintiff must have been about on the edge of the plank farthest from the rail when she was struck; that the bumper, as the witness stated it, "just glanced her," knocking her off sideways. In order to sustain the theory of the charge, it must be assumed, we think, that there is an implied invitation by the company to its passengers to stand upon any part of its platform—even at its very edge—when its trains are passing, and with it an obligation to exercise reasonable care for their safety when they may thus expose themselves to danger. In order to sustain a claim of liability against the owner or occupier for the injury sustained in the use of his premises where there is no express invitation, it must appear that there was an implied invitation; that is, that the person injured "entered the premises because he was led by the acts or conduct of the owner or occupier to believe that the premises were intended to be used in the manner in which he used them, and that such use was not only acquiesced in, but was in accordance with the intention or design for which the way or place was adapted, and prepared or allowed to be used." Sweeney v. Old Colony R. Co., 10 Allen, 364, 87 Am. Dec. 644; Phillip v. Library Co., 55 N. J. Law, 307, 27 Atl. 478; Turess v. N. Y., Susq. & West. R. Co., 61 N. J. Law, 314, 40 Atl. 614. Applying this test to the circumstances here involved, we must find that the plaintiff was using the extreme edge of the platform, near the rail, for a purpose entirely foreign to the intention and purpose of the company as to its use, and that there was no evidence to show that such a use was ever permitted or acquiesced in by the company.

It is undoubtedly a settled rule that a railroad company is under a duty to exercise ordinary and reasonable care to so construct and maintain station buildings, platforms, and approaches that they shall be safe for use by passengers. Elliott on Railroads, 1590. But this use is to be exercised in conformity to the manifest purpose for which the structure in question is adapted. And so a railroad company is only required to build platforms of sufficient dimensions to accommodate passengers getting on and off at their stations. Harkey v. R. & P. Ry. Co., Fed. Cas. No. 6065; Taylor v. Penn. R. R. (C. C.) 50 Fed. 755; Moreland v. Boston, etc., R. R., 141 Mass. 31, 6 N. E. 225; Kelly v. Manhattan Ry., 112 N. Y. 440, 20 N. E. 383, 3 L. R. A. 74; Lafflin v. Buffalo R. Co., 106 N. Y. 136, 12 N. E. 599, 60 Am. Rep. 433. It is manifest that this duty requires the railroad company to construct its platform sufficiently near to the rails that it will afford to passengers, including the aged and infirm, a safe exit to and from the trains And it is a matter of common knowledge that, in performing this duty, the platforms along the best regulated railroads are built so near the rails that the projections from the engines and the cars will overlap, to some extent, the edge of the platform. While the extreme edge of the platform is perfectly safe for passengers when occupying it for the purpose to which it is manifestly adapted, it is a matter of common knowledge that it is a place of danger when occupied while trains are passing or are likely to pass. It is the plain duty of the passenger when not getting on or off a train, but while he may be waiting upon the platform, or engaged in walking upon it, to keep such a distance from the edge of it next to the rail that he would be beyond the reach of the projections of ordinary trains. And the company is not liable for injury to a passenger who suffers himself to go beyond such a limit, and is injured by a passing train It was held in C., B. & Q. R. R. v. Mahara, 47 Ill. App. 208, that, where a platform is wide enough to give room for safety, the fact that it is so built that the edge nearest the track cannot be safely occupied as a standing place while trains are passing is not negligence. In Matthews v. Pa. R. Co., 148 Pa. 491, 24 Atl. 67, it was held that where a passenger waiting for a train at a station, the platform of which is properly constructed, stands so near the track as to be struck and killed by the bumper of a passing locomotive, the railroad company is not liable. See, also, McGeehan v. Lehigh Valley R. Co., 149 Pa. 148, 24 Atl. 205; Pa. R. R. v. Bell, 122 Pa. 58, 15 Atl. 561. It has also been held that a person has a right to walk on an elevated plank walk constructed by a railway company alongside of its track at a station for the use of passengers and the public, and to suppose himself in safety while occupying such walk at a point beyond the projection of all ordinary trains, and, if he is injured by a brake which projected more than the ordinary dis-

tance, the company is liable, etc.; it being the duty to warn the passenger as against extraordinary projections. Sullivan v. Vicksburg, S. & P. R. Co., 39 La. Ann. 800, 2 South. 586, 4 Am. St. Rep. 239. Upon principle somewhat similar, it was held that where an accident occurred to a passenger by his falling into the opening between platform and car, which had a width of from 11½ to 18 inches, the opening itself was not evidence of negligence. Fox v. Mayor, etc., of New York, 53 N. Y. St. Rep. 902, 70 Hun, 181, 24 N. Y. Supp. 43. Under similar circumstances, the plaintiff, without having hold of the railing, and without looking, stepped out, and fell between car and platform. There was no proof that the platform was not constructed in the ordinary way, nor that the space was greater than the exigencies of business required. There was no evidence of any previous accident. Held no evidence of negligence by the company, and no basis for recovery. Lafflin v. Buffalo, etc., R. R., 106 N. Y. 136, 141, 12 N. E. 599, 60 Am. Rep. 433.

There is another reason why we think the question of negligent construction should not have been left to the jury, and that is the entire absence of proof that the construction was faulty, as not being in conformity to the usual mode of construction adopted by well-regulated railroads or otherwise. Negligence must be proved. As was said by Bramwell, B., in Cornman v. The Eastern Counties R. Co., 4 Hurlst. & N. 781: "It is not enough to say there was some evidence. A scintilla of evidence or mere surmise that there may have been negligence on the part of the defendant clearly would not justify the judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude there was negligence." To the like effect is the decision in Caldwell v. Arnhein, 152 N. Y. 182, 190, 46 N. E. 310. See, also, Rigg v. The Manchester, S. & L. Railway Company, 12 Jur. (N. S.) 525.

There was also error in that part of the charge which assumes, without proof, as we think, that the platform stopped at the edge of the graveled surface, where it meets the planking along the rail, and was not, as it seems, from the facts developed, to be only a part of one construction, which served as a platform for trains on both of the tracks. Such a designation by the court would lead the jury to assume, without evidence, that the company had fixed the danger line at that point 18 inches from the rail, and thus enlarged, to a degree, the company's liability for the safety of the passenger.

We also think that, so far as the question of faulty construction of the platform is concerned, a verdict should have been directed for the defendant.

The result is that the judgment below should be reversed, and a venire de novo issued.

MCNEILL *v.* DURHAM & C. R. CO.

(*Supreme Court of North Carolina, April 28, 1903.*)

[44 S. E. Rep. 34.]

Carriers—Passes—Unjust Discrimination.

Laws 1891, p. 277, c. 320, § 4, provides that if a carrier subject to the act shall, by any special rate or other device, charge or receive from any person a greater or less compensation for any service rendered in the transportation of passengers than it charges or receives from any other person for a like service under substantially similar conditions, such carrier shall be deemed guilty of unjust discrimination. Section 25 contains exceptions authorizing carriers to give reduced rates to certain persons, not including newspaper editors, and a violation of such act is made punishable by a fine not exceeding $5,000 for each offense: *held*, that an agreement by a railroad company by which it gave a newspaper editor an annual pass over its lines in consideration of a publication of the company's schedule in his paper constituted an illegal discrimination, within such statute, inasmuch as it does not appear that the value of the advertisement would be exactly equal to the value of the free pass, and also because it was a sale to the editor of his transportation on credit, and not payable in money.

Riding on Pass Issued in Violation of Law—Pari Delicto.

Where a railroad company issues a newspaper editor an annual pass in violation of Laws 1891, p. 277, c. 320, § 4, forbidding discrimination, and the editor, while riding on the pass, is injured by the company's negligence, he and the company being pari delicto, he could not recover for the injuries sustained.

Douglas, J., dissenting.

Appeal from Superior Court, Moore County; O. H. Allen, Judge.

Action by W. H. McNeill against the Durham & Charlotte Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Guthrie & Guthrie, Murchison & Johnson, and H. F. Seawell, for appellant.

U. L. Spence, W. J. Adams, and Douglass & Simms, for appellee.

CLARK, C. J. This is an action for personal injuries alleged to have been received by the plaintiff April 6, 1900, by negligence of the defendant, while traveling on its road. The defendant, in its answer, among other things, avers that the plaintiff was a "trespasser on its train, having tendered to defendant no ticket, money, or compensation whatever for its fare—only a free pass, which had expired 1st January previously by its own limitation," and which further had on its back a stipulation exempting the company from liability under all circumstances for injury to his person, or loss or damage to his baggage. The plaintiff testified that he was "editor of the Carthage Blade, a newspaper published at Carthage. In 1899 I made a contract with the defendant to publish its time-table in my paper, as the consideration for the pass. I did publish the time-table, and the defendant agreed to continue the contract and renew the pass for 1900." It is true, he said he told the conductor he would pay the

fare; but, upon his making the above statement, the conductor accepted him as a free passenger.

Upon this evidence the motion for judgment as of nonsuit should have been granted. There is no lawful contract of passage, and the only right the plaintiff could claim against the defendant is that the defendant should not willfully and wantonly injure him. Cook v. Railroad, 128 N. C. 333, 38 S. E. 925. The General Assembly (Laws 1891, p. 277, c. 320, § 4) provided that "if any common carrier subject to the provisions of this act shall directly or indirectly by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of this act than it charges, demands or receives from any other person or persons for doing for him or them, a like and cotemporaneous service in the transportation of a like kind of traffic under substantial similar circumstances and conditions such common carrier shall be deemed guilty of unjust discrimination." Section 25 of said chapter (page 286) contains the exceptions which permit handling free and at reduced rates property of the United States, state or municipal governments, or for charitable purposes, or to or from fairs, and at exhibits thereat, and permits "the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the free transportation of persons traveling in the interest of orphan asylums or any department thereof, or the issuance of mileage, excursion or commutation passenger tickets. Nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of national homes or state homes for disabled volunteer soldiers and of soldiers' and sailors' orphan homes, including those about to enter and those returning home after discharge, under arrangement with the boards of managers of said homes: nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers or employees." These exceptions are very liberal, but they do not embrace newspaper editors. Subject to the liberal exceptions just recited, the General Assembly deemed that free transportation or any other discrimination was so much against public policy that a violation of the statute was made punishable with a fine "not exceeding five thousand dollars" for each offense. Nothing could be more clearly a discrimination than the ground upon which the plaintiff asked for and received free passage on this occasion, to wit, that for the year previous he

had advertised the schedule of the defendant company in his paper, and had received therefor a free pass over its line for the previous year, and this contract had been renewed for the year then current. It does not appear what was the value of the advertising done, charging for the space at the same rates as would be charged others; but, let it be what it may, it could not amount exactly—"neither more nor less"—to the value of a free pass to travel ad libitum an unstipulated number of miles over the defendant's road. Besides, it was an illegal discrimination to sell the plaintiff transportation on credit, and not payable in money.

This statute was before this court, and the clear meaning of the statute, and the duty of the court to enforce the public policy indicated by its unequivocal terms were stated in an exhaustive and able opinion by Mr. Justice Montgomery. State v. Railway Co., 122 N. C. 1052, 30 S. E. 133, 41 L. R. A. 246. In the opinion of Mr. Justice Douglas in that case it was stated that the number of free passes issued in this state per year was understood to be over 100,000, and, after deducting the free passes issued in the cases allowed by the act, over $250,000 of transportation was given away each year, mostly to the classes best able to pay, and that this quarter of a million dollars was perforce added to the fares of those who paid their way. This was to show the public policy which required that such discriminations should be forbidden. Sections 4 and 25 of the act of 1891, above quoted, were copied from the act of Congress forbidding such discriminations, and the rulings of the Interstate Commerce Commission and of the federal courts thereon have been to the same effect as our own; many of those decisions being cited by Justice Montgomery in State v. Railway, 122 N. C. 1063-1067, 30 S. E. 133, 41 L. R. A. 246. At page 1060, 122 N. C., page 135, 30 S. E., 41 L. R. A. 246, it is well said: "The thing which was denounced by the statute, and for which the defendant is indicted, is not the act of giving the free pass—the mere handing to the passenger the piece of paper on which was written the privilege of riding free—but the actual transporting the favored passenger without charge or the payment of fare. The law would be violated when no pass was actually issued, if the passenger was carried free. The favored passenger might be known to the conductor, or be known to him by preconcerted signs, or mileage books distributed gratis or sold at reduced rates, and in other ways."

The plaintiff knew that the defendant had no right to make a contract with him to transport him free an unlimited number of miles for an advertisement which in any aspect would not be the exact rate charged all other passengers. He knew that the statute denounced such attempted contract as unlawful and punishable with a fine "not less than one thousand nor more than five thousand dollars." While the plaintiff was not himself made indictable, as in some states, he knew that

the contract was unlawful, and he cannot now come into a court of justice and ask that the court shall give him compensation for damages sustained by the negligent breach of the contract of safe carriage. That presupposes a lawful contract, and he knew that this was an unlawful contract. He and the defendant are in pari delicto, and the court will leave the parties to settle their own controversy over damages for breach of a contract forbidden by law. In Cook v. Railroad, 128 N. C. 333, 38 S. E. 925, a tramp was stealing a ride. He was on the train unlawfully. In Pierce v. Railroad, 124 N. C. 83, 32 S. E. 399, 41 L. R. A. 316, a boy had jumped on a switching train, and was riding thereon, contrary to the town ordinance. The court held that the company was liable in such cases only for any willful or wanton injury inflicted by the employees of the company. Here the plaintiff was on the train illegally, and against a prohibition more severe than the violation of a town ordinance against the boy, or the stealing of a ride by a tramp. To same purport, Richmond & D. R. Co. v. Burnsed (Miss.) 35 Am. St. Rep. 656, and notes; Hendryx v. R. Co., 45 Kan. 379, 25 Pac. 893, and cases cited. The plaintiff is an educated, reputable gentleman—a member of an honorable profession; but, being on the cars illegally, seeking free transportation, or at least discrimination in rates, contrary to the prohibition of the statute, his rights as against the company are the same as those others who were also riding contrary to law. He neither shows nor avers willful, wanton, or malicious injury, and cannot recover. In State v. Railway, 122 N. C. 1052, 30 S. E. 133, 41 L. R. A. 246, the defendant set up the plea of ignorance of the law, but the court said every one was fixed with knowledge of the law. The plaintiff has had the additional advantage of the notice given by the construction of the statute in that case. In a subsequent case (State v. Railway, 125 N. C. 670, 34 S. E. 527) the court repeated that free transportation, or reduced rates, except in cases allowed by the statute, "would be an undue preference, forbidden by the statute, equally whether it was given upon a free pass from an official, or by a verbal order, or upon a ticket or mileage book not in truth paid for, but donated by the company. It is the fact of discrimination, and not the method by which it is done, which constitutes the offense." Subsequent to these decisions, the General Assembly re-enacted these sections as sections 13 and 22, c. 164, pp. 301, 304, Laws 1899, with no substantial change, though some other sections were repealed. The Constitutions of 11 states—Alabama, Arkansas, California, Florida, Kentucky, Mississippi, Missouri, New York, Pennsylvania, Washington, and Virginia—prohibit the issuing of free passes or giving reduced rates to any member of the Legislature or other officeholder whatever; and some of these Constitutions, like the federal statute and our statute, and the statutes of yet other states, as Colorado, Massachusetts, North

Dakota, Wisconsin, and others, forbid the issuing of free passes or reduced rates to any one whatever, with exceptions similar to those enumerated in our statute above set out. Indeed, the Constitutions of four states—New York, Missouri, California, and the recently adopted Constitution of Virginia—make the acceptance by any officeholder whatever of a free pass from a railroad or telegraph company, or other discrimination in his favor, a forfeiture of office. This recital will serve to show the importance and general acceptance of the public policy of equality in treatment by quasi public corporations, whose infringement our statute punishes with a fine "not exceeding five thousand dollars," and whose observance it is the duty of all courts to enforce.

We were cited to many authorities holding ineffectual stipulations upon the back of free passes exempting the common carrier from liability for injuries sustained by the holder thereof. These authorities are conflicting (4 Elliott, R. R. § 1608), and can only be considered when the pass is issued in one of the cases permitted by our statute. They have no application to a case like this, where the contract of free carriage is illegal, and the parties are in pari delicto.

This is the first case in which the illegal discrimination is set up by the common carrier, but it so happens that by the lapse of time it is now protected from indictment by the statute of limitations.

In refusing to grant judgment as of nonsuit, there was error.

DOUGLAS, J. (dissenting). I am inclined to think that in pari delicto is not a defense to a tort arising from the negligence of the defendant.

CHINN v. CHICAGO & A. RY. CO.

(Court of Appeals at Kansas City, Mo., May 25, 1903.)

[75 S. W. Rep. 375.]

Carriage of Live Stock—Action for Delay—Liability—Sufficiency of Evidence.

In an action against a carrier for delay in carriage of cattle, evidence considered, and *held* sufficient to take the case to the jury on the issue whether the delay was unreasonable and whether the shrinkage and depreciation in the cattle was occasioned thereby.

Demurrer to Evidence.

In the determination of defendant's demurrer to plaintiff's evidence, the evidence introduced by the defendant should be regarded as waived by it, or as if it had never been introduced.

Carriage of Live Stock—Delay—Judicial Notice—Increase in Traffic.

In an action against a carrier for delay in the carriage of cattle, the court may take judicial notice of the fact that the live stock traffic increases yearly.

Same—Same—Sufficiency of Evidence.

In an action against a carrier for delay in carriage of cattle, the evidence examined, and *held* to make a question for the jury whether the delay had been occasioned by an unavoidable "car famine."

Same—Same—Pleading—Findings.

Where, in an action against a carrier for delay in the carriage of cattle, there is in each count of the petition not only allegations of detention and delay, but also of discrimination, but the latter issue is by an instruction, at defendant's request, withdrawn from the jury, defendant cannot thereafter complain that the jury did not find on all the issues.

Appeal from Circuit Court, Lafayette County; Samuel Davis, Judge.

Action by Thomas M. Chinn against the Chicago & Alton Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

F. Houston, for appellant.
Alexander Graves, for respondent.

SMITH, P. J. The petition is in two counts, the first of which is based on a claim made for damages occasioned by the unreasonable delay and detention in shipping a certain number of cattle, of which plaintiff was the owner, from defendant's Mayview station to Kansas City, in consequence of which such cattle sustained extra shrinkage in weight and depreciation in value; and the second is based on a claim made for damages occasioned by the unreasonable delay and detention by defendant in shipping a certain number of hogs, of which plaintiff was owner, at its Mayview station, to Bloomington and East St. Louis, in the state of Illinois, in consequence of which such hogs sustained extra shrinkage in weight and depreciation in value, etc.

After a general denial, the answer to the first count alleges that defendant kept a large number of extra live stock cars on hand which were ordinarily and reasonably sufficient to meet all the demands of past experience made by farmers and shippers along its lines; that, owing to the extreme drought prevailing in the states through which its lines were located and operated, an unusual and unprecedented number of all kinds of live stock were offered for shipment over its lines, by reason whereof it was unable to promptly meet all the demands made upon it for stock cars, though it used every possible effort to do so; that a "car famine" prevailed, and in consequence of which it was unable to furnish the plaintiff the cars required until the 31st day of July, 1901—the date the shipment was made.

The answer to the second count was similar in allegation to the first. The replication contravened the new matter pleaded by the answer. There was a trial, and at the conclusion of all the evidence the defendant interposed a demurrer thereto, which was by the court denied.

The question thus raised is whether or not the evidence adduced by the plaintiff established his prima facie case, entitling him to go to the jury. On looking at it we find that it tends to prove that the plaintiff was the owner of 73 head of fat cattle and 148 head of fat hogs, and that on July 26, 1901, he requested defendant to furnish him four cars on the

29th at its Mayview station in which to ship his cattle to the Kansas City market; that on the 13th of July he requested defendant to furnish a car on the 16th in which to ship part of the hogs to Bloomington, and on the 15th he still further requested the defendant to furnish another car for the 18th to go to East St. Louis. It appears, further, that two days after he had requested the cattle cars he went to the defendant's station agent and told him that he wanted to know for certain whether the cars were going to be furnished at the time for which they had been requested, for if not he wanted to stop his cattle where there was feed and water, and thereupon the defendant's agent stated that he felt sure he (plaintiff) would get the cars, as he had requested them in ample time. On the day the cars had been requested the plaintiff drove his cattle, weighed them on defendant's scales, and put them in its stock pens, relying upon the assurance of the defendant's agent that the cars would be furnished to ship out on as requested. The cattle remained in the defendant's pens from 8 a. m., July 29th, until 6:30 p. m., the 31st, or 58 hours, without food, water, or shelter. It further appears that when the cattle reached the Kansas City market on the 31st they had sustained extraordinary shrinkage, and were greatly depreciated in value. They were in that condition which is known in market parlance as "stale cattle." The shrinkage and depreciation, as alleged in the petition, was well established by the evidence.

The evidence was amply sufficient to carry the case to the jury on the issue as to whether or not the detention and delay was unreasonable, and as to whether or not the shrinkage and depreciation was occasioned by such detention and delay. The hogs were detained from July 16th to the 19th, 84 hours, and what has just been said in respect to the detention and delay of the cattle is equally applicable to them. The contradictory evidence adduced by the defendant in support of the negative of the issue just referred to must, in the determination of its demurrer, be regarded as waived by it, or as if it had never been introduced.

The plaintiff's prima facie case having been established by practically uncontroverted evidence, it devolved upon the defendant to establish the excusatory defense pleaded by it. The facts pleaded as constituting this defense were controverted by the replication. While the defendant adduced evidence tending to support its special defense, it will not do to say this was not contradicted by any evidence of the plaintiff.

As negativing the defense of "car famine," the plaintiff testified that on the evening of the 29th of July, from the repeated assurances given by the defendant's agent, he felt so sure that the cars would be furnished him that evening he took a passenger train for Kansas City, expecting his cattle to follow. That night his hand in charge of the cattle telephoned him that no cars had been furnished; and he called

up Starr, defendant's superintendent, who informed him that he had a train of empties at Slater (about 25 miles east of Mayview), and that he would have his cattle loaded out early the next morning (July 30th). But he did not do this, and the cattle did not arrive in Kansas City until 7:30 a. m., July 31st, the run being only four hours. Besides this train load of empties, which Superintendent Starr said he had at Slater, plaintiff counted three empty stock cars standing idle at Odeassa, and another at Independence, and no stock in the pens at either place. This he saw himself as he went up on the passenger the evening of the 29th. So far from a car famine, there was a train load of empties at Slater and others scattered idly along the route from Mayview to Kansas City.

Plaintiff's testimony graphically explains the hog situation as follows: "Q. State to the jury with regard to the shipment of these hogs to Bloomington and East St. Louis. A. I ordered my cars on the morning of the 13th, one car for Tuesday, the 16th, to go to Bloomington, and on Monday, the 15th, another car for the 18th, to go to East St. Louis. The hogs came in on Tuesday morning. Q. What day of the month was that? A. Tuesday was the 16th, but we did not get the cars that day. I asked for cars Wednesday. Wednesday could not get cars. Wednesday night I telegraphed Mr. Starr, and asked him for cars, telling him I had no water and feed there. He did not answer. I got no answer. Wednesday night I went to the telephone and called Mr. Starr up, and told him I had no feed and water, and had another car coming the 18th, and if I was not going to get the cars I wanted to know it so I could haul them to Lexington to the Missouri Pacific; also I would have to move the otners. He told me I would not have to do that, as he thought he could get me the cars next day. Q. What happened then? A. The next day would be Thursday; he said he thought he could get them. I talked with the agent several times during the day about the cars, and he said they would not talk to him. Q. That was the Mayview agent? A. Yes, sir. Thursday night I telegraphed to Mr. Starr that the stock was still in the pens without feed and water; that was all I said to him. Friday morning I still heard nothing. The agent said he could not hear anything. Q. What day would that be? A. The 19th. I telegraphed to the railroad commissioner at Jefferson City if they would not please aid me. I got two cars that night."

The uncontradicted evidence of Wm. Kelley and W. E. Johnson, two large stock shippers, was that at the station of Higginsville, only seven miles from Mayview, where they shipped from, and where the Missouri Pacific is a rival of the defendant, they were getting cars from defendant in abundance all through this month, and especially at the times when defendant was holding and delaying plaintiff's shipments from Mayview. They also testified that every shipper at Higgins-

ville was fully supplied by defendant all this time. Again, the defendant's own evidence shows that it was using too many of its stock cars off its Western division, extending from Roodhouse to Kansas City (which the evidence showed furnished it 50 per cent. of its stock traffic), in supplying its stock cars to the Chicago, Lake Shore & Eastern Railroad, which had a contract for shipping rails from the Illinois Steel Company at South Chicago to the M., K. & T. system down in Texas.

Mr. Fellows, superintendent of car service on the Chicago & Alton Railroad, testified for defendant that: "Q. It seems he [A. D. Bethard, superintendent of the M., K. & T. Railroad car service] telegraphed you as follows from Denison: 'We have returned 25 your stock cars and tracing for balance, and will get them hurried to you as quick as possible. Those just received will be hurried to destination and released soon as possible and returned to you.' So that was only two days preceding the time when Mr. Chinn, the plaintiff here, was wanting cars at Mayview, and you had your stock cars, according to this telegram, scattered down there, and Bethard hunting them up? This was the state of affairs, was it not? A. We had some of our cars down there; yes, sir. Q. The Western division was demanding stock cars, and you could not supply the demand? A. That is right. Q. Now, Mr. Fellows, if your stock cars had not been employed in the steel business—the transportation of steel rails—you could have met the demand for the stock, and the facilities would have been better? A. Certainly; if they had run the cars back empty, the demand then could have been supplied. Q. The demand then could have been supplied if they had run them back empty? A. Yes, sir; after they had got the rails, if they had sent them back empty." Mr. Fellows further testified that in the year 1900 the C. & A. had on hand 619 stock cars, while in the year 1901 it had only 560 stock cars.

It is a matter of current history—of which we may take notice—that the live stock traffic increases yearly, and yet it seems that the defendant, according to this evidence of its agent, had decreased its facilities as a common carrier for handling the live stock business.

Assuming that every fact alleged in the defendant's answer as constituting its special defense had been proved, would any court, in the face of the plaintiff's countervailing evidence, which we have just noticed, have been warranted in peremptorily instructing the jury to find for the defendant? Here was a controverted issue of fact, and, such being the case, it would have been a glaring invasion of the province of the jury by the court to have given such an instruction.

There are, of course, cases where such an instruction may with propriety be given, as, for example, where the plaintiff's case, under the pleadings, turns wholly on the construction of a contract, the construction of which is simply a question of law, or where the answer admits the plaintiff's cause of

action, and sets up new matter as a defense, and the evidence fails to make out a prima facie defense. Ordinarily, when the plaintiff produces parol evidence to support his action, or when the defendant has pleaded new matter as a defense and produces parol evidence to support such defense, the issue of fact should be submitted to the jury. The evidence may be all one way, yet it is for the jury to say whether they believe the witness or not. The court has no right to tell the jury that they must believe the witnesses of one party or disbelieve those of the other. This has been the well-settled rule in this state for a long time. Bryan v. Wear, 4 Mo. 106; Vaulx v. Campbell, 8 Mo. 224; Gregory v. Chambers, 78 Mo. 294; Wolff v. Campbell, 110 Mo., loc. cit. 120, 19 S. W. 622; Gannon v. Gaslight Co., 145 Mo. 515, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505. Accordingly, the deduction is irresistible that the action of the court in refusing the defendant's peremptory instruction is subject to no just criticism.

The defendant further objects that the jury did not render a verdict on all the issues made by the pleadings. It is true that in each count of the petition there was coupled with the allegation of unreasonableness, detention, and delay that of discrimination of the defendant against the plaintiff as a shipper; but this latter issue at the conclusion of the evidence was, by an instruction given at the defendant's request, withdrawn from the jury. It does not therefore lie in the defendant's mouth to complain that the jury did not render a verdict on all the issues made by the pleadings.

Our attention has been called to no vice in any of the plaintiff's instructions. Those given for defendant were extremely liberal to it.

The petition sufficiently states a cause of action, and is supported by evidence quite ample to support the verdict, and it must follow that the judgment, which was for plaintiff, must be affirmed. All concur.

HOLT v. HANNIBAL & ST. J. RY. CO.

(*Supreme Court of Missouri, Division No. 2, May 19, 1903.*)

[74 S. W. Rep. 631.]

Expulsion of Passenger—Failure to Procure Ticket—Refusal to Make Change—Tender of Fare.

Plaintiff applied to defendant's station agent for a ticket, laying down a $10 bill in payment, and exhibiting a contract for a rebate on the purchase of a certain number of tickets, which entitled him to receive a credit certificate for each ticket bought. The agent prepared the ticket, but could not make the change. When the train arrived, he, in company with plaintiff, asked the conductor to change the bill, explaining that plaintiff wished to purchase a ticket, and that he had a credential contract. The conductor refused to make the change, but told plaintiff he could get on the train. Afterwards he demanded plaintiff's fare, and plaintiff stated he wished his credit slip. After threats to eject plaintiff, the conductor jerked the bell cord, and the train began to slow up, whereupon plaintiff said he would pay his fare.

Thereupon the conductor pulled the cord to go ahead. Plaintiff then asked him to "go through the train, and then come back and see me," whereupon the conductor grabbed him, and started towards the vestibule. Plaintiff offered evidence of a custom among conductors to issue credit slips to passengers in such cases: *held*, that if plaintiff, after the conductor attempted to eject him the second time, tendered his fare, it was the conductor's duty, under the circumstances, to accept it, and in ejecting him afterwards the company would be liable.

Same—Tender of Fare—Burden of Proof.

The burden was on defendant, a railroad company, sued for ejecting a passenger, to sustain its defense that he had refused to pay his fare, etc.

Same—Moving of Train—Nominal Damages.

Rev. St. 1899, § 1074, provides that, if any passenger shall refuse to pay his fare, it shall be lawful for the conductor to put him out of the cars on stopping the train: *held*, that a railroad in ejecting a passenger while the train is in motion is at least liable for nominal damages.

Custom to Issue Credit Slips to Passengers.

Evidence was admissible that it was a custom among conductors of defendant's road to issue to passengers on payment of cash fares credit slips on contracts like the one exhibited by plaintiff.

Appeal from Circuit Court, Shelby County; Nat. M. Shelton, Judge.

Action by Charles H. Holt against the Hannibal & St. Joseph Railway Company. Judgment for defendant and plaintiff appealed to the Court of Appeals, which certified the case to the Supreme Court. Judgment below reversed.

W. O. L. Jewett & Son, O. D. Jones, and R. A. Cleek, for appellant.

Spencer & Mosman, J. D. Dale, and Geo. W. Humphrey, for respondent.

FOX, J. This cause was certified to the Supreme Court by the St. Louis Court of Appeals for the reason that in the opinion of one of the judges of that court the opinion announced is opposed to the decision of the Supreme Court in the case of Perkins v. Railway Co., 55 Mo. 201. The full statement of facts and the opinion of the St. Louis Court of Appeals, are as follows:

"BOND, J. This action is for the unlawful ejection of a passenger from a train of defendant, which the petition alleged was done by the conductor in a rude, angry, and violent manner, to the great bruising and injury of plaintiff's body. The petition asked judgment for $1,000 for actual damages occasioned by physical injuries, loss of time and business, and $1,400 as punitive damages. The answer avers that plaintiff was put off the train because he refused to pay his fare, and denies the other allegations of the petition. The evidence for plaintiff tends to show that on June 13, 1899, he applied to the station agent of defendant at Shelbina for a ticket to Quincy, Ill., at the same time laying down a $10 bill in payment, and exhibiting a contract for a rebate upon the purchase of a certain number of tickets, which contract entitled him to receive a credit certificate for each ticket

bought until the sum specified was expended for tickets. The station agent prepared the ticket requested, the cost of which was $1.60 and, after looking in his drawer, and finding only silver in the sum of $3.40, proposed to plaintiff to wait until the train arrived, when he (the agent) would get change for the $10 bill from the conductor, and hand plaintiff a $5 bill, $3.40, the change already on hand, and the ticket for $1.60, thus completing the transaction. In a few moments the train arrived, and the station agent, in company with plaintiff, approached the conductor, and requested him to change the $10 bill, the agent explaining that plaintiff wished to get a ticket to Quincy, and had a credential contract, and nothing less than $10 to pay for it. The conductor refused to change the $10 bill, but said to plaintiff, if he wanted to go to Quincy, to get on the train. That thereupon the plaintiff boarded the train, and, after taking his seat, was approached by the conductor, who demanded his fare. He answered he had no ticket, as the conductor knew, but wanted to be protected in paying his fare by getting a credit slip for the amount thereof to be used as a future basis for rebate on the said mileage contract. What was then said and done is thus detailed in plaintiff's examination: 'I says, "You asked me to come in here, and I want the benefit of my credential." He says: "Damn you, I want your fare. I have got no time to monkey with you." I says: "You can issue me a credential, or fix me up a statement. You understand the situation." He says, "What are you going to do?" I says "What are you going to do?" He says, "Damn you, I will put you off." I says, "Don't you put me off." He says: "I want your fare, and I want it damned quick. What are you going to do?" I says, "Are you not going to issue a credential?" He jerked the bell cord, and the train began to slow up. I says, "Although it is unfair and unjust, rather than be put off the train this time of night, I will pay my fare." He then signaled by pulling the bell cord—signaled them on. He then says, "I want your fare, and I want it damned quick." I says to him, "Will you please, sir, go through the train, and then come back and see me." He then says, "Damn you," and gave me a grab, and started with me towards the vestibule. Q. Did he take hold of you? A. He grabbed me by the left arm, and jerked me up, or jerked me out of the chair. The chair was a reclining chair. When he grabbed me up, says I: "Take this fare. Don't you put me off." He says, "Damn you, you have got to get off here," and he pushed me on into the vestibule. Q. Was he before you or behind you? A. He was behind me, pushing me on. When he got out into the vestibule, he pulled the cord. I says, "Take this fare, and don't put me off this time of night." He says, "Damn you, you have got to get off." He then opened up the vestibule, and pushed me down. Then he says, "Take your grip, or I will throw it off." I took my grip. The train was slowed up,

and he pushed me down. I fell, and struck this side of my face on the coal cinders and bruised my leg.' Plaintiff also testified as to other injuries occasioned by his expulsion from the train, and his great chagrin and mortification, occasioned by the violence of the conductor in throwing him from the train. He further stated that he had in his hand the $10 bill, and tendered it in payment of his fare before and until he was put off the train. The conductor's version of the transaction is that when he asked plaintiff for his fare it was refused unless he would give plaintiff a credit slip for the amount thereof to protect him in his credential contract, whereupon he proposed to put plaintiff off, and signaled the train to stop; that, after it stopped, plaintiff offered to pay his fare, when he signaled the train to resume its journey, and again approached plaintiff, and demanded his fare, and after some words plaintiff positively refused to pay his fare, and that he put him off the train; that in so doing the only violence he used was to break the hold which plaintiff took on one of the brass rods in front of the car window when he reached the platform; that after this was done plaintiff alighted, and he closed the vestibule door, and saw no more of him. The case was submitted to a special jury, and a verdict and judgment rendered for defendant, whereupon plaintiff appealed to this court.

"Opinion of the Court.

"Under the common law, carriers of passengers, for their own protection and for the comfort and convenience of the traveling public, were entitled to eject from their vehicles, without unnecessary force, any passenger who refused to pay the established fare for such transportation, or whose behavior was disorderly, or who was infected with a contagious disease. In this and many of the states the doctrine of the common law on this subject has been superseded by statutes defining the causes and regulating the procedure for the lawful ejection of a passenger from the train upon which he has embarked. Our statute is, to wit: 'If any passenger shall refuse to pay his fare, or shall behave in any offensive manner, or be guilty of repeated violations of the rules of the company, it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place, or near any dwelling house, as the conductors shall elect, on stopping the train.' Rev. St. 1899, § 1074. It will be seen from the terms of the foregoing statute that a passenger can only be put off the train, for the reasons therein specified and in the manner therein prescribed, when it shall have been brought to a stop at one of its stations or near any dwelling house. With reference to these provisions, our statute is a liberal copy of the one in force in the state of Wisconsin, and it has been uniformly held in that state, that such a statute by necessary implication prohibits the forcible ejection of a passenger for refusal to pay his fare, except at the

places and in conformity with the other conditions specified in the statute. Boehm v. Duluth R. R. (Wis.) 65 N. W. 506, and cases cited. And such is the uniform doctrine in other states having similar statutes. I. C. R. R. Co. v. Blance Latimer, 128 Ill., loc. cit. 171, 21 N. E. 7; St. Louis, Iron M. & S. R. R. Co. v. Branch, 45 Ark. 524; Stephen v. Smith et al., 29 Vt. 160. A passenger is one who enters the vehicle of a carrier with the intention of paying in money the usual fare for his transportation, or who is supplied with a ticket or pass entitling him to ride to a given point. After his relation as such is established, the next inquiry in the construction of the statute is, what is meant by the terms 'shall refuse to pay his fare,' upon which depends the lawfulness of his expulsion from the train? This particular delinquency, unlike the other instances of misconduct mentioned in the statute, concerns the carrier alone, and is of no interest to fellow travelers. It authorizes a removal of the passenger upon the just principle that he who refuses to pay shall be refused a ride. The law only imposes the duty of carriage for reasonable hire; it does not force carriers to perform this obligation without any compensation. To protect them in the reasonable avails of their services, the statute (like the common law) permits them to compel payment of a just recompense under penalty of ejection of a recusant passenger. In applying this wholesome doctrine, a greater number of the cases in other states have announced the rule that, although the passenger who has once refused to pay his fare may change his mind, and offer to pay his fare, before any steps are taken for his expulsion, and thus gain the right to complete his journey, yet, the moment anything has been done looking to his removal from the train, no submission thereafter, nor an actual tender of the fare during the process of his expulsion, will make the same unlawful, or entitle him to remain on the train. 4 Elliott on Railroads, § 1637, and cases cited; Fetter on Carriers of Passengers, vol. 1, § 314. This rule, however, is not universal, and its extreme rigidity is opposed to some well-considered cases in other states. L. & N. Ry. v. Garrett, 8 Lea, 438, 41 Am. Rep. 640; Railway v. Bond, 62 Tex. 442, 50 Am. Rep. 532. In this state the question as to whether the passenger may prevent his ejection if he actually tenders the money for the fare after the process of expulsion has begun, but before it is completed, has not been directly decided. The remarks of the court in Perkins v. Railway, 55 Mo. 211, are far from determinative in themselves. The appeal in that case was by the defendant railroad, and the principal question reviewed was the liability of such corporations for punitive damages. In considering, however, the receivability of the evidence introduced by the respondent going to show that, while he was being put off the train for refusal to pay the full fare demanded, a fellow passenger offered to pay the balance of his fare, the court remarked that the trial court had correctly

instructed that such evidence was 'not proper to show that plaintiff was from that time entitled to remain on the car.' It is evident that the mere offer or expression of a willingness to pay, whether by a passenger or other person, is quite a different thing from the actual tender of the money. The former would not be considered in a matter of contract for the payment of money, as of any legal efficacy whatever, while an actual tender would, under such circumstances, completely stay the running of interest on a matured debt. Besides, the mere offer to pay fare might be followed by subsequent refusals of actual payment ad infinitum; and, if that alone were sufficient ground for the cessation of the ejection of a nonpaying passenger, the railroad companies might find it out of their power to adhere to any schedule as to time in the running of their trains, and the traveling public might be subjected to the annoyance and inconvenience of repeated stoppage of the train thus occasioned. No such consequences, however, could ensue if, after a first refusal, the carrier was only required to cease the ejection of a nonpaying passenger upon actual tender of the fare; for by receiving the money thus tendered the company would at once get its own, and escape even the delay attending a complete expulsion of a passenger, and necessarily avoid any future repetitions of the delay in running its train incident to controversies over fare with a passenger of a vacillating mind. If the rulings as to the effect of second offers to pay fare in prevention of expulsion had been made to conform to this essential distinction between the actual tender of the money and the mere promise or offer to pay, they would rest upon a just and rational basis, which would effectually prevent any of the mischiefs sought to be escaped by the doctrine of the finality of the first refusal to pay fare as a ground of lawful ejection. A passenger is entitled to a reasonable indulgence in the discussion of his rights and duties in the payment of fare when it is demanded by the agent of the company. This is illustrated in the case at bar. Here the uncontradicted evidence shows that the plaintiff had voluntarily sought to get a ticket before boarding the train, and also a credit slip in pursuance to a contract to give him a rebate after purchase of tickets to a certain amount which was binding on the defendant; that his difficulty in this matter was explained to the conductor by the station agent of defendant. What is more natural than that the plaintiff, when approached on the train, should endeavor, while paying it, also to secure from the conductor a credit slip, such as the station agent would have given him before boarding the train if the $10 bill tendered in payment could have been changed. Nor do we think his insistence upon this to a certain degree was unreasonable, especially in view of the testimony which plaintiff proffered, but which was excluded by the court, tending to show that it was the habit and custom of the conductor on defendant's road to issue just such credit slips in similar

cases. Under these special circumstances the subsequent actual tender of the money for his fare by plaintiff, if made before or during the process of his expulsion by the conductor, should have been accepted, and he should have been allowed to remain upon the train. We therefore think that instruction No. 4, requested by plaintiff and refused by the court, is applicable to the phase of the evidence presented by the testimony given for plaintiff, and that such instruction should have been given. The instruction is, to wit: '(4) Although the jury should find that plaintiff did at first refuse to pay his fare, yet if, when he saw the conductor was stopping the train to put him off, he then changed his mind, and offered to pay and tendered to the conductor the money for his fare, it then became the duty of the conductor to accept it, and if you so find that plaintiff did thus offer to pay, your verdict must be for the plaintiff.'

"2. The learned trial court also erred in refusing the instruction (No. 6) requested by plaintiff to the effect that the burden of sustaining the affirmative defense, set up in its answer by a preponderance of the evidence rests, upon the defendant. The defendant could only escape liability for putting plaintiff off the train by proving the happening of the contingency upon which such right would accrue under the statute, supra, and by further proving a compliance with all the provisions of such statute regulating the mode and place of its enforcement. Necessarily, the burden of sustaining this defense pleaded in the answer rests upon the defendant.

"The learned trial court also erred in giving instruction No. 10 at the request of defendant, which stated substantially that plaintiff would not be entitled to recover upon evidence that he was put off defendant's train while it was in motion. This instruction is diametrically opposed to the provisions of the aforesaid statute, which requires that the train shall be stopped before the ejection of a passenger for the causes mentioned in the statute. For the breach of this statutory duty defendant was clearly liable for nominal damages, irrespective of any injury caused thereby to plaintiff. If any injury resulted to plaintiff from his ejection while the train was in motion, then defendant would also be liable for substantial damages, but its infraction of any one of the statutory provisions regulating the right of expulsion—whether as to place or stoppage of the train—of itself entitled an expelled passenger to recover nominal damages, regardless of the infliction of any other injury upon him. 2 Rorer on Railroads, p. 666, and cases cited; St. Louis, I. M. & S. Ry. v. Branch, 45 Ark., loc. cit. 529.

"The learned trial court also erred in excluding the testimony tendered by plaintiff to prove that it was the usual custom and habit of conductors on defendant's road to issue to passengers upon payment of cash fares credit slips upon contracts like the one exhibited by plaintiff. Such evidence had a tendency

to show a waiver by defendant of the requirement in such contract with reference to the obtention of such credit slips from station agents at the time of purchase of tickets. If it went to the extent of showing a general custom and habit on the part of the conductors to issue such slips, it was clearly competent, and it makes no difference whether plaintiff was advised of the authority thus conferred upon defendant's conductors before entering the car. He had the right, if the authority existed, to demand its exercise. It is the fact of agency which binds the principal, not knowledge thereof by the party dealing with the agent. If the authority to issue such credit slips was confided by defendant to the conductor in charge of its train when plaintiff was put off, then his ejection was unlawful, and, in the event of proof of such authority on another trial, the jury should be so instructed.

"For the foregoing reasons the judgment herein is reversed, and the cause remanded.

"BLAND, J., concurs."

On motion for rehearing, which was overruled, JUDGE GOODE withdrew his concurrence, and dissented.

We have reached the conclusion, after a careful consideration of the case of Perkins v. Railway Co., supra, that the opinion of the St. Louis Court of Appeals is not in conflict with it. The opinion, as herein quoted, correctly declares the law as applicable to the facts of this case. Hence we adopt it as the opinion of this court, and accordingly order that the judgment of the trial court be reversed and remanded. All concur.

GARRISON v. UNITED RAILWAYS & ELECTRIC CO. OF BALTIMORE.

(Court of Appeals of Maryland, June 29, 1903.)

[55 Atl. Rep. 371.]

Street Railways—Transfers—Time Limit.

Acts 1900, p. 463, c. 313, requiring the street car company of Baltimore City to give, on request, each passenger paying a cash fare a transfer for a "continuous" ride, does not prohibit the company from limiting the time within which a transfer can be used.

Same—Same—Same.

When the time limit of a transfer issued by a street railway has expired, the transfer is void on its face, and a conductor is justified in refusing to honor it and demanding a fare.

Expulsion of Passenger.

When a conductor of a street railway has given a passenger a reasonable time and opportunity to pay his fare, and the passenger has refused, and the conductor has commenced the process of ejecting the passenger, the ejection may be completed, even though a fare be tendered, as the passenger has forfeited his rights as such.

Appeal from Court of Common Pleas; Henry D. Harlan, Judge.

Action by Robert M. Garrison against the United Railways & Electric Company of Baltimore. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, and SCHMUCKER, JJ.

Hyland P. Stewart, for appellant.

J. Pembroke Thom and B. Howell Griswold, for appellee.

McSHERRY, C. J. There are two controlling questions arising on this record, and they are presented by the prayers submitted at the conclusion of the evidence. The bill of exceptions brings up for review only the rulings on the prayers. The first question is this: Was the trial court right in ruling that a transfer delivered to the appellant by the conductor of the appellee's Lombard street line was void after the expiration of the time limited on its face for its use? The court below held that the transfer was void, and accordingly granted the appellee's second prayer, and rejected the appellant's first prayer. The second question is this: Was the conductor of the Wilkins avenue car, upon which the appellant attempted to use the transfer, justified in ejecting the appellant when the latter refused to pay his fare, and after the conductor had stopped the car in order to eject the appellant, though, after the car had been stopped for that purpose, a companion of the appellant offered to pay the fare? This question was answered by the trial court in the affirmative by the granting of the defendant's fifth prayer. Besides the two controlling questions just stated, there are some subsidiary inquiries which will be considered later on.

1. It appears that the appellant, with two friends, boarded a car of the appellee at the corner of Lombard and Carey streets, in Baltimore, about 3:40 or 3:45 on the afternoon of March 6, 1901. They paid their fares, and asked for transfers to the Wilkins avenue line going south. The conductor gave the transfers as requested, and punched the date, the hour, 3:50, and the transfer point, Gilmor and Lombard streets. The transfers were limited as to the time within which they could be used, and the time thus limited was indicated by the punch marks which the conductor made. It is alleged by the appellant—and for the purposes of this discussion it will be assumed to be true—that no car passed south on Wilkins avenue until after the time limited for the use of the transfer had expired. By the act of assembly of 1900 (page 463, c. 313) the street car company of Baltimore City is required to issue transfers. The first proviso in that enactment reads: "Provided, that such company shall give a free transfer, when the same shall be requested, upon the payment of each cash fare, which transfer shall be good at all points of intersection of lines of said railway for a continuous ride." The appellant and his friends boarded the

first car going south on the Wilkins avenue line, and presented the transfers. The time within which they could be used had then elapsed, and the conductor refused to take them. He demanded the payment of the regular fare. This was refused, and the car was stopped, and the conductor went in search of a policeman. When the conductor returned with a policeman and re-entered the car, he requested the appellant and his companions to get off the car. This they refused to do, and one of them offered to pay the fare, which the appellant alleges the conductor refused to receive. According to the appellant's testimony, the conductor grabbed the appellant viciously by the shoulders, and shoved him violently out of the door of the car, and up against the heavy metal controller, severely hurting his left arm. The fare was again tendered by the appellant's companions, and after much parley was accepted, and the car was started, and the appellant proceeded to his destination. The policeman flatly contradicted the statement of the appellant with respect to the alleged use of force.

It has been insisted by the appellant, against whom the jury rendered a verdict, and against whom a judgment for costs was entered, that the appellee company had no authority to limit the time within which a transfer must be used. We cannot accede to this contention. Whilst the act of 1900 (page 463, c. 313) contains no specific provision declaring for what length of time the transfer shall be good, it is obvious that it does not contemplate that no reasonable regulation shall be made upon the subject. In the nature of the case, regard being had to the character and the magnitude of the business of conveying on street cars hundreds of thousands of passengers, it would seem to be a very proper precaution for the company to protect itself against imposition by affixing to the transfers which it is required to issue a limit beyond which they should not be available for use. When thus limited, they are void, and do not entitle the holder to ride on the cars after the expiration of the time specified by the punch marks. The statute makes the transfers good for a continuous ride. That language would seem to exclude the notion that there can be no time limit affixed. A continuous ride does not mean a ride interrupted by a considerable interval of time. If the time within which the transfer may be used expires by reason of the failure of the company to run its cars frequently enough, that fact does not make the transfer good, or authorize a conductor to honor it. In such circumstances it is the plain duty of the passenger to pay his fare. But he is not without remedy. If, by the company's fault, the transfer expires before the holder has had an opportunity to use it, and in consequence he is required to pay and does pay his fare, he would have his action against the company. But if it were held that, in spite of the expiration of

the transfer, the conductor was still obliged to accept it, the company would be exposed to flagrant imposition without any means of protecting itself. The transfer, like a railroad company's ticket, is the evidence of the passenger's right to ride. U. Rys. & E. Co. v. Hardesty, 94 Md. 661, 51 Atl. 406, 57 L. R. A. 275; W. M. R. R. Co. v. Stocksdale, 83 Md. 245, 34 Atl. 880; B. & O. R. R. Co. v. Blocher, 27 Md. 277. If the transfer, like the ticket, is void on its face, it is not a token of the holder's right to be transported on the carrier's conveyance. In P. W. & B. R. R. Co. v. Rice, 64 Md. 63, 21 Atl. 97, the liability of the company was placed upon the ground that the ticket was apparently good on its face. This is distinctly pointed out in W. M. R. R. Co. v. Stocksdale, supra. In the case at bar the transfer was void on its face when the appellant attempted to use it. It therefore did not entitle him to ride on the Wilkins avenue car, and the conductor was justified in demanding the appellant's fare, and, upon the refusal of the latter to pay, the conductor was warranted in ejecting him. There was, consequently, no error committed in rejecting the appellant's first prayer and in granting the appellee's second prayer. The appellee's third and fourth prayers were also properly granted. The legal propositions which they embody are fully sustained by what has been said thus far in this judgment.

2. Both upon authority and principle it is clear that, when the conductor has given the passenger a reasonable time and opportunity to pay the fare, and the passenger has persistently refused to comply, and the conductor has begun the process of expulsion by stopping the car or by applying force to the passenger, when necessary, "the passenger thereupon forfeits his rights as a passenger, and his ejection may be completed, even though he may thereafter tender the performance demanded." Hutchinson on Carriers, § 591a. This doctrine is supported by many adjudged cases. Geo. S. & F. R. Co. v. Asmore, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53, and notes; 5 Am. & Eng. Ency. L. (2d Ed.) 597, note 1. There was, consequently, no error committed in granting the appellee's fifth prayer.

The appellant's third prayer related to punitive damages. It was rejected. The jury having decided that the appellant was not entitled to recover any damages at all, it becomes unnecessary to consider whether the prayer correctly defined the measure of exemplary damages.

What we have said in treating of the appellee's second prayer is all that is required to show that the court was entirely right in overruling the appellant's special exception to that prayer.

Finding no errors in the record, the judgment will be affirmed, and it is so ordered. Judgment affirmed, with costs above and below.

BIRMINGHAM RY. & ELECTRIC CO. *v.* MASON.

(*Supreme Court of Alabama, April 16, 1903.*)

[34 So. Rep. 207.]

Injury to Passenger—Sufficiency of Complaint.

An allegation of the complaint, in an action against a street railway company for an assault, that it was committed "while plaintiff was engaged in or about becoming a passenger on said car," did not show that plaintiff was a passenger.

Carriers of Passengers—Liability for Assaults by Employees.*

A carrier is not liable for an assault committed by its servant or agent on a person not a passenger, and having no relation with the carrier, nor in any way encroaching on its rights, unless committed by its authority and under its direction.

Same—Same—Complaint.

A count in the complaint in an action against a carrier for an assault committed by one of its servants having alleged that plaintiff was at the time a passenger on defendant's car, it was not necessary to aver that it was committed within the scope of the servant's duty.

Witnesses.

A Jew was asked on his cross-examination if he considered an oath binding when he took it with his hat off. A general objection to the question was interposed and overruled. He answered that under the Jewish law an oath is not considered binding unless one is sworn with his hat on, and that, if he had been in the old country, he would not have considered himself bound to tell the truth unless his hat were on: *held*, that there was no error in overruling the objection.

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action by James Mason against the Birmingham Railway & Electric Company. From a judgment for plaintiff, defendant appeals. Reversed.

Walker, Tillman, Campbell & Walker, for appellant.
Bowman, Harsh & Beddow, for appellee.

HARALSON, J. The first count in the complaint avers, that "while plaintiff was engaged in or about becoming a passenger on said car, or being carried as a passenger on said car, defendant's servant or agent assaulted and abused plaintiff," etc.

The second count avers, that "while plaintiff was in said car, or engaged in or about boarding the same, defendant through its servant or agent wrongfully assaulted and abused plaintiff," etc.

Each count was demurred to separately on the same grounds, for that it did not appear in and by said counts that the alleged agent was at the time of the assault, acting within the scope of his duty; that it did not appear that the defendant owed any duty to the plaintiff; that it did not appear

*As to the liability of a carrier of passengers for assaults by employees, see monograph appended to Birmingham Ry. & Electric Co. *v.* Baird (Ala.), 22 Am. & Eng. R. Cas., N. S, 909.

therefrom that the plaintiff was a passenger on defendant's car, and that it did not appear that the assault was wrongful.

The first count purports to state two grounds for recovery, the first, that plaintiff "was engaged in or about becoming a passenger," and the second, "or [that plaintiff was] being carried as a passenger." The allegation that plaintiff "was engaged in or about becoming a passenger on said car," shows no relation between him and the company as a passenger. He may have been engaged in and about such business, and yet failed to carry out his intention. From aught appearing, he may have been at a distance from the train, and the conductor, if that were important, may not have known of his intentions to become a passenger. Until some offer to become a passenger, the conductor was not bound to know that he would become such. Hutch. on Carriers, § 538; North B. R. Co. v. Liddicoat, 99 Ala. 546, 13 South. 18. It is not averred, that the assault by the servant or employee of the company was done by the authority of the company, or by its servant or agent while acting within the scope of his duty. If an assault is committed by a servant of a common carrier of passengers, upon a person not a passenger, and having no relation with the carrier, nor in any way encroaching upon the rights of the carrier, the carrier is not liable for the assault unless committed by its authority or under its direction.

Common carriers owe the duty to passengers to carry them safely, to conserve by every reasonable means their convenience, comfort and peace throughout the journey, and protect them from insult and personal violence, whether from another passenger, or stranger, or an employee or servant of the carrier. Birmingham R. & E. Co. v. Baird, 130 Ala. 334, 30 South. 456, 54 L. R. A. 752.

The first count in so far as it sought a recovery on the first ground mentioned therein was defective and liable to demurrer, in not averring that the assault was committed by the defendant's servant or agent while acting within the scope of his duty or by the authority of the defendant.

The second ground stated in the count, on which recovery was sought, was sufficient to show that plaintiff was being carried as a passenger, and it was unnecessary as to it, that there should have been an averment that the assault was committed within the scope of the duty of the servant or employee.

The second count does not aver that at the time of the alleged assault, the plaintiff was being carried by defendant on its cars as a passenger, and fails to aver that he was assaulted by the defendant or under its authority, and for this reason, was liable to the demurrer interposed.

I. Levy, who it appears was a Jew, examined in chief by defendant, was asked by the plaintiff on the cross, "Do you consider an oath binding when you take it without your hat

on?" There was a general objection to the question, which the court overruled. The witness answered: "In our country, when we go to our Jewish laws, we are bound to be sworn with our hats on. * * * Under the Jewish law in the old country, an oath is not considered binding unless you are sworn with the hat on. If I was in the old country, I would not consider myself bound to tell the truth unless the oath [was] with my hat on." We find no error in this ruling of the court.

This disposes of the only errors assigned, except the motion for a new trial, which there is no necessity to consider.

Reversed and remanded.

NORMAN v. SOUTHERN RY. CO.

(*Supreme Court of South Carolina, April 1, 1903.*)

[44 S. E. Rep. 83.]

General Exceptions.

Where exceptions fail to point out any specific error, they are too general for consideration.

Expulsion of Passenger—Limited Ticket—Punitive Damages.

Where a passenger is put off a train by a conductor because the time limit on his ticket has expired, whether he is entitled to punitive damages, the pleading sustaining such a claim, is for the jury.

Limited Ticket—Notice.*

Where a passenger pays full fare for a general ticket, he is not bound by limitations printed thereon, where his attention has not been called to them, and the posting of notices in the waiting rooms and ticket offices is not sufficient to charge him with notice thereof.

Appeal from Common Pleas Circuit Court of Union County; Watts, Judge.

Action by Charles H. Norman against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The facts, omitting the formal allegations, are thus set out in the complaint:

"Second. That on the 7th day of January, 1899, the plaintiff being then at Union, in the county of Union, aforesaid, his place of residence, and desiring and intending to go to Spartanburg, aforesaid, on business, purchased from defendant one first-class passage from Union to Spartanburg, paying full fare for same, and receiving a first-class ticket therefor.

"Third. That on said 7th day of January, 1899, the plaintiff

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*Acceptance of ticket as including assent to printed conditions, see foot-note appended to Hanlon v. Illinois Cent. R. Co. (Iowa), 16 Am. & Eng. R Cas., N. S., 101; note appended to Merrill v. Pacific Transfer Co (Cal.), 21 Am. & Eng. R. Cas., N. S., 143.

As to whether a passenger is chargeable with notice of conditions printed upon his ticket merely because there are placards posted in the ticket office to call his attention to them, see Georgia R. Co. v. Baldoni (Ga.), 6 R. R. R. 68, 29 Am. & Eng. R. Cas., N. S., 68.

boarded the train upon which he expected to travel, but just before its departure plaintiff was handed by the defendant's ticket agent, who was also the telegraph operator, a telegraphic dispatch directing plaintiff not to come to Spartanburg that day; and plaintiff thereupon, because of such dispatch, decided to remain at Union, and got off the train along with said agent. The plaintiff's change of purpose and his reason therefor was known to said agent, and plaintiff did not use, or attempt to use, said ticket that day.

"Fourth. That on the 8th day of January, 1899, plaintiff again boarded defendant's train for Spartanburg, and when accosted by the conductor tendered the ticket for passage to Spartanburg. That the conductor refused the ticket, telling the plaintiff he could not ride upon it; that such ticket was good only on the day of sale; and that he would have to pay fare or get off the train, which plaintiff declined to do.

"Fifth. That at Pacolet station the conductor came to plaintiff, telling plaintiff that by order of the defendant's superintendent the plaintiff must pay fare or leave the train; and plaintiff declined to leave, whereupon the conductor seized plaintiff, and forcibly ejected him from the car; and plaintiff was compelled, in order to pursue his journey, to purchase and pay for a passage from said station to Spartanburg. And plaintiff was ejected from said car by order of said superintendent.

"Sixth. That by reason of said wrongful conduct and force of defendant in ejecting the plaintiff he was greatly distressed and disturbed in his mind and feelings and humiliated in spirit, and was held up and exposed to the gaze and contempt of strangers and passengers upon the car as a person who was attempting to defraud the defendant company, and cheat them out of a passage or fare.

"Seventh. That the ticket purchased at Union, and tendered for passage and refused, had printed upon its face the following, among other, words: 'Good for one first-class passage, unless otherwise notched, if used on or before the midnight of date canceled by "L" punch in margin below, only on the trains stopping at destination;' and the date of its sale, January 7, 1899, was stamped upon its back, and same date was canceled by 'L' punch in margin below. But the plaintiff avers that at the time of the purchase by him of said passage and receipt of said ticket he was not aware that the ticket contained the printed words above set forth, or that there was any condition or limitation that the ticket was good only on the day as canceled by the punch, or good only on day of sale; and he was not aware of any rule or regulation of the defendant company that such ticket was good only on day of sale or as canceled, or that the ticket purchased by plaintiff was good only, and must be used, on the 7th day of January, 1899. And plaintiff avers that he had previously ridden upon defendant's trains on similar tickets on days subsequent to the day of sale.

"Eighth. That by reason of the facts hereinabove alleged the plaintiff has suffered injury and damage to the amount of six hundred ($600) dollars."

The jury rendered a verdict in favor of the plaintiff for $200.

C. P. Sanders, for appellant.

McGowan & Gunter, for respondent.

GARY, A. J. The first and second exceptions assign error on the part of his honor the circuit judge, as follows: "(1) In allowing the following question to be asked the plaintiff, and in allowing him to answer the same: Q. Did you say anything to him with reference to the ticket as to why you got off? And also in allowing the plaintiff to detail a conversation had between himself and the telegraph operator on the day he purchased the ticket in question. (2) In allowing the plaintiff in reply to testify as to facts which he says occurred between himself and the conductor, which facts had already been testified to; the error being that the same was cumulative evidence." While these exceptions were not formally abandoned, nevertheless they were not discussed by the appellant's attorney. They, however, fail to point out any specific error, and are, therefore, too general for consideration.

The thirteenth exception is as follows: "(13) Because his honor erred in refusing defendant's twelfth request: 'In this case only actual damages can be allowed; no vindictive or punitive damages can be recovered;' and in submitting to the jury the question of vindictive or punitive damages. It being respectfully submitted that in this case there was a time limitation plainly printed upon the ticket, which his honor instructed the jury the defendant company had a right to make; and it being an admitted fact that the time within which the ticket was to be used had expired, and the evidence showing that there was no unusual force, no insult, no willfulness or maliciousness on the part of the defendant company, but only an honest effort to enforce a reasonable rule of the company in a quiet and dignified way, his honor should have instructed the jury that this was not a case for vindictive or punitive damages." By reference to the complaint it will be seen that the allegations thereof are appropriate to an action for punitive damages. In the case of Myers v. Southern Ry. Co., 64 S. C. 514, 42 S. E. 598, Mr. Justice Jones says: "It was fairly left to the jury in other portions of the charge to determine whether defendant's agent was merely negligent in his conduct, or whether he was acting willfully or wantonly. If defendant's agent, conscious of plaintiff's right as passenger, nevertheless invaded that right by exacting and coercing an unlawful payment of money under threat of expulsion from the train, his conduct was willful or wanton, such as would subject defendant to exemplary damages." In the case of Griffin v. Southern Ry. Co., 65 S. C. 122, 43 S. E. 445, the court uses this language:

"It is frequently difficult to tell whether an act of wrong is attributable to willfulness or mere inadvertence, which is the foundation of negligence; and, whenever the facts are susceptible of more than one inference, it is peculiarly the province of the jury to determine such question. Pickens v. R. R. Co., 54 S. C. 498, 32 S. E. 567. The fact that it is often hard to determine whether an act of wrong was the result of recklessness or inadvertence was no doubt one of the reasons inducing the Legislature to pass the act of 1898, hereinbefore mentioned." These cases are cited with approval in Marsh v. W. U. Tel. Co., 65 S. C. —, 43 S. E. 953. The presiding judge could not have decided that the plaintiff was not entitled to punitive damages in this case without invading the province of the jury.

All the other exceptions, in different forms, raise the question whether his honor the circuit judge erred in ruling that the plaintiff was not bound by the conditions printed upon the ticket unless he had actual notice thereof. The authorities upon this question are conflicting, and it has never been decided in this state. The principle is correctly stated in the case of Louisville & N. R. Co. v. Turner (Tenn.) 47 S. W. 223, 43 L. R. A. 140, as follows: "While there may be some uncertainty, and even conflict, in the authorities, we are of the opinion that the correct rule is that a person who purchases a general ticket, and pays the usual price therefor, is entitled to one passage, unlimited as to time, upon any train which, under the proper and usual schedule of the road, stops at the point of the passenger's destination. If a ticket, limited or conditional, is sold to a passenger, it can only be done upon an express agreement with him, either oral or in writing, and either based upon a consideration or with the alternative presented to the passenger of a full and unlimited ticket." Numerous authorities are cited to sustain this doctrine. Continuing, the court says: "So, in Michigan C. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. 330, 21 L. Ed. 303, it is said: 'Nothing short of an express stipulation by parol or in writing will be permitted to discharge a carrier from the duties which the law has annexed to his employment; and such agreement is not to be implied or inferred from a general notice to the public, limiting the obligation of the carrier, which may or may not be assented to.' See, also, New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. Ed. 465. We are also of opinion that the mere stamping or printing of a limitation or condition upon the back or face of a ticket, and the acceptance of such ticket by the passenger, without more, are not sufficient to bind him to such limitation or condition, in the absence of notice to him of such condition or limitation, and his assent thereto, when he purchases his ticket. It cannot be presumed that every person buying a railroad ticket for ordinary and general use will, in the hurry and bustle of travel, stop to read and

critically inspect his ticket. As a matter of fact, but little opportunity is afforded him to do so. He generally takes his place with the crowd at the ticket window, and produces and hands over his money with a request for ticket to destination. His money is received. The ticket is procured, and, after being stamped, is handed to him through the ticket window. He has no opportunity to see what is upon it, and he has no time in the rush to stop and read and consider what may be printed or stamped on its face or back; and when he has paid full fare there is no occasion for his doing so, inasmuch as he can safely rely upon the contract which the law makes for him. Ordinary local tickets do not generally contain any terms of contracts, and are not intended to do so. They are mere tokens to the passenger and vouchers to the conductor, adopted for convenience to show that the passenger has paid his fare from one place to another, very much in the nature of baggage checks. The contract is in fact made when the ticket is purchased, and, if it is different from what the law would imply, it must be so stated and assented to when the ticket is delivered. Nor will the posting of notices in the waiting rooms, ticket offices, and on the cars affect purchasers with notice in such cases. Passengers have but little time or opportunity to read such placards, and it would impose quite a serious burden upon travel that the public must read all these notices thus posted before taking passage on a train upon which they are willing to and do pay full fare. Rawson v. Pennsylvania R. Co., 48 N. Y. 212, 8 Am. Rep. 545; Cole v. Goodwin, 19 Wend. 251, 32 Am. Dec. 505, and note; Ray, Passenger Carriers, § 145; Hutchison, Carriers, §§ 246, 580, 581; 4 Elliott, Railroads, § 1593. This rule, which we consider to be settled by the weight of authority and by reason, by no means prevents a railroad company from selling special tickets for special trains, with limitations and conditions, such as excursion, round trip, commutation, and mileage tickets, when the conditions and limitations are known to the purchaser, and assented to orally or in writing, and he has paid for such ticket less than the usual fare. When tickets are sold at reduced rates, it has been very wisely said that the purchaser should, in view of such reduced fare or greater privileges, expect and look for some conditions, limitations, and terms different from those attaching to tickets generally, and be on his guard to be informed of them. But there is no such obligation upon the ordinary passenger, who pays the usual or full fare, and asks for no reduced rates or special privileges, and he has a right to expect an unlimited ticket." We have quoted at length from the foregoing case because its reasoning renders unnecessary the citation of other authorities.

It is the judgment of this court that the judgment of the circuit court be affirmed.

METROPOLITAN ST. RY. CO. *v.* HANSON *et al.*

(*Supreme Court of Kansas, June 6, 1903.*)

[72 Pac. Rep. 773.]

Negligence—Question of Law—Street Railways—Care Due Passengers.*

In an action to recover damages for personal injuries resulting from the alleged negligence of another, if the facts are admitted or undisputed and but one conclusion can be drawn therefrom, the question of whether negligence existed is one of law.

Street Railway—Care Due Passengers.

A street railway company in the transportation of passengers must use the utmost degree of care and skill, for the protection of passengers, in the preparation and management of the means of conveyance.

(Syllabus by the Court.)

In Banc. Error from Court of Common Pleas, Wyandotte County; Wm. G. Holt, Judge.

Action by Clara Hanson against the Metropolitan Street Railway Company and the Kansas City Elevated Railway Company. Judgment for plaintiff against the Metropolitan Street Railway Company, and it brings error. Affirmed.

Miller, Buchan & Morris, for plaintiff in error.

C. W. Trickett, for defendants in error.

GREENE, J. This was an action to reeover damages for personal injuries alleged to have been sustained by the plaintiff, through the negligence of the employees of the defendants, the Metropolitan Street Railway Company and the Kansas City Elevated Railway Company, while she was a passenger on one of their cars. Plaintiff recovered judgment against the Metropolitan Street Railway Company, to reverse which this proceeding is prosecuted.

The plaintiff was a passenger upon one of the elevated lines of the defendant's road, from Kansas City, Mo., to the James Street Station, Kansas City, Kan. When the car in which she was a passenger arrived at the station, the doors leading into the station were opened, and she alighted from the car upon an elevated structure leading into the waiting room of the station. The entrance to the station is through double doors, so hung that when released from their fastenings they gravitate apart; they are held together by a rope or cord, so arranged that it can be released from its fastenings by the conductor in the rear end or vestibule of the car. It is the duty of the conductor, when the car stops at a station, to be in the rear of the car and release the rope, which will permit the doors to open for the entrance of passengers into the station, and, when all passengers have passed through, it is his duty to pull the rope, thus closing the doors, which are held shut by

*As to the care required of a carrier of passengers, see foot-note appended to Larkin *v.* Chicago & G. W. Ry. Co. (Iowa), 6 R. R R. 852, 29 Am. & Eng. R. Cas., N. S., 852.

placing a ring attached to the end of the rope upon a peg or nail on the side of the building. On this occasion, when the car arrived at the station, the conductor was inside and about the middle of the car, collecting fares. While at his place a passenger, without authority from the conductor, pulled the ring off the peg, thus permitting the doors to open, and, while the plaintiff was passing through the doors into the station, the same passenger pulled the cord, which closed the doors and caught her between them, thus inflicting the injury for which she recovered. The negligence charged is as follows: "That the conductor in charge of said car was not at his post of duty when said car arrived at said station, although said conductor and the defendant knew well enough that, if he was absent from his post of duty, passengers were liable to pull said rope and open and shut said door, and that it was negligence in said conductor in abandoning his post of duty, and negligence in his not being on the rear platform when said car arrived at said station, and it was negligence in said conductor permitting passengers on said car to open and close said door, and it was negligence in the motoneer, in opening the gates of said car before the conductor had got to his post of duty on the rear platform, and negligence in said motoneer in opening said gates before knowing said conductor was at his post of duty." It was not denied that it was the duty of the conductor to be in the rear of the car to open and close these doors; that he was not at such place when the car arrived at the station, or that he did not get to his place in time to either open or close the doors before the passengers had all passed into the waiting room. The excuse offered was that a number of passengers boarded the car just before reaching James Street Station, and he was endeavoring to collect the fares and get to the rear of the car in time to perform this duty; that because of the number of passengers and the performance of those other duties he was unable to do so within time.

Errors are predicated upon the overruling of the demurrer to the evidence of plaintiff, and upon the refusal of the court to submit to the jury that the question of contributory negligence of the plaintiff, neither of which is of sufficient importance to require of us more than to say that, in our judgment, no error was committed.

The principal contention is upon the giving of the following instruction: "It was the duty of the conductor of the defendant the Metropolitan Street Railway Company in charge of the car in question to exercise the highest possible caution and prudence in the letting off passengers at the station in question—the James Street Station of the defendant—and it was also his duty to see and know that the plaintiff was safely off the car and through the doors of the waiting room; and, having failed in his duty in that behalf, the plaintiff is entitled

to recover a verdict against the defendant. So that the only question for you to determine in this case is, how much the plaintiff is entitled to recover for the result of the injuries sustained at the time and place in question." The fact that the conductor was not in the rear of the car when it arrived at the James Street Station is undisputed. The defendant was a common carrier of passengers, and was granted and protected in the exercise of large privileges that it might quickly and safely transport passengers upon its lines of road. It undertook for the carriage of human beings, whose lives, limbs, and health are of great importance to the public, as well as to themselves. It is held to the utmost degree of care and skill in the preparation and management of the means of conveyance which may be employed under the circumstances. The authorities generally hold this to be the true measure of duty of such corporations. Terre Haute, etc., R. Co. v. Sheeks, 155 Ind. 74, 56 N. E. 434; McCurrie v. Southern Pac. Co., 122 Cal. 558, 55 Pac. 324; West Chic. R. R. Co. v. Kromshinsky, 185 Ill. 93, 56 N. E. 1110; The Louisville, New Albany & Chicago Railway Company v. Snyder, 117 Ind. 435, 20 N. E. 284, 3 L. R. A. 434, 10 Am. St. Rep. 60; New Jersey Railroad Company v. Kennard, 21 Pa. 203; Moore v. The Des Moines & Fort Dodge Ry. Co., 69 Iowa, 491, 30 N. W. 51; C., P. & St. L. Ry. Co. v. Lewis, 145 Ill. 69, 33 N. E. 960; Ladd v. Foster (D. C.) 31 Fed. 827; Jennie A. Jordan v. New York, New Haven & Hartford Railroad Company (Mass.) 43 N. E. 111, 32 L. R. A. 101, 52 Am. St. Rep. 522. The injury occurred upon an elevated road upon which passengers, after alighting from the car, could get out of danger only by passing into the station. It was therefore the bounden duty of the company to have some one upon the rear end of the car when it stopped at this station to open the doors for the admission of passengers into the depot, and not to close them until all passengers had passed through. To neglect these duties, or to allow passengers to undertake the performance of them, was negligence which unnecessarily endangered the lives and limbs of passengers. Whether negligence is shown, is ordinarily a question for the jury; but when the facts are undisputed, and only one conclusion can be drawn therefrom, it becomes a question for the court. Kansas Pac. Ry. v. Butts, 7 Kan. 309; U. P. Ry. v. Lipprand, 5 Kan. App. 484, 47 Pac. 625; Dewald v. K. C., F. S. & G., 44 Kan. 586, 24 Pac. 1101; Kansas Pac. Ry. v. Pointer, 14 Kan. 38; Central Branch U. P. R. v. Hotham, 22 Kan. 41. The law as expressed by the court below upon the undisputed facts announced the correct rule, and is amply supported by authorities.

The judgment of the court below is affirmed. All the Justices concurring.

RYAN *v.* GREAT NORTHERN RY. CO.

(*Supreme Court of Minnesota, June 19, 1903.*)

[95 N. W. Rep. 758.]

Bill of Lading—Right to Possession of Property.

As between the carrier of goods and the owner to whom the same are consigned, the bill of lading is a reliable symbol of title, and vests in the legitimate holder thereof the right to possession of the property. Ratzer *v.* Railway Co., 66 N. W. 988, 64 Minn. 245, 58 Am. St. Rep. 530, followed. Bank of Litchfield *v.* Elliott, 86 N. W. 454, 83 Minn. 469, distinguished.

Diversion Pending Transportation.*

The true owner of property in the possession of a common carrier for transportation may have the same diverted at a station on the route between the shipping point and the place of destination while it is in transit, but may be required to produce the bill of lading or furnish other evidence of ownership to entitle him to this right.

(Syllabus by the Court.)

Appeal from Municipal Court of Minneapolis; H. D. Dickinson, Judge.

Action by D. E. Ryan, doing business as D. E. Ryan & Co., against the Great Northern Railway Company. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Reversed.

Rome G. Brown and Chas. S. Albert, for appellant.

George C. Stiles, for respondent.

LOVELY, J. Damages are sought in this action for the failure of a railway carrier to comply with a request by the consignee of a car of apples to divert it while in transit at a point between the place of shipment and its destination. The cause was tried to the court, who made findings of fact and ordered judgment for plaintiff for the amount claimed in the complaint. There was a denial of a motion for a new trial, from which order defendant appeals.

Upon the findings of fact, amply supported by the evidence, it appears that the firm of Johnson & Co., of Diamonds, in the state of Washington, shipped a car load of apples to plaintiff at Minneapolis. The apples were delivered to the Oregon Railroad & Navigation Company for transportation on the 22d of October, 1901, and thereafter transferred by the initial carrier to the defendant at Spokane, and in due time forwarded by the latter to the point of destination. The initial carrier delivered to the shippers its bill of lading, in which Johnson & Co. were named as consignors and the plaintiff as consignee. When the goods were shipped, the consignors informed plaintiff of that fact by telegram, on the receipt of which the latter requested an agent of defendant at Minneapolis, some three or four days before the apples went through Devils Lake on defendant's line, to set the car off at

*See foot-note appended to Felix *v.* Brandstetter Co. (Iowa), 2 R. R. R. 930, 25 Am. & Eng. R. Cas., N. S., 930.

that place, and the damages awarded were for failure to comply with this request. There was some controversy whether the agent had authority to act upon the request for the diversion of the car, but, in the view we have taken of the law applicable to the issues, we have not thought it necessary to discuss this question, but shall assume that such authority did in fact exist. It was found upon competent evidence that, when the request to set off the car at Devils Lake was made, the agent inquired of the plaintiff whether he had a bill of lading; that plaintiff then stated that he would produce it as soon as it was received from the shipper; but it was also found by the court that it was not furnished to defendant until the 28th or 29th of October, when the car had actually passed Devils Lake in the course of transportation, and could not then be stopped at that place. It also appeared that, at the time the request was made to divert the car at the intermediate point, the agent said he would see what could be done with reference to changing its destination, but neither he nor any other agent of defendant made any promise or agreement with plaintiff that the stoppage would be made. There is no claim that there was any waiver on the part of defendant of the production of the bill of lading or other evidence of plaintiff's title to the property.

It is proper, on the facts, to assume for the purpose of this case that the owner of goods transported by a common carrier has the right to have his consignment, while in transit, diverted at any intermediate point through which it passes; but such right of diversion cannot add to the burdens of the carrier, or require it to do more than comply with a proper and legal demand therefor. Hutchinson on Carriers (2d Ed.) 337, and notes; Amer. & Eng. Encv. Law (2d Ed.) vol. 2, p. 214. It necessarily follows that some evidence of the right of the party to make the diversion may be demanded by the carrier before the goods reach the stopping point, for the person authorized to have that right could not require the goods to be reshipped and returned at the extra expense of the carrier; hence the question still remains whether the request to have the car put off at Devils Lake required the defendant to comply therewith without the production of the bill of lading or any further evidence of plaintiff's ownership of the property than was furnished in this case.

In an action in this court, where the consignor of goods in transit requested the delivery of the same at an intermediate point without producing the bill of lading, the carrier was held liable to a third party to whom an assignment of that evidence of title to the property had been previously made. This court in that case held that "a well-established custom has grown up in commercial circles by which bills of lading are treated as the symbols of title to the property in transit, are taken as security for money advanced, and indorsed and delivered as a transfer of the property. This is well under-

stood by the railroad companies and every one else. To allow the railroad companies to ignore this custom would be to destroy the custom itself." Ratzer v. Railway Co., 64 Minn. 245, 66 N. W. 988, 58 Am. St. Rep. 530. The reasons for this rule are fully considered in this case, and as a result of the decisions cited therein it was further said: "It is hardly necessary to cite authorities to the general proposition that, when a bill of lading is outstanding, the railway company delivers the goods at its peril, without its production; * * * and, if it so delivers them to some one other than the bona fide holder for value of the bill, it is liable to him for conversion of the goods;" and it was held that the carrier was estopped from showing that it delivered the goods to the shipper, who had assigned the bill of lading at an intermediate point.

Counsel for plaintiff insist that this decision does not apply, for the reason that the bill of lading issued in this case was not negotiable, since it contained a provision that "in order to render it negotiable the property shipped thereunder must be consigned to order of owner without any condition or form other than naming of the party to be notified of the arrival of property," with other provisions that would impair its negotiability in the sense in which that character would attach to ordinary commercial paper.

We have recently held that, as between parties other than the carrier and the true owner or consignee of goods, the bill of lading is prima facie evidence of title, which may be rebutted and contradicted by evidence. Bank of Litchfield v. Elliott, 83 Minn. 469, 86 N. W. 454. But as between the carrier and the person entitled to receive the property at its hands the rule laid down in the Ratzer Case has not been changed, and it is not obvious, in view of the usual customs and usages of the commercial world, which we must recognize and enforce so far as lawful, that we should abrogate or modify the effect of the salutary doctrine there laid down. If we were to hold upon the facts in this case that the actual consignee of goods in transit could divert or rightfully demand possession at an intermediate point without the production of the prima facie evidence of his ownership, or some assurance or reasonable proof that he was entitled to have his request complied with, we would deny to the carrier due protection under the rule we have already adopted, which would impose the onerous and oppressive burden of determining the ownership of the property upon which it must act at its peril; hence it follows that while the bill of lading is outstanding, and the effect of its transfer by the holder conveys, according to commercial usages and the customs of the country, the title to the property, the carrier should have the right to require its production, and we must hold that this is a prerequisite for its delivery or diversion. Since the bill of lading was not in this case produced, although requested by defendant, and

no other evidence of ownership furnished the carrier than that the person demanding the diversion was the consignee, this did not establish his right to have the goods set off.

It is true that at the time when the request was made the plaintiff did not have the bill of lading. It is also true that in the ordinary course of the mails he could not have had it at a time when it would have been available. But this was his misfortune, against which the court cannot relieve him without destroying the force of the rule we have established in Ratzer v. Railway Co., supra.

We might in this connection, however, say that it is not probable that under such circumstances, where the true owner of goods shipped furnishes proper assurance and evidence of his title, and offers indemnity to the carrier, that the latter could arbitrarily refuse to act upon his request. When a case arises where the bill of lading is not in the hands of the consignee, and the latter is legally entitled to have it, and he furnishes evidence of such right with suitable protection to the carrier, this question will no doubt be properly met and determined. It is not before us at this time, for upon the evidence and findings nothing further was done by the plaintiff than to make the request to stop the goods at Devils Lake, which was not promised by the carrier, and was not alone sufficient to impose that obligation upon the defendant.

The order appealed from is reversed, and a new trial granted.

HENRY SONNEBORN & CO. v. SOUTHERN RY. CO.

(*Supreme Court of South Carolina, March 31, 1903.*)

[44 S. E. Rep. 77.]

Depositions.

Where a notice provides for the taking of a deposition at No. 21 Bank of Baltimore building, it is complied with by taking the deposition at the office of S., No 21 Bank of Baltimore building, the objector being present by representative.

Same—Signature of Witness

Code 1902, § 2881 et seq., do not require that the signature of the witness be identified, other than by the certificate of the notary that he had sworn and examined the witness.

Witnesses—Refreshing Memory.

Where a witness had testified that he saw the samples of goods sold, and superintended the charging of the same at the time they were furnished, he could refresh his memory as to the value of the sample by an inspection of the books.

Carriers—Special Damage for Injuries to Baggage.

In an action against a railroad company for putting off trunks of sample clothing at a station during a severe rain without protection, under the issue of willful negligence it is proper to show special damage.

Evidence.

One who has had experience in custom-made clothing may testify as to the injury caused by rain, though he has never seen the goods.

Henry Sonneborn & Co. *v.* Southern Ry. Co

Duty to Protect Passenger's Baggage.*

It is the duty of a railroad company to protect the baggage of its passengers, while in its custody, from exposure to rain, by the exercise of due care.

Same.

If there be any negligence on the part of a carrier in the care of baggage in leaving it exposed to the rain, the carrier cannot escape responsibility by showing that the act of God was the cause of the injury.

Act of God—Definition.

An act of God means inevitable accident, without the intervention of man and the public enemy.

Appeal from Common Pleas Circuit Court of Fairfield County; Watts, Judge.

Action by Henry Sonneborn & Co. against the Southern Railway Company. From judgment for plaintiffs, defendant appeals. Affirmed.

C. P. Sanders, for appellant.

J. E. McDonald, for respondents.

JONES, J. The appeal in this case is from a judgment on verdict in favor of plaintiffs in an action for damages alleged to have been caused by defendant's negligent and wanton conduct in putting off its train in Winnsboro, S. C., 10 trunks of sample clothing belonging to plaintiffs, during a severe rain and without any protection, whereby the samples became wet and injured.

1. The first exception assigns error in admitting the deposition of Moses S. Sonneborn, the objections thereto being: (1) That it was taken in the office of Shiver, Bartlett & Co., instead of Thos. K. Le Brou, pursuant to the notice; (2) when it appeared that the signature of the deposition had not been witnessed by the notary, there being no indentification of the signature as being the true signature of the witness examined. These objections were properly overruled. The notice was that the deposition could be taken before Thomas K. Le Brou, a notary public, at his office, No. 21 Bank of Baltimore building, in the city of Baltimore, and the certificate states that it was taken by Thomas K. Le Brou, a notary public, at the office of Shiver, Bartlett & Co., No. 21 Bank of Baltimore building, Baltimore, Md. It thus appears that the deposition was taken at the place noticed, and the inference is that the notary mentioned also had his office at that place. Besides, this defendant was present by representative at the taking of the deposition.

2. With reference to the second objection as to the identification of the signature of the deponent, such identification sufficiently appears by the certificate of the notary to the effect that he had sworn and examined the witness Moses S. Sonneborn, and that the questions and answers were contained in the pages constituting the deposition. The statute (section 2881 et seq., Code 1902) relating to such deposi-

*See monograph by Mr. Rose, 2 Am. & Eng. R. Cas., N. S., 1.

tions does not require any other identification of the deponent's signature. The signature purporting to be that of Moses S. Sonneborn, and attached to the deposition is presumptively the signature of the witness Moses S. Sonneborn, who was sworn and examined by the officer certifying the deposition.

3. The second exception alleges error in allowing question No. 28 of the deposition of the witness Sonneborn, and the answer thereto, when it appeared that the witness had not made the entries in the book, nor could he testify to the fact contained in the entry in the books from his own knowledge. Interrogatory No. 28, and the ones immediately preceding, are as follows: "26 Q. Have you produced the book of original entry containing the list of samples taken by Mr. Browning on said trip? A. I have done so, and this is the book. 27 Q. Is that the book of original entry? A. It is. 28 Q. According to the book you hold in your hand, what is the exact value of the samples taken by Mr. Browning on said trip? A. The exact value as to loss or damage with respect to the salable value of the suits, of which Mr. Browning carried the sample coats, was $2,341.24, and the sample coats which he carried cost more than half the cost of the suits; but, in case of loss or damage to the coats, it also depreciates the cost of the pants and vests." The witness had previously testified that he saw the samples furnished to Mr. Browning, the traveling agent, and that he superintended the charging of the same at the time they were furnished. It thus appears that the grounds of objection are not based upon the facts. The witness, having seen the samples furnished to the agent, and superintending the charging the same on the books kept for that purpose, could certainly refresh his memory as to the value of the samples by an inspection of the books. State v. Collins, 15 S. C. 376, 40 Am. Rep. 697, and authorities therein mentioned.

4. The third, fourth, fifth, and sixth exceptions charge error in allowing the witness Browning to testify, over objection, as to loss or damage with respect to the salable value of the whole suits by reason of the injury to the coats. The trunks contained overcoats, and coats forming parts of full suits, but the vests and pants of such suits were in Baltimore at the time of the injury. The objection urged to this testimony is that it is an attempt to prove special damages not alleged in the complaint. The fifth allegation of the complaint is as follows: "(5) That upon the arrival of the defendant's said cars at the town of Winnsboro, on which the plaintiffs' salesman and agent was a passenger as aforesaid, the defendant, by its agents, servants, and employees, recklessly, carelessly, negligently, willfully, wantonly, and in utter and willful disregard of the rights of the plaintiffs, put off the 10 said trunks of clothing samples upon the platform of its passenger station at the town of Winnsboro during a very hard downpour of rain; and then and there recklessly, carelessly, willfully, and

wantonly neglected, failed, and refused to move said trunks out of the rain and put them in its baggage room or other place of shelter, or to cover the same with canvas cloth, as was its duty in the circumstances, in order that the samples in said trunks might be kept dry and uninjured by the rain; but, on the contrary, the defendant carelessly, negligently, recklessly, willfully, and wantonly placed and turned said trunks with their ends upward instead of placing them down flat—in which first position the rain could more easily run into said trunks and wet contents thereof—and thus allowed the said 10 trunks of samples belonging to plaintiffs as aforesaid to remain unprotected in the rain and weather for the space of one hour, whereby the said samples of clothing in said trunks were thoroughly wet and saturated with the rain water, and were thereby damaged and injured to the amount of one thousand ($1,000) dollars." In the case of Lipscomb v. Tanner, 31 S. C. 52, 9 S. E. 733, the court said: "It is not always easy to determine whether damage is or is not special. The cases upon the subject are full of nice distinctions. We have seen no clearer definition or description of it than the following: 'The general allegation of damages will suffice to let in proof and to warrant recovery of all such damages as naturally and necessarily result from the unlawful act complained of; the law implies such damages. But where damages do not necessarily result from the act complained of, and consequently are not implied by law, the plaintiff must state the particular damage sustained in order to introduce testimony in regard to it; the rule is to avoid surprise,' etc. See 5 Am. & Eng. Ency. Law, 49, and very full notes." Such is the rule established by the decisions in this state. Alston v. Huggins, 3 Brev. 185; Rowand v. Bellinger, 3 Strob. 375; Loeb v. Mann, 39 S. C. 468, 18 S. E. 1; Mood v. Telegraph Co., 40 S. C. 528, 19 S. E. 67; Pearson v. Spartanburg Co., 51 S. C. 484, 29 S. E. 193. The injury alleged in the complaint was the negligent and wanton exposure of the trunks to the rain, whereby the samples of clothing in the trunks were wet and saturated with rain water and damaged. Considered with reference to the distinction between general damages and special or consequential damages, we think evidence as to damage resulting to the whole suit, parts of which were not in the trunk, would relate to special damages. With respect to actual, or compensatory, or general damages, the highest measure of damages that could be awarded under the complaint would be the depreciation in the value of the coats, alone, through the negligence of defendant. But the complaint alleged, also, that the conduct of the defendant which caused the injury was wanton, and demanded punitive damages. In view of this, it was competent for plaintiffs to show not only general, but special, and even remove, damages resulting to them from defendant's act, with a view to enable the jury to award proper punitive damages under all the cir-

cumstances of the case, in the event they should conclude that defendant's conduct was wanton. Pickens v. R. R. Co., 54 S C. 505, 62 S. E. 567.

5. The seventh exception complains of error in allowing the witnesses Owens and Kitchens to testify as to the effect generally upon custom-made clothes by reason of the canvas in the lining of the coats getting wet, when these witnesses had not seen the coats in question. The exception is not sustained. Previous to the testimony of the witnesses it had been testified that the clothes in question were custom-made, and that such clothes generally have a buckram or canvas lining between the inner lining and the outside, which, if it gets wet, will draw up and put the coat out of shape. Owens had been a clerk in a dry goods store handling custom-made clothes for about 10 years, and Kitchens had been in the mercantile business and handling such clothing for about 30 years. Under these circumstances, they were competent as experts to testify as to the effect the wetting of the canvas in such coats would have.

6. The eighth exception imputes error as follows: "In refusing to allow the witness Skinner to testify and state why the railway company had not taken extra precautions to avoid trunks and baggage getting wet previous to this. It being respectfully submitted that it was both relevant and competent to prove that, in view of there being an unprecedented rainfall, something beyond the experience of people of ordinary prudence, the company was not to be held responsible for not taking extra precautions to prevent injury, and was in response to the facts brought out by the plaintiffs on the cross-examination of defendant's witness as to the absence of a canvas covering, and would have tended to negative the idea of negligence in not having such canvas on hand." The testimony was properly excluded, because it would have been merely the opinion of the witness, and that, too, upon an irrelevant matter. It had already been shown that the trunks had been left exposed to a very heavy rain, and the question was as to the duty of the defendant company under such circumstances to protect the trunks by placing them under shelter or covering at the time of the injury. As it is the duty of a railroad company to protect the baggage of its passengers, while in its custody, from exposure to rain, by the exercise of the care due under the circumstances, we do not see how its failure to exercise proper precautions in that regard in the past would tend to excuse or negative an inference of negligence in the present instance. Negligence does not cease to be negligence when it is customary.

Appellant's ninth exception is as follows: "In refusing to charge defendant's sixth request, to wit: 'Where baggage is injured, it is the duty of the passenger after the baggage is delivered to him to do all he can to lessen the damage; and if he fails to do this, and by reason of such failure the damage is

increased, then for this the railroad is not held responsible.' The error being that, in refusing this request, his honor allowed the jury to estimate and give as damages any injury that might have been done to the clothing by reason of the failure of plaintiffs or their agent to take care of them after they had been delivered to them by the railroad." This exception is not well taken, for an inspection of the record shows that the charge of the judge was all that appellant could properly require in that connection. The case shows that, in response to appellant's requests to charge, the jury were instructed as follows: "I refuse to charge you that, in that language; but I have already told you that if you believe the railroad was careless and negligent, and that was the cause, the direct and proximate cause, of the damage to the plaintiff, if he sustained any at all, then the plaintiff would be entitled to recover damages as they sustained by reason of the carelessness and negligence of the railroad in injuring them, if you think the railroad did carelessly and negligently injure the property of the plaintiffs."

7. The tenth and last exception assigns error as follows: 'In refusing to charge defendant's ninth request, to wit: If an injury is caused by an unprecedented rainfall, such as ordinary human foresight and prudence could not foresee, then such injury is caused by an act of God, for which the railroad is not to be held responsible.' The error being, it is respectfully submitted: (a) In refusing to define what is an act of God. (b) In leaving it to the jury to say whether an unprecedented rainfall, such as ordinary human foresight and prudence could not foresee, was or was not an act of God. (c) In holding substantially that this was a question of fact for the jury, instead of holding it to be a question of law for the court." The judge had already charged that a railroad company is not liable for such damage to goods in its custody by an act of God, and so stated in refusing the above request in the language proposed. The request was properly refused in that form, because it failed to exclude all human agency as co-operating cause. The correct rule is thus stated in Slater R. R. Co., 29 S. C. 101, 6 S. E. 936: "Where an act of God causes injury to property in the hands of a common carrier, and such act is the sole cause of such injury, then the proof of this fact is a perfect shield. But if there be any negligence on the part of the carrier, which if it had not been present the injury would not have happened, notwithstanding the act of God, the carrier cannot escape responsibility, and the onus is upon the carrier to show not only that the act of God was the cause, but that it was the entire cause, because it is only when the act of God is the entire cause that the carrier can be shielded." An act of God means "inevitable accident, without the intervention of man and the public enemies." 2 Kent Comm. p. 597.

The judgment of the circuit court is affirmed.

STATE *v.* PEARSON *et al.*

(*Supreme Court of Louisiana, March 16, 1903.*)

[34 So. Rep. 575]

Separation of White and Colored Passengers—Constitutionality of Statute.*

It was competent for the General Assembly to require street railway companies to provide separate but equal accommodations for white and colored passengers using their cars, and to enforce same by penalties imposed upon the officers of such companies in case of their neglect of this legal duty.

Same—Same.

It is *held* this requirement is not so closely connected with other provisions of the statute (Act No. 64, p. 89, Acts 1902) that the same may not be operated independently of the other provisions, nor so related in substance and object with the other provisions that it is impossible to suppose the Legislature would have enacted the one without the other.

Same—Same.

The third section of the statute (Act No. 64, p. 90, Acts 1902), which imposes a minimum fine of one hundred dollars for failure to provide separate accommodations, but which neglects to name a maximum fine, is helped out in the latter particular by section 982 of the Revised Statutes of 1876, and the two, together, are *held* sufficient to save the statute from being obnoxious to article 155 of the Constitution.

Breaux and Monroe, JJ., dissenting.

(Syllabus by the Court.)

Appeal from Second City Criminal Court, City of New Orleans; Auguste M. Aucoin, Judge.

H. H. Pearson, Jr., and others were charged with violating the laws relating to the separation of the white and colored races in street cars. A demurrer was sustained, and the state appeals. Reversed.

Walter Guion, Atty. Gen., and J. Ward Gurley, Dist. Atty., J. H. Ferguson, Asst. Dist. Atty. (Lewis Guion, of counsel), for the State.

Adams & Otero and Lawrence O'Donnell, for appellee H. H. Pearson, Jr.

BLANCHARD, J. In November, 1902, an officer of the police force of the City of New Orleans appeared before the Judge of the Second City Criminal Court and made affidavit charging H. H. Pearson, Jr., C. H. Ledlie, Jos. H. De Grange and John G. Woods, who are described in the body of the affidavit as being "of the New Orleans Railway Company," with violating section 1 of Act No. 64, p. 89, of Acts 1902, in that they failed to provide wire or wooden screens to separate the white and colored races in the cars of the company—mentioning time, street, number of car, etc.

At the head of the affidavit this caption is given to that document:—"The State v. H. H. Pearson Jr., Prest., C. H.

*As to the constitutionality of such statutes, see foot-note appended to Chesapeake & O. R. Co. *v.* Commonwealth (Ky.), 14 Am. & Eng. R. Cas., N. S., 508.

Ledlie, 1st Vice Prest., Jos. H. De Grange, 2nd Vice Prest., Jno. G. Woods, Gen'l Manager"—from which we learn that the parties accused hold, respectively, in the New Orleans Railway Company the positions of President, 1st Vice President, 2nd Vice President and General Manager of that corporation, which owns and operates a line of street railway in the City of New Orleans.

The parties were arrested and brought before the Second City Criminal Court. They were arraigned and pleaded not guilty, reserving the right to, later, withdraw this plea and file such exceptions or demurrers as they might deem proper. Whereupon they were released on bond.

Later, one of them, H. H. Pearson, Jr., the President of the Company, appeared and, first withdrawing his plea of not guilty, demurred to the affidavit, alleging that the matters therein contained are not sufficient in law to require him to answer the same.

The demurrer then avers the unconstitutionality of Act No. 64, p. 89, of Acts 1902.

It is set out, in substance, that the first and second sections of the Act seek to delegate to the officers of street railway companies, carrying passengers in cars, the power and duty of determining and declaring the races to which passengers belong, and assigning them to seats set aside for white or colored people according as to how the decision may be as to racial distinction. And it is charged that this is in violation of article 84 of the Constitution, which vests the judicial power of the State alone in certain courts named and authorized, and also in disregard of article 96 of the Constitution, which prohibits conferring judicial powers upon any officer other than the judges of the courts named in article 84, except as committing magistrates in criminal cases and such as may be necessary in towns and cities for the enforcement of municipal ordinances.

It is further set out, in substance, that the General Assembly, in enacting the third section of the Act of 1902, which makes the offense with which defendant Pearson is charged a misdemeanor, failed to fix a maximum and minimum penalty as required by article 155 of the Constitution; and that the section, in respect to the penalties fixed, is so uncertain, indefinite and indeterminate that the same is not susceptible of being carried into execution and does not permit of any satisfactory determination as to the court vested with jurisdiction for the trial of offenders against the provisions of the statute.

The trial court sustained the demurrer and ordered the accused discharged.

The State appeals, and the appeal finds lodgment in this Court under the provision of the organic law which vests the Court with appellate jurisdiction in all cases where a law of the State is declared unconstitutional, and orders that the

appeal on the law and the facts in such cases shall be directly to this tribunal from the court in which the case originated.

Ruling—The legislation known as Act 64, p. 89, of Acts 1902, under which the appellee was proceeded against, is not new in Louisiana.

In 1890, by Act No. 111, p. 152, of that year, similar legislation was enacted applicable to railway companies transporting passengers for hire within the limits of the State.

The Act of 1902 does nothing more than make the legislation of the earlier Act applicable to street railways operating car lines within the State—the former act having specially excluded street railroads.

In Ex parte Plessy, 45 La. Ann. 80, 11 South. 948, 18 L. R. A. 639, the constitutionality of the Act of 1890 was challenged, the question there presented being whether a statute requiring railroads to furnish separate but equal accommodations for the two races and requiring passengers traveling from one point in the State to another to confine themselves to the accommodations provided for the race to which they belong, violated the thirteenth and fourteenth Amendments to the Constitution of the United States.

This Court held it did not and sustained the statute against the attack there made upon it.

Whereupon Plessy took the case by writ of error to the Supreme Court of the United States, which tribunal affirmed the judgment of this Court. See Plessy v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256.

While it was not distinctly put at issue in the Plessy Case that the statute attacked sought to delegate to officers of railway companies the power and duty of determining and declaring the race to which passengers belong, and assigning them to seats set aside for white or colored people according as to how the decision might be as to racial distinction, the question was raised, at least incidentally, and engaged the attention of Mr. Justice Fenner, the organ of the Court.

After stating (Ex parte Plessy, 45 La. Ann. 88, 11 South. 948, 18 L. R. A. 639) that the petitioner (Plessy) claimed the statute vested the officers of the railway company with a judicial power to determine the race to which the passenger belongs, he dismissed the contention with the observation that:—

"The discretion vested in the officer to decide primarily the coach to which each passenger by race belongs is only that necessary discretion attending every imposition of a duty, to determine whether the occasion exists which calls for its exercise."

We do not now feel called upon to go any further into the examination and discussion of that question, for it is not considered properly raised in the instant case.

Here the only charge against the appellee is that he violated that portion of section 1 of Act No. 64, p. 89, of Acts

1902, requiring the erection of screen partitions in cars for the separation of the races.

The section in question is as follows:—

"That all street railway companies carrying passengers in their cars in this State shall provide equal but separate accommodations for the white and colored races by providing two or more cars, or by dividing their cars by wooden or wire screen partitions, so as to secure separate accommodations for the white and colored races. No person or persons shall be permitted to occupy seats in cars or compartments other than the ones assigned to them on account of the race they belong to."

There are here two distinct propositions. One is the requirement that street railway companies shall provide equal but separate accommodations for the white and colored races, either by separate cars, or by means of partitions erected in the same car. The other is that persons are not to be permitted to occupy seats in cars other than those set apart for them on account of the race to which they belong.

This proceeding arises under the first proposition and is taken against the appellee solely because the company of which he is president failed to provide separate accommodations for the white and colored races, as the statute commands.

He is not being prosecuted for permitting a colored person o occupy a seat in a car or compartment allotted to white people, nor for permitting a white person to occupy a seat in car or compartment allotted to colored people.

Nor is he being prosecuted for failing to assign a passenger o the car or compartment set apart for the race to which he the appellee) should decide the passenger belonged, as is the equirement of section 2 of the Act.

It will be time enough to meet and decide those questions when cases come here directly involving the same. "It is oth more proper and more respectful to a co-ordinate epartment," declares Mr. Cooley in his work on Constitutional Limitations (4th Ed.) p. 198, "to discuss constitutional uestions only when that is the very lis mota."

The first section of the Act required the appellee to provide separate accommodations for the races and the third section inflicts a punishment for his failure to do so. The portions of those sections, relating to his failure to provide separate accommodations and visiting a penalty upon him for not doing so, are alone involved in the case now before us.

If he had provided the separate accommodations required by the statute, it is to be presumed persons of the white race would, without further action on his part, or that of his employees, have taken seats in the cars or compartments allotted o them, and those of the colored race would have taken seats n the car or compartment allotted to them.

The law commands this separation of the races in street

cars and the presumption is not authorized that people of either race will disobey the law, or that they will have to be coerced into obeying it by something done or threatened to be done at the time by the officials in charge of the car.

But for fear some persons of either race might fail in their obedience to the law of separation, the second section of the Act punishes by fine or imprisonment any passenger who disobeys it by insisting on going into a car or compartment to which by race he or she does not belong.

In view of the penalty thus provided, it is all the more to be presumed that, had the appellee not failed in his duty of providing separate accommodations, persons of the two races would, without further action on his part, or that of his employees on the cars, have taken the seats separately assigned them by the law.

All of which goes to establish that those sections or portions of the statute requiring separate accommodations for the two races, and inflicting a penalty on railway officials for failing to do this, and commanding people of the two races to use and occupy separately the cars or compartments set apart for each race, and inflicting a penalty for willful disobedience, may well stand and be executed independent of those other portions of the law which, in the opinion of the learned counsel for the appellee, are infirm, constitutionally, in that they delegate to officials of street railway companies the power and duty of primarily determining and declaring the race to which a given passenger may belong, and, by reason of such decision, assigning such passenger to a seat in the car or compartment set apart for people of his or her race.

It was competent for the General Assembly to have enacted a statute requiring alone, at the hands of street railway companies in the State, provision for the separate though equal accommodation of the races and inflicting a penalty upon the officers of such companies for failure to do this.

It does not matter, for the purpose of this discussion, that, in the statute, along with this, they put other provisions and requirements. Eliminate these other requirements, if you will, and what is left is complete in itself and susceptible of operation and fulfillment without the other.

To put it in a different way, one of the main intents of the statute was that street railway companies should provide separate accommodations for the races. This is complete in itself, as far as it goes, and capable of being executed wholly independent of those portions of the statute which require officials of the companies to decide upon the race to which a passenger belongs and assign him, in accordance with such decision, to a compartment set apart for people of that race, with power to enforce the assignment or compel the passenger to leave the car.

Nor are we quite prepared to presume the Legislature could not have passed the one without the other. See Moore

v. City of New Orleans, 32 La. Ann. 742, 743; Cooley, Const. Law, 178.

Is the third section of the Act of 1902 obnoxious to article 155 of the Constitution—is the next question to engage our attention.

That article reads:—

"The General Assembly shall grade all misdemeanors and minor offenses against the State, and shall fix the minimum and maximum penalties therefor."

That portion of section 3 of the Act of 1902 which is pertinent here is the following:—

"All officers and directors of street railway companies that shall refuse or neglect to comply with the provisions and requirements of this act shall be deemed guilty of misdemeanor, and shall, upon conviction before any court of competent jurisdiction, be fined not less than one hundred dollars, or be imprisoned in the parish jail not less than sixty days and not more than six months."

It will be observed that so far as the alternative penalty of imprisonment is concerned a minimum and maximum of punishment is fixed.

The contention of the appellee is that in not fixing a maximum for the fine imposed, and the section leaving it discretionary with the judge to fine or imprison—one or the other, not both—the Constitution is violated, the part of the section quoted is void, and no penalty at all under it can be imposed.

Article 155 of the Constitution of 1898 is new, in the sense that it is not found in the preceding Constitutions of the State.

Up to the time of the enactment of Act No. 64, p. 89, of Acts 1902, which statute was approved by the Governor June 26, 1902, the General Assembly had, pursuant to the direction of article 155, passed no law grading misdemeanors and minor offenses against the State and fixing minimum and maximum penalties therefor.

There was, therefore, at the time no act of the Legislature specifically carrying into effect article 155.

Subsequently a statute was enacted the title of which is:—

"An Act to grade misdemeanors and minor offenses against the State and to fix the minimum and maximum penalties therefor, in accordance with the direction to the General Assembly contained in article 155 of the Constitution."

This is known as Act No. 107, p. 161, of Acts 1902, and it was approved by the Governor July 7, 1902.

It does not go any further than grading certain misdemeanors and minor offenses therein named and fixing minimum and maximum penalties therefor. It contains no general clause applicable to misdemeanors and minor offenses generally, other than those named, and fixing a minimum and maximum penalty therefor, which should apply, as the law governing, in cases where the Legislature, in acts already passed or thereafter to be passed, failed to fix the minimum

and maximum penalties, or failed in respect to either, for the minor offenses described and punished in such acts.

On the state of the case as just here presented, two contentions arise. One on part of the appellee that the latter clause of article 155, to-wit:—"and shall fix the minimum and maximum penalties therefor," is mandatory, and the Legislature, in enacting the third section of the Act of 1902, should have observed its command; that right then and there that part of the article could and should have been carried into effect by fixing a minimum and maximum penalty for the misdemeanor denounced, and a failure to do so contravenes the organic law.

The other contention, made on part of the State, is that the framers of the Constitution of 1898 were careful to provide against the repeal of existing laws, not inconsistent with its provisions, and did so in article 325 where it declared that:—

"All laws in force in this State, at the time of the adoption of this Constitution, not inconsistent therewith, and constitutional when enacted, shall remain in full force and effect until altered or repealed by the General Assembly, or until they expire by their own limitation."

That at the time of the adoption of the Constitution of 1898 there was a law, not inconsistent with its provisions, nor since altered or repealed, and, therefore, remaining in force, which is applicable to article 155 and its commands in all cases where the Legislature, in enacting a statute making something described therein a misdemeanor and providing a penalty therefor, fails to fix the minimum and maximum punishment; and that under such pre-existing law, in connection with the third section of the Act of 1902, the appellee may be sentenced, if found guilty, without violating article 155.

The law referred to is section 982 of the Revised Statutes 1876 and reads as follows:—

"Wherever the punishments of fine and imprisonment are left by law at the discretion of any court, the fine shall not exceed one thousand dollars, nor the imprisonment two years."

Here, it is urged, is a law which meets just such cases, as the present one, of omission on part of the Legislature to fix a maximum penalty for offenses denounced and punished, and there being such a law in force when the statute of 1902 was enacted, it has the effect of saving the Act, in the particular mentioned, from the anathema of unconstitutionality hurled at it.

If the law embodied in Rev. St. 1876, § 982, had been enacted since the adoption of the Constitution of 1898, would it have the effect of saving that part of the third section of the act of 1902 under discussion from unconstitutionality.

We must hold it would, for it would be a general statute

fixing the maximum punishment for offenses, which otherwise would be left to the discretion of the trial court—something, in the case of misdemeanors, the Constitution commands, in its article 155, shall not be done.

It was competent for the Legislature to have written in the third section of the Act of 1902 that the fine imposed shall not exceed one thousand dollars. It could have made the clause under discussion read:—"shall, upon conviction before any court of competent jurisdiction, be fined not less than one hundred dollars and not more than one thousand dollars," instead of stopping, as it did, with the imposition of a fine "not less than one hundred dollars."

If this be so, then it was not absolutely necessary (unless the Legislature desired to make the maximum fine less than one thousand dollars) to add the words:—"and not more than one thousand dollars," since, by general statute already existing, that maximum of fine was fixed for offenses in all cases where the particular statute, making the thing done or not done an offense and providing for its punishment, left the maximum fine unnamed.

If, then, the law embodied in Rev. St. 1876, § 982, would suffice to save the pertinent part of the Act of 1902 from unconstitutionality had it been enacted since the adoption of the Constitution of 1898, the question recurs whether Rev. St. 1876, § 982, has an equal effect to do this though it be a statute antedating in enactment the adoption of the Constitution of 1898.

This cannot be doubted in view of the first declaration of article 325 of that Constitution heretofore referred to and quoted.

We find no inconsistency between the law as found in the section of the Revised Statutes and article 155 of the Constitution. But even if there were, in view of the third declaration of article 325 of the Constitution, such inconsistency would not avail, for the present and until the Legislature acted, to render the section of the Revised Statutes inoperative.

The third declaration of article 325 is:—

"The provisions of all laws, which are inconsistent with this Constitution, shall cease upon its adoption, except that all laws which are inconsistent with such provisions of this Constitution as require legislation to enforce them, shall remain in full force and effect until such legislation is had."

The most cursory reading of article 155 of the Constitution shows that its provisions require legislation to enforce them. It is left for the Legislature to do by general act, or in each particular act it may pass relating to misdemeanors, what the latter clause of the article commands, viz.:—fix the minimum and maximum penalties for such offenses.

But, in any event, legislation is necessary.

The article does not direct that the General Assembly, in enacting each particular law relating to misdemeanors shall,

in such act, fix the minimum and maximum penalties therefor. If it did, such direction—being a mere command—would undoubtedly be self-acting.

It directs the grading of misdemeanors and minor offenses and the fixing of minimum and maximum penalties therefor.

The first part of the article is unquestionably merely directory. The latter part may be mandatory. But if mandatory, it may be done by general statute and we find such a general statute in force limiting maximum fines, while the particular statute under which appellee is being proceeded against limits the minimum fine assessable against him. As we have seen Act No. 107, p. 161, of Acts 1902, purporting to carry article 155 into effect, really does so as to certain minor offenses only, and the said Act, by its thirteenth section. leaves unrepealed laws not inconsistent with it. Section 982, Rev. St. 1876, is not inconsistent with it.

We hold that section 982 and the statute under which the appellee is being prosecuted, taken together, meet the requirement of article 155 of the Constitution, and lift that portion of the third section of the statute, under discussion, out of the "slough of despond"—i. e., unconstitutionality.

The last contention of the appellee is that the third section of the Act, in respect to the penalties fixed, is so uncertain, indefinite and indeterminate that the same is not susceptible of being carried into execution and does not permit of any satisfactory determination as to the court vested with jurisdiction.

This is in the nature of a plea to the jurisdiction of the Second City Criminal Court.

With it as such we have nothing to do on this appeal. The case could only reach and did only reach this Court on appeal by reason of the fact that the Second City Criminal Court, by judgment rendered, is considered to have declared a law of the State unconstitutional.

Our enquiry on the appeal is, therefore, limited to that sole question. Const. art. 85; Louisiana Society v. Moody, 52 La. Ann. 1815, 28 South. 224.

Limiting it to that, we find the law attacked, in the features of it properly before the Court, is not unconstitutional. That must necessarily end the case here in its present form.

If it be true, the Second City Criminal Court is without jurisdiction to try and determine the case, or the Judge thereof is without authority to sit upon it as Committing Magistrate, and nevertheless jurisdiction is taken in one or the other of the capacities named—either as Judge or as Committing Magistrate—the Constitution, in such case, gives no appeal from such tribunal to this Court.

Another and altogether different process and remedy is provided by law to reach inferior courts which take cognizance of cases of which the law has not vested them with jurisdiction.

We are not to be understood as expressing or intimating e opinion that the Judge of the Second City Criminal Court without jurisdiction, either to try the case or sit upon it as ommitting Magistrate. We reserve opinion as to that.

And we also reserve opinion as to the power of the Criminal istrict Court of the Parish of Orleans over the case, as well to whether either of the tribunals mentioned, or any other, is authority to sit upon the case and determine it.

The judgment sustaining the demurrer, dismissing the fidavit made against the accused and ordering his discharge, annulled and reversed, and it is now adjudged and decreed at the constitutionality of Act No. 64, p. 89, of Acts 1902, in e respect that the same is at issue herein, be sustained.

It is further ordered and decreed that the demurrer filed by e accused be overruled and that the case be remanded to the econd City Criminal Court with instructions to proceed erewith according to law.

It is further ordered, etc., that the costs of the appeal be orne by the appellee.

BREAUX, J., dissents on grounds relating to the want of risdiction of the court a qua.

MONROE, J. I am of the opinion that the city court was ithout jurisdiction ratione materiæ. I therefore dissent.

CHANEY v. LOUISIANA & M. R. R. CO.

(*Supreme Court of Missouri, Division No. 1, June 20, 1903.*)

[75 S. W. Rep. 595.]

ho Are Employees.

One who is acquainted with the conductor and brakeman on a mixed in, and for several years has ridden once a week thereon without ying fare, but rendering assistance in handling baggage and unload- g cars, etc., is not an employee of the railroad company.

ssengers—Crowded Car—Assuming Dangerous Position.

Neither on general principles, nor under Rev. St. 1899, § 1080, provid- g that if a railroad passenger shall be injured while on the platform, in any baggage, wood, or freight car, in violation of printed regula- ns posted inside of the passenger cars, the company shall not be liable at the time it furnished room inside its passenger cars sufficient for ssengers, is a passenger justified in taking a position, on account of crowded condition of the passenger car, on the top of a freight car, lding on to a brake with his legs dangling over the end of the car.

ntributory Negligence—Absence of Plea.

Though in an action by a passenger for injuries there is no plea of ntributory negligence, yet where it clearly appears from plaintiff's n evidence that he was guilty of negligence directly contributing to injury, it is proper to take the case from the jury by an instruction the nature of a demurrer to the evidence.

Appeal from Circuit Court, Audrain County; E. M. Hughes, dge.

Action by John Chaney against the Louisiana & Missouri

River Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Geo. Robertson, for appellant.
F. Houston, for respondent.

VALLIANT, J. Plaintiff sues to recover damages for personal injuries sustained by him in an accident on a railroad owned by the defendant corporation, but leased to and operated by the Chicago & Alton Railroad Company. The accident is alleged to have resulted from a defective condition of the road and the negligent running of the train. The petition is in two counts. In the first count plaintiff declares that he was an employee of the Chicago & Alton Company, engaged in operating the train, and in the second that he was a passenger.

The plaintiff's evidence tended to show as follows: The defendant is a Missouri corporation owning a railroad extending from Louisiana, Mo., south to the Missouri river, which road is leased to and operated by the Chicago & Alton Railroad Company. Plaintiff lived near Auxvasse, which is a station on this road a few miles from Mexico, Mo. A local train composed of freight cars and a caboose, in which passengers were usually carried, ran regularly on that part of the road. The plaintiff was familiar with this train, was well acquainted with the conductor and brakeman, and made frequent trips on it from Auxvasse to Mexico and return. He was not in the habit of paying fare, and did not expect to do so. The conductor never asked him for fare, but frequently would ask him to assist in handling the baggage and unloading cars, and he always assisted in whatever he was asked to do. He frequently rode on the top of the cars, and helped with the brakes when requested. He had been going to and fro on this train, on these conditions, once a week for several years. On the day of the accident the plaintiff boarded the train at Auxvasse, aiming to go to Mexico; he got on the front platform of the caboose; the conductor at that time was on the rear platform, giving the signal to the engineer to start; plaintiff at that time was in the line of the conductor's vision; whether he was seen by the conductor or not he did not know. When the train pulled out from Auxvasse, the plaintiff, standing on the front platform, looked into the caboose and saw that all the seats were occupied, four or five men were standing in the aisles, and thereupon he climbed upon top of the freight car next in front, and walked on along to the front over about six cars and sat down on the top of a freight car. The two brakemen saw him. When the train stopped at the next station, he got down on the ground. While the train was standing there one of the brakemen asked him to go up and let off a brake; he went up on top of the car for this purpose; it was the third or fourth car from the caboose; he let off the brake as requested, and then sat down

n top of the car at one end, facing to the rear, with his legs anging down between two cars, holding to a brake. He was ı that position when three of the cars in front jumped the ·ack, the rails spread, the wheels of the car he was on dropped etween the rails, the rear cars crushed against it, and his leg 'as crushed. The result was his leg was afterwards ampuıted. The road was in bad condition, and the train was being ın unusually fast. Upon the conclusion of the plaintiff's :stimony, the court, at the request of the defendant, gave an ıstruction to the effect that the plaintiff was not entitled to :cover, which resulted in a judgment of nonsuit, from which ıe plaintiff appeals.

The plaintiff, as shown by his petition, was not entirely ıtisfied in his own mind whether he was on the train in the apacity of an employee to assist in its operation, or that of a assenger to be taken care of by those in charge of the train; ı his brief before us he inclines to the position that he was passenger, but insists that, whether employee or passenger, e was entitled to have his case submitted to the jury. We ıink it is very clear he was not an employee, but it does not)llow from that conclusion that he was a passenger. If he 'as on the train with the knowledge and consent of the conuctor, for the purpose of being carried, he was a passenger. he only evidence from which it could be inferred that the ɔnductor knew he was on the train at all is to the effect that e was in the line of the conductor's vision when the latter was iving the signal to the engineer to start. But at that time ıe plaintiff was on the front platform of the caboose; there no evidence that the conductor saw him on the top of the eight car. It is perhaps unnecessary, however, for us to :cide that question, because, if we concede to the plaintiff ıat his relation to the defendant was that of a passenger on ıe train, we cannot concede that he was justified as a pas:nger in taking his seat on top of the freight car, and we ınnot adjudge the carrier liable for an injury received by the laintiff, to the producing of which his position, so unnecssary and so unusual for a passenger, contributed.

The plaintiff, in giving his testimony, was unable to divest mself entirely of either of the two characters in which he ıed. Having in mind that perhaps his relation was that of ı employee, he conveys the idea that he was on top of the ır to assist with the brakes; but, if he is to be adjudged a ıssenger, he says he climbed on top of the car and took his :at there because all the seats in the caboose were occupied ıd four or five were already standing in the aisles. If we ıould sustain the plaintiff's suit on that theory, then we ould be laying down the law that whenever a passenger train so crowded that one cannot obtain a seat inside he may imb on top of the train, and if then, through the negligent ındling of the train, there comes a jar sufficient to throw

him off his elevated seat, and he is injured, the carrier is liable, notwithstanding the fact that his position on top of the train had as much to do with the injury as the jar. Of course the bare statement of the proposition is its refutation.

But the plaintiff relies on section 1080, Rev. St. 1899: "In case any passenger on any railroad shall be injured while on the platform of a car, or in any baggage, wood or freight car, in violation of the printed regulations of the company, posted up at the time in a conspicuous place inside of its passenger cars then in the train, such company shall not be liable for the injury: provided said company, at the time, furnished room inside its passenger cars sufficient for the proper accommodations of the passengers." There were no such printed regulations posted in this caboose. That is a quaint old statute. It was enacted in 1853 (Acts 1852–53, p. 143) passed into the revision of 1855, and seems to have escaped the pruning knife of all the revising sessions of the General Assembly since that date.

The art of operating railroads has improved since that statute was enacted, and the people of this state now know more about railroad traveling than they did 50 years ago. That act seems to contemplate that it was expected that passengers, when the car or cars especially designed for them happened to be crowded, would find seats in the baggage car, or in a freight car, or in a "wood car," whatever that may have been, and it devolved the duty on the railroad company to post conspicuous notices on the passenger cars warning the people not to do so. But we need not say in this opinion what the effect of that statute would be at this day on a case brought within its terms, for the reason that the plaintiff's case does not come within those terms. The statute contemplates that, when the passenger car is crowded, men may take refuge in a baggage car, in a freight car, or in a wood car; but it makes no provision for a man who is so reckless as to take a position on the top of a freight car, as this passenger did. The plaintiff was the only person hurt in the accident, and it is certain the perilous position which he voluntarily and unnecessarily assumed contributed to the result.

Although there was no plea of contributory negligence, yet where it clearly appears, as it does in this case from the plaintiff's own evidence, that he was guilty of negligence that directly contributed to produce the injury, it is the duty of the court to take the case from the jury by an instruction in the nature of a demurrer to the evidence. Hudson v. Wabash Ry. Co., 101 Mo. 13, 14 S. W. 15; Buesching v. Gas L. Co., 73 Mo. 219, 39 Am. Rep. 503.

We are tempted to follow the learned counsel in their able discussion of the question of the liability of a lessor company when the injury, as in this case, is alleged to have resulted

rom the negligent management of its train by a lessee com-
ıany, but the facts of this case showing no right of recovery
n plaintiff against the defendant, even if the defendant itself
ıad been operating the train, it is not only unnecessary, but
vould be improper, for us to decide what, would be the
lefendant's attitude if the case was different.

The judgment is affirmed. All concur.

MCGRATH v. DELAWARE, L. & W. R. CO.

(Court of Errors and Appeals of New Jersey, June 15, 1903.)

[55 Atl. Rep. 242.]

laster and Servant—Inspection of Appliances.*

With respect to the condition of implements furnished to his servants, master must make such inspection as ordinary prudence requires, inuding the use of such tests as are known to him to be called for, or ·e so commonly employed in such inspections that he might reasonably : deemed to have known of them.

Dixon, Bogert, and Vroom, JJ., dissenting.

(Syllabus by the Court)

Error to Supreme Court.

Action by Daniel McGrath against the Delaware, Lackaanna & Western Railroad Company. Judgment for defendnt, and plaintiff brings error. Affirmed.

Warren Dixon, for plaintiff in error.

Bedie, Edwards and Lawrence, for defendant in error.

GARRISON, J. This case was tried originally in the court common pleas of Hudson county, where the plaintiff reıvered a verdict for damages for personal injuries. Upon a rit of error taken to the Supreme Court, the judgment of the ımmon pleas was reversed and set aside. From this judgent of the Supreme Court the present writ of error was ken.

The opinion of Chief Justice Gummere, delivered in the ıpreme Court (68 N. J. Law, —, 53 Atl. 207) fully states the cts upon which the legal questions in the case arise. We ncur with the view expressed in that opinion that the defecte condition of the coal car was the occasion, only, of the jury to the plaintiff, and not a proximate cause of it. The oximate cause was the condition of the wooden tool called "sprag," which caused it to break in the hands of the plaini. In the opinion cited, conclusive effect was given to the ıtement of one of the plaintiff's witnesses that the defective ndition of the sprag could have been readily detected by a sual examination of it; and, proceeding from this premise, e conclusion reached was that the plaintiff himself was ilty of negligence in failing to observe what a casual

*See note appended to Thompson v. Great Northern Ry. Co. (Minn.), Am. & Eng. R. Cas., N. S., 421.

observation would have discovered. We think that this conclusion gave, perhaps, undue weight to the expression of the plaintiff's witness, to the exclusion of inferences more favorable to the plaintiff than might have been drawn by the jury from other parts of the testimony. It is not clear that the defective condition of the wooden tool in question might not have escaped such observation as was incident to the use of it by the servant, and yet have been detected by the master, either in the course of its manufacture, or by the exercise of reasonable care in its inspection before placing it in the hands of the servant. The case has therefore been examined with regard to the duty of the master in these respects.

The implement called a "sprag" is shown by the testimony to be a triangular block of wood, 2 inches wide, 5 inches at its base, and with a perpendicular of about 12 inches; representing, therefore, less than half a cubic foot of wood exposed to observation upon five of its aspects. If any of these aspects presented to the observer evidences of rottenness, the rule as to master and servant is the same, and in such case, as was held in the court below, the servant could not recover from the master. To entitle the servant to such recovery, the defect must have been at once hidden from ordinary observation, and yet detectable by such ordinary inspection or tests as the master was bound to use. This raises the legal question in the case, namely, what was the duty of the master in these respects? Since the rendition of the opinion in Atz v. The Manufacturing Co., 30 N. J. Law, 41, 34 Atl. 980, the rule therein laid down by Mr. Justice Magie has been accepted. namely, that, with respect to the condition of implements furnished to servants, a master must make such inspection as ordinary prudence requires, involving the use of such tests as are known to him to be called for, or as are so commonly employed in such inspections that he might reasonably be deemed to have known of them.

Applying this rule to the case in hand, the question is whether any tests were omitted by the master which he knew to be called for, or ought to have known. One only is suggested, namely, what is called the "hammer test," which is described in the testimony as "sounding, which is a usual method of testing to find out whether a piece of wood is solid to the core when it appears to be solid on the outside." The concrete question, however, is whether this method is shown by the testimony to have been in ordinary use with respect to small blocks of wood, such as was the sprag in question. The testimony is silent upon this point, and it may well be that where the core of a piece of timber is at a distance from its exposed surface a different rule would obtain from that which would be reasonable when, in the process of manufacture, the wood had been reduced to a block containing a few cubic inches. In its bearing upon the master's duty, it is immaterial whether the intimate structure of a given piece of wood

disclosed as the result of a test, or as a necessary step in ıe process of manufacture. In either case the required dis- osure is obtained. If, in the present case, the master, for ıe sole object of a test, had caused the block to be sawed in ve separate dimensions—i. e., with the grain, across the ain, and obliquely, besides two lateral cuts but two inches ıart—without disclosing any defect, it could scarcely be id that he had not used ordinary care to acquaint himself ith the structure of the material he was using. This, how- er, was just what was done in the making of the sprag, cording to the testimony. Giving, therefore, to the ıstract testimony in the case its fullest import, it entirely ils to show that, in respect to the subject-matter of this it, the master either failed to use ordinary care, or that he glected any reasonable test of whose existence he either ıew or ought to have known.

Upon this ground, and not upon the ground of the contrib- ory negligence of the plaintiff, the judgment rendered in e Supreme Court is affirmed.

BOGERT and VROOM, JJ., dissent.

DIXON, J. (dissenting). The opinion of the court in this se rests upon an assumption which I think is unwarranted that the exposed surfaces of the sprag presented no indi- tions of unsoundness. The fact that the sprag was unsound, shown by the rottenness of the wood fibers when examined er the accident, was proved and scarcely disputed at the al; and the opinion before mentioned demonstrates the at probability, if not the certainty, that such unsoundness uld be disclosed by the various sections to which the terial had been subjected in making the sprag. This being two questions remained: First, whether it could reason- y be decided that the maker of the sprag, who was the er ego of the defendant, and a worker in wood, would have ceived the defect and discarded the material if he had ex- ised due care in the process of manufacture, and a due re- d for the safety of those who were to use the sprag; and, ond, whether it could reasonably be decided that the defect ght have escaped the observation of the plaintiff, even ugh he exercised due care in using the sprag. Consider- , on the one hand, the ample opportunity for examination orded to the manufacturer, and the high degree of care re- red of him, in view of the serious danger incurred by the of a rotten sprag, and, on the other hand, the right of the r to presume that sound material had been employed, and slight opportunity for observation afforded to him as he ks up the sprag to stop an advancing car, I think it was rful to submit each of these questions to the jury, and that jury had legal right to decide both of them in favor of the intiff.

NORDQUIST *v.* GREAT NORTHERN RY. CO.

(Supreme Court of Minnesota, June 5, 1903.)

[95 N. W. Rep. 322.]

Injury to Employee—Contributory Negligence—Disobedience of Rules.*

An employee is bound to obey all of the reasonable rules of his employer with reference to the conduct of his business. Disobedience of such rules, if it contributes directly to the injury of the employee, conclusively charges him with negligence, which will bar any recovery of damages for his injury.

Same—Same—Same.

The plaintiff in this, a personal injury action, is chargeable as a matter of law with contributory negligence in failing to comply with the rules of the defendant as to taking of freight trains through one of its tunnels.

(Syllabus by the Court.)

Appeal from District Court, Hennepin County; J. F. McGee, Judge.

Action by Ulrik Nordquist against the Great Northern Railway Company. Verdict for defendant. From an order denying a new trial, plaintiff appeals. Affirmed.

John Lind and A. Ueland, for appellant.

W. E. Dodge, Rome G. Brown, and Chas. S. Albert, for respondent.

START, C. J. On September 11, 1901, the plaintiff, who was then an employee of the defendant as a conductor on its freight trains, was taking a freight train through a tunnel in the main range of the Cascade Mountains in the state of Washington. The train became unmanageable by reason of the failure of the air brakes to work properly, and ran at a dangerous rate of speed through the tunnel to a point below, where it left the rails at a curve in the roadbed, and was thrown down the mountain side, and demolished. The result of the accident was that several persons, including the engineer and fireman of the train, were killed, and the plaintiff's skull was fractured in two places, and his right arm crushed so that it had to be amputated. He brought this action to recover damages for such injuries on the ground that they were caused by the alleged negligence of the defendant in failing to light the tunnel and in omitting to construct and operate a safety switch at or near Wellington between the western portal of the tunnel and the curve in the roadbed where the train left the rails. The answer denied any negligence on the part of the defendant, and alleged that the plaintiff's injuries were due solely to his own negligence. The defendant, on the trial of the action, and at the close of the evidence, requested the court to direct a verdict for the defendant, for the reason that the evidence did not show any negligence on the part of the defendant, but did conclusively show

*See foot-note appended to Green *v.* Brainerd & N. M. Ry. Co. (Minn.), 4 R. R. R. 87, 27 Am. & Eng. R. Cas., N. S., 87.

hat the plaintiff was guilty of negligence contributing to his njury, and that he assumed the risk. The court expressed he opinion that the plaintiff was guilty of contributory negigence, but granted the request, and directed the jury to reurn a verdict for the defendant on the ground that the vidence was not sufficient to justify a finding of negligence n its part. The plaintiff appealed from an order denying his notion for a new trial. The evidence as to the construction f the tunnel, the grade of the roadbed and its curves, is unisputed. The tunnel is 2.62 miles in length, 16 feet wide, vith perpendicular sides 12 feet high from the top of the ails, and arched to a radius of 8 feet, so that from the top of ne rails to the apex of the crown it is 20 feet. The roadbed nrough the tunnel from east to west and for some 20 miles elow is on a sharp downgrade approximating as an operating rade 2.2 per cent., the maximum grade elsewhere on the efendant's railway line. There are numerous and frequent nrves in the roadbed for 20 miles next below the tunnel. he station at the east entrance of the tunnel is known as Cascade Tunnel," and the one at the west entrance, which about one-eighth of a mile below, is "Wellington." A mile nd one-half below this station is the curve where the train ft the rails. There are, including this curve, seven curves the roadbed between the western entrance of the tunnel nd the place of the accident. It is apparent that the tunnel connection with the roadbed for 20 miles below was a place great and peculiar danger through and down which to perate heavy freight trains. This was recognized by defendnt, and, in addition to its general rules making conductors sponsible for the conduct of the trainmen, and requiring them know that cars in trains have been inspected, and that the akes and signals are in proper order, adopted and promulted a special rule as to the movement of freight trains at nscade Tunnel, which was this: "No train will leave Casde Tunnel until the air brakes have been carefully tested. ne engineer will test the brakes, and leave them set until ainmen examine each car; then release them, and trainmen ll again examine each car, and see that the brakes release, fore giving the signal to start the train. Conductors must orm engineers how many cars, loaded and empty, in the in, and how many cars of air are working. All retainers nst be used from Cascade Tunnel to Merrit, and from iwagin to Leavenworth, and from Cascade Tunnel to ykomish." This rule, as well as the general rules, was ll known to and understood by the plaintiff before the accint. The train in question was westward bound, and conted of thirty-three loaded freight cars, and was hauled by ee engines, one at each end and one in the middle. It was uipped with hand and air brakes, the latter alone being equate, if the air worked properly, to control the movent of the train through the tunnel and down the grade.

When the train reached Cascade Tunnel station, the rear engine was detached, the middle one set out, the train coupled, and it entered the tunnel. When it reached a point about a quarter of a mile from the eastern entrance, and had attained a speed of some 20 miles an hour, the engineer attempted to set the air brakes, but they failed to work. The plaintiff, who was in the engineer's cab, started at once to set the hand brakes, but in the darkness made slow progress. The first one he reached had been set, evidently by the fireman. He reached the second one, which he set, but before he could set another the train was thrown from the track. We are of the opinion that the evidence was insufficient to sustain a verdict based upon the alleged negligence of the defendant in failing to light the tunnel. But the question whether the evidence was sufficient to take the case to the jury on the issue as to the defendant's alleged negligence in omitting to construct and operate a safety switch at or near Wellington station is a doubtful and complicated one, involving, as it does, questions of civil engineering. We find it unnecessary to decide this question, for we are of the opinion that it conclusively appears from the evidence that the plaintiff was guilty of contributory negligence is not complying with the special rule as to the conduct of conductors at Cascade Tunnel. An employee is bound to obey all of the reasonable rules of his employer with reference to the conduct of his business. Disobedience of such rules, if it contributes directly to the injury of the employee, conclusively charges him with negligence, which will bar any recovery of damages for his injury. Green v. Railway Co., 85 Minn. 318, 88 N. W. 974, 4 R. R. R. 87, 27 Am. & Eng. R. Cas., N. S., 87, this rule is based upon the plainest principles of justice and sound public policy, for upon a prompt compliance with such rules, especially in the railway service, depends the safety of not only property, but of human life and limb.

We have attentively examined all of the evidence relating to the question whether the plaintiff complied with the rules of the defendant as to the moving of trains at Cascade Tunnel, and have reached the conclusion that he failed to comply with them in several material respects, and that his failure to do so contributed directly to his injury. The evidence is practically conclusive that the air brakes were sufficient in number, if in proper condition, to have controlled the movements of the train through the tunnel, and prevented the accident; that, if they had been in proper condition when the train entered the tunnel, it is not be presumed upon any reasonable hypothesis that their condition changed in the two or three minutes, at most, which it took the train to go one-fourth of a mile into the tunnel; hence the defect must have existed before the train started into the tunnel, and would have been discovered if the rules had been complied with. And, further, that while the plaintiff knew, after the train had

been coupled, that the air was working on the 18 cars which were ahead of the middle engine before it was set out, yet he had no personal knowledge that it was working on the 15 cars back of the engine; that as to those he simply saw his brakeman "working back there examining the air"; that the brakeman applied no tests to determine whether the air was working or not, and gave as a reason why he did not inspect the air in accordance with the rules that "we were in a hurry to get out of there"; and that the plaintiff did not inform the engineer how many cars the air was working on, as the rule imperatively required, for he had not informed himself in the premises. The conclusion is not to be resisted that the plaintiff failed to comply with the rules, and that his negligence in this respect contributed to his injury.

Order affirmed.

SECCOMBE v. DETROIT ELECTRIC RY.

(*Supreme Court of Michigan, May 12, 1903.*)

[94 N. W. Rep. 747.]

Injury to Motorman—Collision—Defect in Track—Proximate Cause.

Where plaintiff, a street railway motorman, was injured by a collision with a car which was being backed on the same track on which his car was being operated, for the purpose of obtaining relief for a car which had been derailed by reason of a defect in the track some distance ahead, the defect in the track was not the proximate cause of the injury.

Same—Same—Rules—Failure to Promulgate—Negligence.

Where a street railway company had promulgated a rule requiring that cars shall not be started backward before the motorman receives three bells from the conductor, who must remain on the rear platform while the car is moving backward, the failure of the company to promulgate other rules regulating the running of cars backward was not negligence justifying a recovery for injuries to a motorman in collision with a backing car; it not appearing that other or different rules were in use on other roads, regulating such operation of cars.

Same—Assumption of Risk.

Where a street railway motorman knew that cars were operated backward on some occasions without red lanterns being carried on the rear thereof, and that the company had not established telephone connections to warn following cars of a car being operated backward, he assumed the risk of the operation of such cars without such precautions.

Same—Collision—Negligence—Conductor Jumping from Car to Avoid Danger.

Where a street railway car was being run backward, and just before collision with a following car the conductor signaled the motorman to stop the car, and then jumped, his act in jumping did not constitute negligence on which a liability for injuries to the motorman of the following car could be predicated.

Same—Same—Incompetency of Conductor—Notice to Company.

In an action for injuries from the negligence of a street railway conductor, witnesses testified that he was slow in ringing bells, and was unable to get excited and give wrong signals. Other witnesses testified that he was not a good conductor, and that he was short, and had to stand on tiptoes to reach the bell cord, which made him slow in emergencies; but none of such witnesses testified that the conductor's incompetency had ever been reported to the company or the union: *held*,

that such evidence failed to raise a presumption that the company knew or ought to have known of his incompetency, so as to charge it with negligence in failing to remove him.

Error to Circuit Court, Wayne County; Joseph W. Donovan, Judge.

Action by Frederick W. Seccombe against the Detroit Electric Railway. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

Thomas Kissane and Lehmann & Stivers, for appellant.
Thomas T. Leete, Jr., for appellee.

HOOKER, C. J. The plaintiff was a motorman on defendant's railroad. He was injured by reason of his car coming into collision with another car which was backing up. At the point of collision there were two tracks, and cars were not expected to run both ways upon either. It is claimed that the reason for it on this occasion was the derailment of a third car at a point about a mile or more distant from the place of the collision, where there was a switch, and a worn rail which had on two or more previous occasions caused the defendant's cars to leave the track. The court directed a verdict for the defendant, and the plaintiff has appealed.

The negligence alleged and relied upon appears to be (1) that (Drouillard) the conductor and the motorman of the car which was being run backward were incompetent; (2) that the track was in bad condition, and therefore caused cars to be derailed at the switch, thus making it necessary to back the next car to another switch; (3) that defendant neglected to provide and furnish rules by which its servants could operate its cars with safety when backing up.

At plaintiff's car barn there was a switch, by means of which a car might pass from one track to the other. The next such switch was a mile or more distant, and it was at the last-mentioned switch that the car was derailed. Plaintiff says that this derailment was due to a worn rail, and that such derailments had occurred there before, and on such occasions the next car would have to back up to the car barn before it could be switched upon the return track. On two or three occasions the plaintiff had known of the cars being backed to the barn, and he had done so with his car. On this occasion he passed the barn at 8 o'clock in the evening, and the collision occurred a little later, when he met the preceding car backing up. The trolley wires were supported by posts set between the tracks, and defendant's counsel contend that, had not the two cars been upon the same track, these poles would have intercepted plaintiff's line of vision to the other car—not otherwise—and that this should have been notice to him, the failure to observe and heed which was contributory negligence in him. No testimony was introduced by the defendant.

On the night of the accident the car second in advance of

plaintiff's car ran off the track, and made an obstruction. The next car to arrive was in charge of Drouillard, as conductor, and Clixby, as motorman; and they were asked to carry word to the barn, a distance of a mile and a half, to send relief. There was no way to do this but to back the car to that place, which they proceeded to do. The alleged defect was that there was a worn rail or point of a switch at the Y, which on some occasions had derailed the cars. The worn rail was not the proximate cause of the injury, if it was a remote one. Railway v. Perriguey, 138 Ind. 416, 34 N. E. 833, 37 N. E. 976; Jackson v. R. Co., 13 Lea, 492, 19 Am. & Eng. R. Cas. 433, 49 Am. Rep. 663; Fawcett v. R. Co., 24 W. Va. 760, 19 Am. & Eng. R. Cas. 1; De Camp v. Sioux City, 74 Iowa, 392, 37 N. W. 971; Kistner v. City of Indianapolis, 100 Ind. 211; Lewis v. P. M. R. Co., 54 Mich. 55, 19 N. W. 744, 52 Am. Rep. 790; Selleck v. L. S. R. Co., 58 Mich. 199, 24 N. W. 774, 23 Am. & Eng. R. Cas. 338. See, also, cases cited in opinion in case of Noe v. Rapid Railway, 94 N. W. 743.

We are asked to hold that it should have been left to the jury to say whether this accident was not due to the want of some reasonable and necessary rule for the backing of cars. The record shows that a printed rule required that "motormen must not start their cars until receiving either two bells, or the word 'Right' from the conductor, nor start the car backward before receiving three bells from the conductor, who must remain on rear platform while car is moving backward." We are not advised that any other or different rule is in use on any street railway in the country. Counsel suggest that the company should have established telephone connection with the Y, or should have required red lights on the rear of cars. It requires more than the production of authorities asserting that it is the duty of railroads to promulgate reasonable rules for the running of trains to establish the fact that defendant has been negligent in that respect. In Niles v. N. Y. Cent. Ry., 43 N. Y. Supp. 751, it was said: "The doctrine imposing liability upon railroad companies for failure to adopt particular rules, the necessity for which is not apparent to them, should not be unduly or unreasonably extended. And since the company has a paramount interest in protecting its property from injury or destruction, and also in avoiding all liability for damages to employees and passengers, * * these considerations must have some weight in determining whether the omission to promulgate a particular rule constitutes a neglect of duty, in not being able to foresee certain contingencies." And in the case of Berrigan v. N. Y. W., 131 N. Y. 582, 30 N. E. 57, it was said: "There is no proof in the case that rules for such a case had ever been promulgated by any other railroad company, or that it was reasonable or practicable to provide against the occurrence of such an accident by a rule. The learned trial judge sub-

mitted to the jury the question whether the defendant was at fault in omitting to make and publish such a rule. This opened to the jury a wide field for speculation and conjecture. In the absence of some proof on the part of the plaintiff that such a rule was in operation by other roads, or of persons possessing peculiar skill and experience in the management and operation of railroads, to the effect that such a rule was necessary or practicable under the circumstances, or unless the necessity and propriety of making and promulgating such a rule was so obvious as to make the question one of common experience and knowledge, the court is not warranted in submitting such a question to the jury. Besides, it affirmatively appeared that the rules in use by the defendant provided in a reasonable way against the occurrence of such an accident, so far as such casualties can be prevented by rules." The following comment in Morgan v. Hudson River Iron Co., 133 N. Y. 666, 31 N. E. 234, is apropos: "The recovery was based entirely on the absence of rules. It was not suggested at the trial, nor is it on this appeal, what particular rule the defendant could have adopted that would have been likely to have prevented the accident. No evidence was given that any rule is in use in business of a similar character by other corporations of the same class, carrying on like operations, nor was there any evidence by experts or other witnesses to show that any rule was necessary or practicable in such cases. It was left to the jury to say whether or not it was a case for rules, and, if so, what particular rule should have been adopted. We know nothing with respect to the views entertained by the jury on these questions, except so far as they are indicated by their verdict for the plaintiff. It is not probable that they concluded that any definite rule should have been promulgated, but were content to hold that, as the plaintiff was injured, the defendant ought in some way to have prevented it, or, in case it did not, respond to him in damages. Almost every conceivable injury that a servant receives in the course of his employment may in this way be submitted to a jury, and with the same result." This accident occurred on a street railroad, where cars are expected to be under such control as to be stopped when the exigencies of public travel require it, and are incident to many delays that are not common upon steam roads. They are started and stopped at any and all points where occasion demands, and not in obedience to telegraph or telephone commands. As said by Montgomery, C. J., with the approval of the entire bench, in Mertz v. R. R., 125 Mich. 15, 83 N. W. 1036: "The distinction between steam railways and street railways has been often pointed out. It is a fact that must be assumed to be within the knowledge of all persons sui juris that a steam railway train cannot be brought under control within a short distance, while it is equally known that street cars in cities can be kept within control sufficiently to prevent collision

with vehicles lawfully on the track." See cases there cited. We think the learned judge did not err in declining to submit this question to the jury.

There is another reason why plaintiff's contention should not prevail. He was not a passenger, but an employee, who was familiar with defendant's methods and rules; he knew that cars had been backed on this piece of road, and that it was likely to happen again; he knew that the cars did not carry red lanterns upon the rear, as is customary upon steam roads, and he knew what, if any, means there were of determining whether a car was approaching or going away from him; and, under such circumstances, he may be said to have assumed the risk of such methods. Lang v. Transportation Line, 119 Mich 85, 77 N. W. 633.

The plaintiff would have had the trial court permit the jury to find that the responsibility for this collision rested upon Drouillard and Clixby, the conductor and motorman of the car that was backing up. Our attention is not called to any evidence that tends to show that it was due to any negligence of Clixby. Hence it is unimportant whether he was competent or not.

The testimony regarding Drouillard's negligence consists in the statement that he did not stand on the back platform all of the time that his car was backing up, it being shown that he took up a fare or two from a witness who got on at Twenty-Sixth street. This was the testimony of the passenger, and he said that Drouillard was in the act of taking the fare when the collision occurred. One Phelps testified that Drouillard jumped off from the car with two others, pulling the bell just before the accident. His jumping from the car after giving the signal to stop, and when he could do no good by remaining on the car, would not be culpable nor negligent. His negligence, if any, was his absence from the platform, where the rule required him to be, and his consequent failure to stop his car earlier. It is not for us to say that the passenger's evidence is false, or that Phelps' is true. Taken together, his testimony raised the question of Drouillard's negligence, as a cause of the collision, and made the question of his incompetency a proper one for consideration, if his incompetency, and defendant's negligence in relation thereto, were proved, to relieve the plaintiff from the effect of the fellow-servant rule, which is otherwise clearly applicable.

Before a master can be held liable on the ground that he has in his employ an incompetent servant, it must appear that he has been negligent either in employing or retaining him, and the burden of proof is upon the plaintiff. The presumption is that he was not negligent in either respect. Davis v. R. R., 20 Mich. 105, 4 Am. Rep. 364; M. C. R. R. v. Dolan, 32 Mich. 509; Walkowski v. Mines, 115 Mich. 629, 73 N. W. 895, 41 L. R. A. 33. Drouillard had worked for defendant about 10 weeks. One witness testified that, in his

opinion, he was slow to act—slow in ringing bells and stopping his car—and could not grasp two or three ideas at a time. He did not testify to his general reputation. This witness did not inform defendant that Drouillard was not competent, although himself its employee, and he never told the union to which they both belonged. Henry Benns testified that he knew his reputation. He was then asked, "What was it—competent or incompetent?" He did not answer the question asked, but replied, "Well, he was not competent to run a car." He was then asked what he had seen him do, and he said he had seen him get excited and give two bells when he ought to give one. On cross-examination he said he never reported him to the company or the union—never told anybody; had never heard of his having any accident, except once when this plaintiff ran into his car. Walter Smith testified that Drouillard's "reputation was not the best"; that "he was said not to be a good conductor, in that he was slow at times, and not quick to catch ideas," and that it was common rumor that he had been excluded from operating certain lines of the defendant"; and he also testified that he was short, and had to stand on his tiptoes to reach the bell cord, which would make a man slow in an emergency. John Hethrington said that he knew his reputation, and, when asked what it was, replied: "Well, what I could see, I judge he was incompetent. He was incompetent." On cross-examination he said he never heard anybody say he was incompetent, and did not understand the court's question to be what other people said about him; that what he said to the court was what he saw; and that he could not ring the bell and start the cars as quick as some, because he was short. He never reported him as incompetent, and never heard of his having an accident. If it can be said that all of the foregoing raised a question as to the fact of Drouillard's incompetency, it failed to raise any presumption that defendant knew it or ought to have known it, or that it should have removed him if it did know all that these witnesses testified to.

The judgment is affirmed. The other Justices concurred.

TEXAS & P. RY. CO. v. SWEARINGEN.

(*Circuit Court of Appeals, Fifth Circuit, April 7, 1903.*)

[122 Fed. Rep. 193.]

Master and Servant—Contracts Limiting Master's Liability—Assumption of Risk.

An application made by a railroad switchman for employment, in which he stated his knowledge of the dangers arising from certain kinds of structures built alongside the tracks, is not admissible to establish his assumption of the risk from such a structure alleged to have been negligently placed too close to the track.

Same—Action for Injury to Servant—Questions for Jury.

In an action by a railroad switchman to recover for injury received by being knocked from the side of a car, where he was riding in the course of his duty, by a track scale box erected by defendant in its switchyard near the track, the question whether plaintiff assumed the risk as one incident to his employment, either on the ground that the scale box was placed at a reasonably safe distance from the track, or that the danger was open and obvious, and was such that a reasonably prudent person engaged as plaintiff was must be presumed to have known of the same, is one for the jury, where there is a conflict in the evidence as to such facts.

Same—Railroad Switchman—Assumption of Risk from Structures beside Track.*

A switchman employed in railroad yards, where he is required in the performance of his duties to ride on the ladder on the side of freight cars while they are being moved, is not chargeable, as matter of law, with knowledge that a structure built by the company in the yards near to a track is so close to the track as to be dangerous to a person so riding merely because the structure itself is open to ordinary observation. It is the duty of the company to place its structures at such distance from the tracks as not to endanger its employees in the performance of their ordinary duties, and the employee has the right to presume that such duty has been performed, and is not charged with any duty of inspection to ascertain the exact distance of such structures from the track.

In Error to the Circuit Court of the United States for the Western District of Texas.

W. W. Swearingen, the defendant in error, instituted this action in the state court for El Paso county, Tex., from which court it was duly removed by the plaintiff in error to the Circuit Court. The pleadings of the plaintiff below present substantially the following allegations: That the defendant owns and operates a line of railway running into the city of El Paso, where it has tracks and switches constituting a general switch yard for the handling, switching, and shifting of both passenger and freight cars; that on and prior to the 7th day of February, 1902, he was in the employ of plaintiff in error as a switchman, working in its switch yard in the city of El Paso, and his duties were to couple and uncouple cars, shift switches, and assist in the placing, switching, and shifting of cars on the various tracks in the switch yard, which cars were moved by means of a locomotive; that he was under the direction and supervision of another servant of plaintiff in error called a "yardmaster"; that on the 7th day of February, 1902, while engaged in the performance of his duties, he was riding on the ladder on the side of a certain freight car of a train of cars attached to the locomotive, which ladder is placed there for employees to ride on while working, and which train of cars were going in a westerly direction along track No. 2 of the switch yards; that his body was swinging slightly out from the car, in the proper and usual position to ride on the ladder; that the yardmaster was at the east end of the train of cars, directing their movements by means of a lantern, it

*See foot-note appended to Gulf, C. & S. F. Ry. Co. v. Darby (Tex. Civ. App.), 2 R. R. R. 327, 25 Am. & Eng. R. Cas., N. S., 327.

being in the nighttime, and plaintiff below was looking back for signals, as was his duty, when he came in contact with the scale box structure which had been negligently placed by plaintiff in error or permitted to remain so near the north line of the track as not to permit the passage of his body in the position in which he was riding, and he was thrown to the ground, and dragged along by the cars, and permanently injured; that the scale structure was of a permanent character, and had been at the same place for many months prior to the time he received his injury, and had been placed there and maintained and used by the plaintiff in error, or was permitted to remain there, plaintiff in error knowing, or could have known by the use of ordinary care, the location of it, and it was during all the time so close to the north rail of the track as to endanger the life and limb of defendant in error and other employees while engaged in their duties, and constituted a dangerous obstruction to the track—all of which was well known to plaintiff in error, or could have been known by the use of ordinary care, but it was unknown to the defendant in error; that in placing the scale structure or permitting it to remain at the place above recited the plaintiff in error was guilty of negligence, and the defendant in error received his injuries by reason of said negligence, for which he claims damages.

The defenses were: First. General demurrer. Second. General denial. Third. The special plea that the defendant in error's injuries were not caused by the negligence of the plaintiff in error; that the scale structure was not erected so near the track as to injure the defendant in error, but that the same was erected in a proper and safe manner, at a safe and proper distance from the track, and that the defendant in error was injured through his own negligence, and the careless manner in which he rode on the cars. Fourth. That, if said scale box structure was erected so near the track as to be dangerous to the defendant in error, he knew it, or could have known it by the use of ordinary care, and assumed the risk arising therefrom, in this: That he had been in the employ of the plaintiff in error, both as a switchman and brakeman, for a long time prior to the accident, and had worked in the yards and on the switches and on the track No. 2, on which he was injured; that track No. 2 is a switch track frequently used by employees of plaintiff in error and used by the defendant in error; that the scale box structure is about six feet high, five feet wide, and it and its location to the track is open, patent, and obvious to the sight—all of which was well known to the defendant in error, or could have been known to him by the use of ordinary care, and by the use of ordinary care he could have avoided the collision with it, and that he was injured through his own negligence. Fifth. That the defendant in error well knew the situation and location of the track scale box in relation to track No. 2, and assumed the risk

sing therefrom, and was injured by his own negligence in ling upon the car in the manner in which he rode, and in t using proper care to avoid the collision, he knowing the nger, and that he was approaching the same.

The trial resulted in a judgment in favor of the defendant error. The plaintiff in error assigns errors, as follows:

'(1) The trial court erred in refusing to permit defendant introduce in evidence portions of the written application employment as a brakeman on defendant's railroad, made plaintiff to defendant on February 22, 1900, as shown by endant's bill of exception, because said testimony was terial to defendant, in this: That the questions asked intiff in said application, and the answer made thereto by intiff, show that plaintiff had notice of the location of the ck scale box, and that he was in danger of being knocked a car in passing same.

'(2) The trial court erred in overruling defendant's motion instruct the jury to return a verdict for defendant, because undisputed evidence established that said track scale box s erected in the defendant's yard and under the circumnces in a reasonably safe place and at a reasonably safe tance and location from track No. 2, on which track plainwas riding at the time he was injured.

'(3) The trial court erred in overruling defendant's motion nstruct the jury to return a verdict for defendant, because intiff testified he knew of the location of the track scale , and the location of track No. 2 with reference to said ck scale box, on which track No. 2 he was riding at the e he was hurt, and because the undisputed evidence shows t the track scale box and the danger of same was open and ious to the view of plaintiff, and that neither the track le box nor the dangers thereof were hidden or latent, and intiff was presumed to know the danger and assume the s thereof.

(4) The trial court erred in overruling defendant's motion nstruct the jury to return a verdict for defendant for the son that the entire and uncontroverted testimony estabed the fact that plaintiff knew of the location of the track e box, and location of said track No. 2 with reference to l track scale box, on which track he was riding at the time was hurt; and that the track scale box and the dangers of same were open and obvious to the view of plaintiff, and hidden or latent, and plaintiff was presumed to know the gers and assumed the risks.

(5) Because the trial court erred in the following portion ts charge to the jury: 'The defendant claims that the ntiff knew of the existence and location of the scale box n which he came in contact, and that by continuing in the k with such knowledge he assumed all risks incident to arising out of his employment. Upon this point you are ructed that if you believe from the testimony that prior

to the plaintiff's injuries he knew of the existence and location of the scale box, and of the danger incident to the discharge of his duties while passing the same on a moving train, if danger there was; or if, knowing of the location of the structure, the danger to the employees while in the usual discharge of their duties was apparent—that is, open to observation—then you are instructed that the plaintiff, by continuing in the employment of the defendant without complaint, assumed such risks, and he would not, therefore, be entitled to recover. In this connection you are further instructed that the mere fact that the plaintiff knew of the existence and location of the scale box would not, as a matter of law, charge him with knowledge of the danger, if such there was, due to its proximity to the north rail of track No. 2; and whether he knew of the danger is a question of fact for you to determine from a consideration of all the facts and circumstances in evidence.' Because the proof showed that plaintiff knew of the location of the track scale box and of track No. 2, on which he was riding at the time he was hurt, in reference to said scale box, and that the same and the location thereof was open and obvious to plaintiff's view, and, being an experienced brakeman, he was charged with notice that riding on the cars as he did was dangerous, and he assumed the risks thereof, and the court should have so charged the jury."

Peyton F. Edwards, Peyton Jas. Edwards, and T. J. Frieman, for plaintiff in error.

R. V. Bowden, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge (after stating the facts as above). The first error assigned is not well taken. The bill of exceptions to which it refers says that at a certain stage of the trial the defendant produced and showed to the plaintiff his written application for employment as a brakeman, signed by him, and dated February 22, 1900. The plaintiff testified that he had read the same at the time he made it, and had written the answers thereto himself to the questions therein asked him, and had signed it. The defendant then offered in evidence the following portions thereof for the purpose of showing that plaintiff had notice of the location of the track scale box, and that he was in danger of being knocked off of a car when passing the same:

"Q. Do you make this application for employment in train service realizing the hazardous nature of such employment, understanding that it is necessary in operating this railway for the company to have overhead and truss bridges at certain points on the line; also coal chutes, track scale boxes, water tanks, coalhouses, platforms, sheds, roofs, and other overhead and side structures, and that in the performance of the

uties for which you are employed you are liable to receive ijuries by being knocked off the side or top of cars unless you se due care to avoid injury thereby? A. Yes. Q. Do you gree to acquaint yourself with the location of all overhead id truss bridges, as well as the location of all other struc- ires along the line of the road? A. Yes. Q. Do you under- and that no officer or employee of this company is authorized request or require you to use defective tracks, cars, machin- y, or appliances of any kind, and that when you do so you sume all the risk of injury therefrom? A. Yes. Q. Do you derstand that this company desires to employ only experi- ced men in the service, and does not undertake to educate experienced men? A. Yes."

Counsel for plaintiff objected to this testimony for the rea- n that it was irrelevant and immaterial, and that plaintiff d made this application and entered the employ of the de- ndant, and afterwards resigned, and again entered the em- oy of the defendant some two years later without making other application; and also because it was offered on the rt of the defendant to limit its liability for its own negli- nce, and void as against public policy; and because the par- ular location of this track scale is not given. In our opinion, was not error to sustain the objection made to the proof. lf, Colorado & Santa Fe Railway Co. v. Darby (Tex. Civ. p.) 67 S. W. 446, 2 R. R. R. 327, 25 Am. & Eng. R. Cas., N. 327.

Errors second, third, and fourth will be considered together. reference to these we remark, in the first place, that the ond states that the undisputed evidence established that track scale box was erected at a reasonably safe distance l location from track No. 2; and the third states that the lisputed evidence shows that the track scale box and the nger of same was open and obvious to the view of plaintiff, l that neither the track scale box nor the dangers thereof re hidden or latent; and the fourth states that the entire l uncontroverted testimony established the fact that the le box and the dangers of the same were open and obvious the view of plaintiff, and not hidden or latent. The bill of eptions purports to contain a statement of all the facts in dence. It opens with about a page of what are put down 'facts about which there is no dispute." But this page of statement of "facts about which there is no dispute" does support the suggestions of the plaintiff in error as to what stablished by the undisputed evidence and the uncontro- ted testimony, as above noticed. And, more than that, all he testimony given by the plaintiff in his own behalf and his behalf by witnesses called by him, and much of the imony drawn from witnesses called by the defendant, ds to question the existence of the facts which these as- nments of error assume to have been established by undis- ed evidence and uncontroverted testimony. Assuming,

however, that it was the intention of the plaintiff in error to suggest and urge that the preponderance of testimony supported their view, said in the assignment to have been established by undisputed evidence and uncontroverted testimony, and that it resulted therefrom that the plaintiff was presumed to know the danger and to have assumed the risks thereof, this would present a case not to have been withdrawn from the jury, but to have been submitted to it under the proper instruction that if they, from a consideration of all the proof, found the fact to be as the defendant contended, either that the scale was placed at a reasonably safe distance and location from track No. 2, or, if it was not, that the danger of the same was open and obvious to the view of the plaintiff, and that neither the track scale box nor the dangers thereof were hidden or latent, and were such, if they existed at all, that a reasonably prudent person engaged as plaintiff was, and in the conditions with which he had been and was then surrounded, would be presumed to know the danger, in such case the plaintiff must be held to have assumed the risk, and could not recover. To this effect, substantially, the jury were directly and clearly instructed.

To support its second assignment of error, defendant's counsel submit that, where a railroad constructs its side tracks and track scale boxes and structures in its own private yards, where the safety of passengers and the public is not involved, and according to the requirements of the situation, and in the manner most convenient to facilitate the transaction of its business, and the same are open and obvious to the sight, and are not hidden or latent, an experienced man who goes to work there is presumed to know the danger thereof, and assumes that risk. To sustain this proposition they cite Tuttle v. Railway, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114; Nicholas Content v. New York, New Haven & Hartford Railroad Company, 165 Mass. 267, 43 N. E. 94, 3 Am. & Eng. R. Cas., N. S., 369; Terre Haute & Indianapolis Railroad Company v. Becker, Administratrix, 146 Ind. 202–219, 45 N. E. 96; Louisville, New Albany & Chicago Railway Company v. Bates, Administrator, 146 Ind. 564, 574, 45 N. E. 108; Oglesby v. Missouri Pacific Railway Co., 150 Mo. 137–233, 37 S. W. 829, 51 S. W. 758.

We notice these cases in the reverse order of that in which they are cited. The Oglesby Case is a decision rendered by the Missouri Supreme Court in banc, consisting of the seven judges. On the last page of the report we find this:

"Per Curiam. The foregoing opinions expressing the views of the different members of the court are ordered filed. Gantt, C. J., and Brace, J., concur with Valiant, J., for the affirmance of the judgment. Burgess and Marshall, JJ., hold the judgment should be reversed, and the cause remanded for a new trial. Sherwood and Robinson, JJ., hold the judg-

ent should be reversed without remanding, but, in order to spose of the case, concur with Burgess and Marshall, JJ., ordering the judgment reversed and the cause remanded. antt, C. J., Brace and Valiant, JJ., dissenting."

It will be observed that a bare majority of the court were in vor of reversing the judgment of the trial court, and this re majority was equally divided on the question as to whether e case should be remanded for a new trial, or should be re-rsed without remanding. In this connection we note that e report shows that section 3776 of the Revised Statutes of ssouri of 1879 provides that the Supreme Court on appeals writs of error shall examine the record, and award a new al, reverse or affirm the judgment or decision of the circuit urt, or give such judgment as such court ought to have ven, as to them shall seem agreeable. The case was one to over damages for personal injuries alleged to have been re-ved through the negligence of the defendant in putting into train on which the plaintiff was hurt a defective car. er the proof both by the plaintiff and the defendant was in, the defendant moved for a verdict, which was denied. e case was submitted to the jury, and the plaintiff recovered. e leading opinion in the case, submitted by Judge Valiant, l concurred in fully by the Chief Justice and Judge Brace, after the statement of the case, divided into five para-phs or sections. The first relates to the state of the adings of the plaintiff, and concludes with the statement that re was nothing in the pleadings or evidence that would e justified the court in taking the case from the jury on the ow-servant doctrine. The second is addressed to the con-tion that there was no evidence tending to show that the endant was liable on the theory that the wreck was caused the alleged defective car, and it concludes that there was stantial testimony to sustain every fact necessary to be ven by the plaintiff under the instructions given; that there nothing to indicate any fault on his part; therefore there no foundation for the demurrer to the evidence. The third siders the contention that the jury awarded excessive ages, and it concludes with the statement that there is ing in the record to indicate that the sum awarded was thing else than the result of the jury's honest judgment, that there is no reason why the court should disturb their lict. The fourth relates to the refusal of certain instruc-s requested by the defendant, touching which it is said, ese were in the nature of demurrers to the evidence, and disposed of by the discussion on that subject." In this graph the opinion adds: "But some of the instructions n for the defendant should not be passed without notice. ough this is its appeal, and therefore there is no excep-to the ruling of the court in giving defendant's instruc-s, yet, as those instructions will be published in this record, as they contain erroneous views of the law, they are liable

to be considered as having passed with the approval of this court, and might be followed as precedents." The first, third, and fourth of the requested charges given by the court for the defendant were then quoted and criticised. The fifth paragraph contains only one line, in these words: "The fifth instruction contains the same error." The opinion concludes: "There is no error in this record of which the defendant has a right to complain. The judgment of the circuit court ought to be affirmed." Gantt, C. J., and Brace, J., concur. Burgess, J., concurs in paragraphs 1, 2, and 3. The opinion of Marshall, J., was very brief. He says: "I am of opinion that there is no evidence that the car was not properly inspected, and want of proper inspection was the only act of negligence upon which the plaintiff could predicate a recovery under the facts as disclosed by this record. * * * In the absence of such showing, I think that the negligence as to inspection was not sufficiently shown, and therefore the judgment should be reversed, and the cause remanded." The separate opinion of Sherwood, J., in which Robinson, J., concurred, covers 65 pages of the report, and has the tone throughout of a dissenting opinion. In it he quotes at length from the opinion of Chief Justice Monks in the case of Railroad v. Bates, supra, in which quotation this occurs: "They [the jury] cannot be allowed to set up a standard which shall, in effect, dictate the custom or control the business of a community;" citing in support thereof two Pennsylvania cases and Tuttle v. Railroad, supra.

It is difficult to extract from the report of this decision the persuasive authority applicable to the case we are reviewing on this writ of error. The case of Railway Company v. Bates, supra, is thus stated by Chief Justice Monks in the opinion of the court:

"Appellee's intestate, while in appellant's service, was killed when in the act of coupling cars upon appellant's road, and this action was brought to recover damages therefor, upon the ground that his death was caused by appellant's negligence. Appellant's demurrer for want of facts to sustain the amended complaint was overruled. After issue was joined, the cause was tried by the jury, and a special verdict returned. Appellant moved the court to render judgment in its favor on said verdict, which motion the court overruled, and rendered judgment in favor of the appellee. These rulings of the court are severally assigned as error."

After an elaborate discussion of the different contentions, the opinion concludes:

"It follows that the court erred in rendering judgment in favor of appellee. It is claimed by appellant that the case made by the verdict does not correspond with the allegations or theory of the complaint. As the case must be reversed for other reasons, and the complaint may be amended before another trial, it is not necessary for us to determine this ques-

on. We think justice requires that, instead of directing a dgment upon the verdict, a new trial be awarded. Judgent reversed, with instructions to award a new trial, with ave to amend the complaint, and for further proceedings not consistent with this opinion."

In the case of Railroad Company v. Decker, supra, there was special verdict. The whole case being considered on the peal, the Supreme Court found that "under the circumances in this case the peril which the deceased was subjected by reason of such irregular trains was a risk incident to the vice which he had entered, and one which he assumed under contract of employment." It is announced further:

'We do not consider that the fifth finding of the jury, relae to the curves in appellant's road between Waveland and oley, and its surroundings, under the circumstances, can ve to exert any influence over the question of appellant's gligence."

After quoting from Tuttle v. Railroad Company, supra, the inion proceeds:

'The thirteenth and fourteenth findings may properly be sidered as being of the character of legal conclusions, and ice can serve no purpose in a special verdict, and must, refore, be disregarded. Elliott, General Practice, vol. 2, § , and authorities there cited. The fifteenth finding is not hin the issue of the third paragraph of the complaint. reasons are urged in support of the cross-errors assigned appellee; hence they must be deemed as waived. The rt erred in awarding judgment on the special verdict in or of appellee, for which error the judgment is reversed, the cause is remanded, with instructions to the lower rt to render its judgment upon the special verdict in or of appellant."

n Content v. Railroad, supra, the opinion states:

There was no conflict in the evidence as to the material nts. The position of the tracks was open and visible. use and the size of the Star Union cars were known to the ntiff. The side tracks were used as storage tracks, and e generally filled with cars. At the place where the plainwas hurt the side track was parallel with the track upon ch he was riding, and had not begun to curve in towards the er track. * * * The defendant did not owe it as a to the plaintiff to change the position of its tracks, or to ontinue the use of Star Union cars upon its railroad, or nake a change in its custom of storing these and other upon the side track. Therefore, in the legal sense, the ndant was guilty of no breach of duty and of no negligence ards him. If the plaintiff entered into the employment he defendant, he must be held to have assumed the risk ing from these things."

n Tuttle v. Railroad, supra, the pleadings on which plainrelied alleged that the siding called the "bootjack siding"

was negligently and unskillfully constructed by the defendant, with so sharp a curve that the drawheads of the cars in use by defendant would pass each other, and cause the cars to crush any one who attempted to make a coupling thereon. This alleged faulty construction of the track was the principal matter of contest on the trial. Plaintiff contended that the defendant was bound in duty to its workmen and employees to construct a track that would not expose them to the danger which existed in this case, whilst the defendant contended, and offered evidence to prove, that the track was constructed according to the requirements of the situation, a sharp curve being necessary at this place in order to place the cars, when loading, alongside of the dock or slip; that such curves were not uncommon in station yards; that in such condition the drawheads of cars quite often pass each other when the cars come together; that this must be presumed to have been well known to Tuttle, the deceased, who was an experienced yardman; that he accepted the employment with the full knowledge of its risks, and must be held to have assumed them; that it was negligence on his part to place himself in such a situation as to incur the danger and suffer the injury complained of. It appeared by the evidence that when trying to make the coupling the deceased stood on the inside of the curve, where the corners of the cars come in contact when the drawheads pass each other, and will crush a person caught between them; whereas on the outside of the curve they are widely separated, and there is no danger. The defendant contended that the position thus taken by Tuttle was contributory negligence on his part. On the other hand, the plaintiff offered evidence tending to show that it was usual for the brakeman, in coupling cars on a curve, to stand on the inside, so as to see the engineer, and exchange signals with him for stopping, backing, or going forward. The defendant contended, and offered evidence tending to show, that this was not necessary, as there was always a yardmaster or others standing by to co-operate, by whom the signals could be given. Upon the evidence adduced the trial judge directed the jury to find a verdict for the defendant, holding that Tuttle wantonly assumed the risk of remaining on the inside of the drawbar, when he should have gone on the other side, and that the defendant ought not to be held in this action. It was on this state of case that the language was used in the opinion of the court, on which the plaintiff in error, in the case before us, so strongly relies, and which its counsel largely quotes. A part of this language we quote:

"We have carefully read the evidence presented by the bill of exceptions, and, although it appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires courts to lay down any rule of law to restrict a railroad company as to the curve it shall use in its freight depots and yards, where the

ıfety of passengers and the public is not involved; much less ıat it should be left to the varied and uncertain opinions of ıries to determine such an engineering question."

Then, after some further discussion of principles and precıents and the particular facts of the case in hand, the opinion roceeds:

"Without attempting, therefore, to give a summary of the ridence, we have no hesitation in saying that the judge was ght in holding that the deceased, by voluntarily assuming ıe risk of remaining on the inside of the draw-bar, brought ıe injury upon himself, and the judge was right, therefore, directing a verdict for the defendant."

The Union Pacific Railway Company v. O'Brien, 49 Fed. 8, 1 C. C. A. 354, 4 U. S. App. 221, was an action of Nora 'Brien against the railway company to recover damages r the death of her husband, alleged to have been caused the defendant's negligence. The case was sent to the ry upon the issue of negligence on the part of the company not properly constructing the track, in that no outlet was ovided for the water which would be liable to come down on the track and deposit thereon sand and other obstrucıns, and of contributory negligence on the part of the deısed, and upon both issues the jury found in favor of the ıintiff and assessed her damages. Judgment was rendered the verdict, and the company brought the case to the cuit Court of Appeals of the Eighth Circuit. On the hear; in that court, Judge Oliver P. Shiras sat as one of the mem's thereof, and delivered the opinion of the court. In erring to the case of Tuttle v. Railway, supra, which was ed by the plaintiff in error in argument, he said, in subnce: The principle of this decision cannot be carried to extent claimed in argument by counsel for plaintiff in or. If it was applicable in the broad sense claimed for it, result would be that the well-established rule that it is duty of the company to use due care and skill in the conıction and maintenance of the roadbed and track and in ıishing proper machinery for the use of its employees would wholly abrogated. In one sense it is a question of eneering skill to determine how a roadbed and track shall constructed, and, if the conclusion of the engineer in rge thereof is final, and cannot be challenged before a rt and jury by one who has suffered injury by reason of ects in the roadbed and track, then it is useless to say that railway company is bound to exercise due care in the struction of its roadbed, for it could always be prepared rove that the road was built in accordance with the inction of its engineer. The difference between the kind of wledge called into action in determining the sharpness of a ve that is needed in running a railway line at a given point that exercised in determining whether the exigencies of a n situation require that some escape or outlet be furnished

for water liable to come down a natural waterway intersecting the line of railway is so great that it renders the rule applicable to the one case inapplicable to the other. The training and knowledge of an engineer is not needed to enable one to understand the action of water in rushing down a gully or similar waterway, nor to know, if an obstruction like a solid railway roadbed is built across a waterway, down which any considerable amount of water may be expected to pass, that, unless an outlet is given to it, it must of necessity collect against the roadbed, and perchance overflow it. Such facts are matters of common knowledge gathered from the experience and observation of every day life, and hence a jury is entirely competent to pass upon an issue involving considerations of that nature. This case was taken to the Supreme Court, and in the opinion of that court, delivered by the chief justice, this language occurs:

"In our opinion, the Circuit Court of Appeals committed no error in its rulings and in affirming the judgment of the court below, and we are not inclined to restate the reasons for the conclusions reached by that court, which are fully set forth in the case as reported." 161 U. S. 457, 16 Sup. Ct. 618, 40 L. Ed. 766.

In the case of Wood v. Louisville & Nashville Railroad Company (C. C.) 88 Fed., on page 46, we find views expressed by Judge Hammond which we think are sound, and applicable to the case before us. He says:

"It cannot be required of a brakeman that he shall go about upon the line of a railroad upon which he is operating and lay a foot rule to all the structures of this kind, and see whether or not they be so close as to make it necessary that he should be watchful when he is climbing the ladders, or to avoid taking the ladder until the chute shall have been passed. The fact that no accident of this kind had happened before upon the railroad, and that trains were constantly passing this chute without the development of this danger, brings it directly within the class of what we may call 'concealed dangers'. This danger was lurking for years without its being known. The constituent element of it was a matter of mere inches, and that, in the very nature of things, could not be detected by ordinary observation. It is an idle struggle to escape the liability for this negligence to impute contributory negligence of the plaintiff under the circumstances of this case. Even if he had been aware of the fact that the cattle chute was there, it does not follow that he was aware of the fact that it was a few inches, more or less, too close to the track, and he had a right to rely upon and believe that the railroad company would not put it too close to the track, or would not permit the constructor whom they allowed to build it to put it too close to the track, to injure their employees. It is a danger that does not probably show itself until an accident like this brings it into promi-

ence, either to the railroad owner who operates the ›ad or to the man who originally constructed it. They ere thinking of establishing a clearance for the cars, ıd not for a man climbing the ladders at the moment : passing the chute. That danger was probably not thought : by anybody; not by the constructors any more than by the aintiff. It is a danger that might arise, and possibly did ·ise in this case, because the car on which he was mounted as wider than ordinary cars, or perhaps the ladder might ıve been constructed so as to have been further away from e side of the car than in the ordinary construction of ladders. any differences of this kind might appear to make a danger this particular conjunction of a brakeman on a ladder and cattle chute too near the track that would not be observ- ›le to any ordinary intelligence or observation. The case ıs fairly left to the jury, and they have decided these ques- ›ns of negligence and contributory negligence against the fendant, and, I think, properly so."

From Pierce v. Clavin, 82 Fed. 552, 27 C. C. A. 227, we ›te language used by Judge Jenkins in delivering the opin- ı of the Circuit Court of Appeals for the Seventh Circuit, follows:

'Is the defendant in error also chargeable with notice of s obvious defect? If he is, he could not recover. The itch, if defective and dangerous, was in such condition en the defendant in error entered into the service of the :eiver. He assumed, in entering upon that service, not y such risks and perils as are incident to the performance his duty, but the risk of such extra hazard and peril of ich he has either actual or presumed knowledge; and, ere the defect is obvious, knowledge is presumed of the ıgers which it suggests and which are apparent. [Citing horities.] The question should, therefore, have been sub- :tted to the jury, whether the defendant in error knew, or ;ht reasonably to have known, the danger to him from this :ged defective appliance."

ıs was said in the opinion of the Supreme Court in the case Northern Pacific Railroad v. Everett, 14 Sup. Ct. 474, 38 Ed. 373, 152 U. S. 107:

'It is not easy on a subject of this kind to lay down un- ıding rules, and conflicting cases can readily be found; , without pursuing the subject further, we are satisfied t in the present case there is no conclusive evidence of want of due care on the part of Everett in not observing projecting timber while he was in the discharge of his y, and while his attention was directed to the work in ch he was engaged."

n Lindsay v. New York, New Haven & Hartford Railroad npany, 112 Fed. 384, 50 C. C. A. 298, 1 R. R. R. 378, 24 . & Eng. R. Cas., N. S., 378, it was well said by Judge :ombe:

"Citations of opinions in other cases are not especially helpful, since the decision of each case necessarily depends on its own facts, and these are rarely the same in any two cases."

On the facts of that case which he was considering he assumed that the place where the plaintiff was set to work was not reasonably safe, and that he acted on the night in question with reasonable prudence under the circumstances, and said:

"If the plaintiff's sole opportunity of observation had been in the obscurity of night, he might have worked there a long time without observing them [sluiceways and drains that ran under and across the tracks]; but when it appears that during the months of April, May, and June, and the first week in July, he was moving back and forth over these open and projecting drains every day from daybreak until 7 a. m., he must be held chargeable with knowledge of their existence, and of whatever risk to one using the pathway their appearance would indicate even to the casual observer."

Earlier in the opinion it had been said:

"Where there is reasonable ground for difference of opinion as to whether the defect was plainly observable by him, the jury should decide; but, when it is plainly thus observable, the court will dispose of the case by direction of a verdict."

It would seem that the trial court had directed the verdict, and the judgment of that court was affirmed.

In the opinion of the court in Missouri Pacific Railway Company v. Lehmberg, 75 Tex., on page 67, 12 S. W. 838, we find this language used by Judge Henry, which commends itself to our concurrence:

"Without now considering the question whether the rule in this respect charges an employee with knowledge of defects, except with regard to such appliances or instruments as he is engaged himself in using, we think it sufficient to say that the law does not, under any circumstances, exact of him the use of diligence in ascertaining such defects, but charges him with knowledge of such only as are open to his observation. Beyond that he has the right to presume, without inquiry or investigation, that his employer has discharged his duty of furnishing him with safe and proper instruments and appliances. The evidence discloses that the deceased could see that the engine had a square tank, but it fails to show that he was aware of the different degrees of danger between the use of that and one with a sloping tank, or that he understood the nature of the danger to himself from the use of the square tank."

It has come to be familiar law that a servant is held to assume the ordinary risks of the business upon which he enters, so far as those risks, at the time of his entering upon the business, are known to him, or should be readily discernible

y persons of his age and capacity in the exercise of ordinary are. And whether the business is dangerous or not, notwithtanding the general rule that the master is bound to use due are to furnish safe and sound material, machinery, applinces, etc., yet the servant assumes the risk of obvious efects in the things which he voluntarily uses. If his work onsists in whole or in part in dealing with dangerous, unsafe, r unsound things, known to him to be so, or obviously so, nd which, by the very nature of the business, must be used hile in that condition, he assumes the risk of doing so.

In the preface to the fifth edition of Shearman & Redfield n Negligence, it is said to be "particularly noteworthy that, ven after allowing for some recent reactionary decisions, the eneral tendency of the federal courts has been toward a libal interpretation of the law of negligence in favor of the iblic, and especially of servants." It appears to be settled Texas that railroad corporations, or other persons owning controlling railroads and operating trains thereon, are sponsible in damages to one of their servants for injuries stained, without fault or negligence on his part, from the gligent construction or erection by them of an appendage the road, which subjects such servant to unnecessary hazd and danger, which he could not reasonably have anticiited, and of which there is proof that he was not informed. so, that a railroad employee owes no duty of inspection to scover obstructions dangerously near the track, which are e to the company's negligence, and does not necessarily sume them by his contract of service, though they are perinent in character, and exist at the time he enters the serv-. H. & T. C. Rv. Co. v. Henry Oram, 49 Tex. 341; issouri Pacific Ry. Co. v. Pauline Lehmberg, 75 Tex. 61, S. W. 838; Bonner & Eddy, Receivers, v. J. C. La None, Tex. 117, 15 S. W. 803; Gulf, Colorado & Santa Fe Ry. . v. Darby (Tex. Civ. App.) 67 S. W. 446, 2 R. R. R. 327, Am. & Eng. R. Cas., N. S., 327; Galveston, Houston & n Antonio Ry. Co. v. Morston (Tex. Civ. App. 4th Dist. n. 7, 1903) 6 Tex. Ct. Rep. 537, 71 S. W. 770.

The passage by the Congress of the United States of the t to promote the safety of employees and travelers upon lroads, etc., approved March 2, 1893, and amended April 1896, and again amended and extended March 2, 1903, and action of those states, including Texas, where this action ose, in abolishing by statute so much of the fellow-servant ctrine as applied to railroad employees, and declaring id any contract between such employees and their emyers as seeks to impose upon such employees the assumpn of the risk from the negligence of their fellow servants; d the judicial recognition, in Texas, at least, that it is inst public policy that railroad employees should be pertted by contract, express or implied, to assume the risks dangers not inherent in the business, but arising from the

negligence of the employer—clearly indicate the propriety and necessity of modifying the terms and limiting the application of the rules theretofore announced by courts of the highest authority with reference to the doctrine of assumed risks.

From a somewhat extended and careful re-examination of recognized precedents and of the more recent editions of the works of standard text-writers bearing upon the questions involved in the alleged errors, which we are considering, we are satisfied that these assignments are not well taken. And what we have said on these does, in our opinion, also dispose of the fifth assignment of error.

The judgment of the Circuit Court is therefore affirmed.

BLACKMAN v. WEST JERSEY & S. R. CO.

(*Supreme Court of New Jersey, June 16, 1902.*)

[52 Atl. Rep. 370.]

Injury to Street Railway Passenger—Alighting from Car—Res Gestæ—Declarations of Conductor.*

Where plaintiff was injured while alighting from defendant's trolley car, and the car was stopped immediately, and the conductor came to her and helped her up, the latter's declaration, in reply to her statement that she had signaled for him to stop, and that he had answered her he would: "I know I did, but I forgot you. It is entirely my fault,"—was not admissible as part of the res gestæ.

Same—Same—Evidence—Agency.

It was not admissible on the ground of agency, because not made in pursuance of a duty to the employer.

Same—Remarks of Counsel.

Where, in an action for personal injuries, plaintiff's counsel asked the jury, in considering the damages, to bear in mind that, if plaintiff's physicians were correct, she could never be a mother, and the court refused to rule on an exception, though there was no evidence justifying the remark, the verdict must be set aside.

Action by Alice B. Blackman against the West Jersey & Seashore Railroad Company. Rule to show cause why a verdict for plaintiff should not be set aside. Rule absolute.

Argued February term, 1902, before GUMMERE, C. J., and VAN SYCKEL, GARRISON, and GARRETSON, JJ.

John W. Wescott, for plaintiff.
Joseph H. Gaskill, for defendant.

GUMMERE, C. J. The plaintiff was injured by a fall received by her while alighting from a trolley car of the defend-

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*Declarations of employees as res gestæ in actions for personal injuries, see note appended to Coll v. Easton Transit Co. (Pa.), 11 Am. & Eng. R. Cas., N. S., 722; Butler et ux. v. South Carolina, etc., R. Co. (N. Car.), 2 R. R. R. 114, 25 Am. & Eng. R. Cas., N. S., 114; Sample v. Consolidated Light & Ry. Co (W. Va.), 1 R. R. R. 380, 24 Am. & Eng. R. Cas., N. S., 380; monograph appended to Louisville & N. R. Co. v. Landers (Ala.), 6 R. R. R. 96, 29 Am. & Eng. R. Cas., N. S., 96.

ınt company. At the trial she offered herself as a witness n her own behalf, and having stated that her fall was caused ›y the sudden starting of the car while she was on the run- ıing board, and that it was stopped again as soon as possible fter she was thrown, and that the conductor then came to ıer and helped her up, was then asked what the conductor aid to her, if anything. The question was formally objected o, but was permitted upon the ground that what the con- luctor said was part of the res gestæ. The answer was: "'It ; too bad,' he says, 'Are you hurt?' I said to him: 'I signaled ou to let me get off, and you answered me.' He said: 'I now I did, but I forgot you. It is entirely my fault.'" The ule with relation to the admission of declarations upon this round is that where the declaration is concomitant with the ıain fact under consideration, and is so connected with it s to illustrate its character, it may be proved as a part of ıe res gestæ; but, where it is merely narrative of a past occur- ence, it cannot be received as proof of the character of that ccurrence. Greenl. Ev. § 108; Castner v. Sliker, 33 N. J. .aw, 95, 97. Tested by this rule, we think the question ıould have been excluded. If the words attributed to the ›nductor had been exclamatory, and coincident with the ıppening of the accident, they would undoubtedly have been lustrative of its character, and proof of them would have ›en admissible. They were, however, not spoken until after e accident had occurred; and, although the time which had apsed between the happening of the accident and the mak- g of the declaration was very short, still the words were erely narrative of the conditions which had brought it ›out. It is suggested that the testimony was competent as e admission of an agent of the defendant company, which ›und the principal. The allowance of the question cannot : supported on this ground. It is only words which are oken or acts which are done by an agent in the execution his agency which are admissible in evidence against the incipal. Ashmore v. Transportation Co., 38 N. J. Law, 13. ıe admission of the conductor was manifestly not made in rsuance of his duty to his employer, and cannot bind the ter. The admission of this testimony was error.

Another reason advanced by the defense for setting aside : verdict in this case is that counsel for the plaintiff, in his dress to the jury, far exceeded his privilege, by laying be- 'e them facts which had not been proved, and which they d no right to consider, and insisting that they should :e those facts into consideration in making up their ver- :t. In discussing the question of the amount of damages ich the plaintiff was entitled to recover, counsel said: "In ısidering that point, bear in mind that this girl, if her phy- ians are correct, unfortunately is robbed of a great deal. e not only has not enjoyed life, but she never, probably, l enjoy life again. She has not been a mother. She never

can be a mother." At this point counsel for the defendant excepted to the statement on the ground that there was no proof whatever in the case that the plaintiff could not become a mother. The trial judge declined to rule upon the exception, and permitted counsel for the plaintiff to proceed, which he did in in the following language: "I was remarking, gentlemen of the jury, that this girl was a single lady; that, upon the theory that her physicians are correct, she never can be cured of this difficulty,—she never can become a married woman and a mother,—and therefore is deprived of one of those pleasures and rights which belong to vigorous, well-organized women, and especially a woman of her type and accomplishments. This is a loss to her which this jury ought to take into consideration." It is not denied that the case is barren of evidence which would support the conclusion that the injuries of the plaintiff are of such a character as to have destroyed her power to bear children; and this is plainly the meaning of the statement made by her counsel, although, after exception was taken, he attempted to modify that statement to some extent. The proper administration of justice, in civil as well as in criminal actions, requires that counsel shall be allowed the widest scope in his discussion of the evidence in a cause; but where he travels outside of the evidence, bases arguments on facts which have not been proved, and appeals to the prejudice of the jury, he not only far exceeds his privilege, but by his conduct vitiates a verdict in his client's favor, if exception is taken by his adversary to such statements. The language of Andrews, J., in the case of Williams v. Railroad Co., 126 N. Y. 96, 26 N. E. 1048, 10 Am. & Eng. R. Cas., N. S., 147, so clearly and admirably defines the privilege of counsel in his summing up to the jury, and the limitations of that privilege, that I cannot forbear to quote it at length. He says: "It is the privilege of counsel in addressing a jury to comment upon every pertinent matter of fact bearing upon the questions which the jury have to decide. This privilege it is most important to preserve, and it ought not to be narrowed by any close construction, but should be interpreted in the largest sense. The right of counsel to address the jury upon the facts is of public as well as private consequence, for its exercise has always proven one of the most effective aids in the ascertainment of truth by juries in courts of justice, and this concerns the very highest interest of the state. The jury system would fail much more frequently than it now does if freedom of advocacy should be unduly hampered,and counsel should be prevented from exercising, within the four corners of the evidence, the widest latitude, by way of comment, denunciation, or appeal, in advocating his cause. This privilege is not beyond regulation by the court. It is subject to be controlled by the trial judge, in the exercise of a sound discretion, to prevent undue prolixity, waste of time, or unseemly criticism. The privilege of

ounsel, however, does not justify the introduction in his
imming up of matters wholly immaterial and irrelevant to
ie matter to be decided, and which the jury have no right
) consider in arriving at their verdict. The jury are sworn to
:nder their verdict upon the evidence. The law sedulously
iards against the introduction of irrelevant or incompetent
/idence by which the rights of a party may be prejudiced.
he purpose of these salutary rules might be defeated if jurors
ere allowed to consider facts not in evidence, and the privi-
ge of counsel can never operate as a license to state to a
ry facts not in evidence, or to present considerations which
ive no legitimate bearing upon the case, and which the jury
ould have no right to consider. Where counsel, in summing
), proceeds to dilate upon facts not in evidence, or to press
on the jury considerations which the jury would have no
ght to regard, it is the plain duty of the court, upon objec-
on made, to interpose; and a refusal of the court to inter-
ose, where otherwise the right of the party would be
ejudiced, would be legal error." The same doctrine is laid
own in the later case of People v. Fielding, 158 N. Y. 542,
N. E. 497, 46 L. R. A. 641, 70 Am. St. Rep. 495, in an ex-
ustive opinion; and a very full collection of the cases which
pport it will be found in 2 Enc. Pl. & Prac. p. 727, under the
le, "Arguments of Counsel." The statement of counsel—
ing of a fact which was not in evidence, and which, if the
y believed it, was likely to influence them to the disadvan-
ge of the defendant in making up their verdict—having
en formally objected to, and the trial court having refused
interpose, the verdict should be set aside.

Another statement made by counsel for the plaintiff in his
gument, which was urged upon our consideration, was that
tain physicians who had testified on behalf of the defend-
t company as to the character and effect of the plaintiff's
uries had examined her because the legislature had author-
d the railroad company to send any number of physicians
invade the house of plaintiff, and lay their violent hands
on her sacred body, and then come upon the witness stand
denounce and betray her. It is hardly necessary to say
it no such authority was ever conferred by the legislature
an a railroad company or upon any other person. That
: object of the statement was to prejudice the jury against
: defendant, and unduly excite their sympathy for the
intiff, is plain. No objection, however, was made to it by
insel for the defendant at the time of its utterance, nor
s the interposition of the court asked. This would be fatal
he case was before us on writ of error, for then only mis-
es in law prejudicial to the plaintiff in error could be con-
ered. But when the case is here on a rule to show cause,
s court has much greater latitude, and it may be that in a
rant case we would feel constrained to direct a new trial
account of an unwarranted and improper statement made

by counsel in his summing up, even where objection had not been made by his adversary, and the trial court had not interposed. But it is not necessary to decide that question on this occasion, as the verdict must be set aside for the reasons already stated.

Before leaving the case, we deem it advisable to state that, in our opinion, the verdict, which was for $9,000, is so exorbitant as to afford an additional ground for making the rule to show cause absolute. When the plaintiff was thrown from the defendant's car she struck upon her hip, severely injurin it. The contention on her part is that this injury is perm a nent, and that she will always be an invalid from it. The jury evidently took that view. A careful examination of the testimony, however, has satisfied us that the conclusion reached on this point is clearly against the weight of the evidence, and that the plaintiff will in time be restored practically to her normal condition.

The rule to show cause will be made absolute.

SULLIVAN v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky, May 1, 1903.)

[74 S. W. Rep. 171.]

Injury to Employee—Explosion of Torpedo—Scope of Employment.

Where a member of a railroad switching crew was injured by the explosion of a torpedo which the foreman of the crew found in some rubbish in a tool box on the switch engine and placed on the rail in front of the locomotive as a prank, which act was not within his employment, the railroad company was not liable for such injuries.

Same—Same—Same—Continuous Act.

The act of the foreman in placing and leaving the torpedo on the track being continuous, with a view to frighten the engineer or fireman by its explosion, his failure to remove the torpedo, knowing that it would explode and might cause injury, was insufficient to create a liability as against the railroad company.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"To be officially reported."

Action by D. J. Sullivan against the Louisville & Nashville Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Matt O'Doherty, for appellant.

Helm, Bruce & Helm and E. W. Hines, for appellee.

O'REAR, J. The foreman of a switching crew in appellee's yard, at Louisville, found a torpedo among some rubbish in a tool box on the switch engine. As a prank he placed it on the rail in front of one of the driving wheels of the locomotive, which, passing over the torpedo, exploded it, a fragment striking appellant, a member of the crew, and injuring

leg. It is conceded that the switching crew had no occasion ıse torpedoes in their work, and that the use of the one sing the injury named was entirely without the line of the ɜman's duty. In this suit by the injured switchman to re- er of the master (appellee) damages for the injury, the uit court peremptorily instructed the jury to find for ellee.

he reason the master is liable for the act of his servant at s because the servant is acting in that matter in the mas- s stead and for him. Obviously, if the servant is not ng for the master, he cannot be said to be his representa- in that act. So, if the servant is charged by the master ı the authority to act in his stead in a given matter, the ant's action, or his failure to act, as the case may be, is ıted to the master as if it were his own. This general rine must be too well known to require now the citation ıthority to support it. But where the servant steps aside his employment and assumes to act, and does act, solely is own account, in a matter which the master has no : connection with than if he were the most complete ıger, it would not be logical or fair to make the master iously suffer for it. For in doing that act the servant, so d, was absolutely his own master. Cousins v. Hannibal, R. R. Co., 66 Mo. 572. Or, as it was expressed by ıell, J., in Morier v. St. Paul, etc., R. R. Co., 31 Minn. 17 N. W. 952, 15 Am. & Eng. R. Cas. 135, 47 Am. Rep. quoted with approval in Davis v. Houghtellin, 33 Neb. 50 N. W. 765, 14 L. R. A. 737): "In determining ıer a particular act is done in the course of the servant's ɔyment, it is proper to inquire whether the servant was : time engaged in serving his master. If the act be done the servant is at liberty from the service, and pursuing vn ends exclusively, the master is not responsible. If :rvant was, at the time the injury was inflicted, acting mself and as his own master pro tempore, the master is ıble. If the servant step aside from his master's busi- for however short a time, to do an act not connected ıuch business, the relation of master and servant is for ne suspended."

Smith v. N. Y., etc., R. Co., 78 Hun, 524, 29 N. Y. Supp. ıe master was held not liable for the act of its station in placing a torpedo upon its railway track by the agent : own amusement, and not for the purpose of signaling ı, whereby a third person was injured. Marion v. go, etc., R. R. Co. (Iowa) 13 N. W. 415, 8 Am. & Eng. s. 177, 44 Am. Rep. 687; Croft v. Alison, 4 B. & Ald.

; court, in Smith v. L. & N. R. R. Co., 95 Ky. 11, 23 S. :, 22 L. R. A. 72, held that, where the servant acts for ster and in furtherance of his master's business in- l to him, the master is liable for his excessive act, or

tort; but that if the servant in the act was acting for himself, to gratify some personal purpose, and independent of any duty to or business of his master, the latter would not be liable. A distinction is made where the person injured is a passenger, under the peculiar and high obligation of the carrier to transport him in safety.

In argument it is rather admitted that the foreman, in placing the torpedo on the track, was acting outside of his employment, and for that act appellee was not responsible; but, it is argued, for the failure of the foreman to remove the torpedo which he knew was on the track, and almost certain to explode, and possibly do injury, the master is liable. While the argument is specious, its application is not practical. The act of the foreman in placing and leaving the torpedo on the track was one continuing act, having in view but one object, namely, the explosion of the torpedo, that its noise might frighten the engineer or fireman. It is not possible to segregate this one continous act so that it could be said that in part of it the servant was acting for himself and in another part he was acting for his master. In truth it was conceived, set in motion, and consummated in furtherance alone of the servant's own purpose, entirely disconnected from any duty whatever imposed by his employment.

The case of Railway Co. v. Shields, 47 Ohio St. 387, 24 N. E. 658, 8 L. R. A. 464, 21 Am. St. Rep. 840, is relied on. In that case some trainmen placed a torpedo on the track in front of a portion of their train, intending to frighten some ladies by its explosion when the cars passed over it. However, it failed to explode. The trainmen negligently left it there, exposed, at a place where small children were in the habit of passing. Later a child found it, was attracted by its appearance, and exploded it, to his injury. The railway company was held liable, because it was said that the servant (the conductor of the train) was charged with safely keeping the dangerous implements of the master committed to his care in the discharge of the master's business. This doctrine, carried to its full logical result, would mean that any injury done by a servant with the master's property in the servant's care would bind the master. As, for example, a brakeman on a railroad train who would assault a stranger with a coupling pin in use about his train. Or, if the fireman on an engine should purposely and maliciously throw a lump of coal at some one, a stranger, standing beside the roadway, and injure him. Or if, in the case at bar, the foreman had for fun thrown the torpedo at appellant and injured him. The best-considered and most numerous authorities do not draw the line at whether the servant is using his master's property when inflicting the injury in question, but whether he is then representing the master in the act and in the scope of his employment.

The judgment of the circuit court is affirmed.

NORFOLK & W. RY. CO. *v.* CROMER'S ADM'X.

(*Supreme Court of Appeals of Virginia, June 25, 1903.*)

[44 S. E. Rep. 898.]

ury to Fireman—Collision—Escape of Car from Siding—Liability.
ı railroad company would not be liable for the escape of cars from a ing to the main track, and a resulting collision with a passenger in, in which the fireman of the train was killed, if the escape of the s was due, not to any insufficiency in their brakes, but to the brakes ng tampered with.

ne—Same—Same—Same.
'he railroad company, as the law stood on January 8, 1900, would be liable if the escape of the cars was due to their being displaced sent adrift by contact with shifting cars; this being the negli- ce of fellow servants.

ration of Railroads—Province of Courts.
ourts cannot dictate to railway companies a choice between methods peration, all of which are shown to be reasonably adequate for the oses intended to be subserved.

ligence of Fellow Servant.
vidence considered, and *held* to show that the death of a fireman on ssenger train in a collision of the train with freight cars which escaped from a siding was due to the negligence of the engineer ıe train, in which the fireman participated.

rror to Circuit Court of City of Roanoke.

ction by Cromer's administratrix against the Norfolk & tern Railway Company. Judgment for plaintiff, and de- lant brings error. Reversed.

/atts, Robertson & Robertson, for appellant.
oge & Hoge and Scott & Staples, for appellee.

'HITTLE, J. This is the sequel to the case of Cromer's inistratrix against the Norfolk & Western Railway Com- y, reported in 99 Va. 763, 40 S. E. 54. At the first trial e was a verdict and judgment for the plaintiff, which judg- t, on writ of error to this court, was reversed, and the remanded for a new trial.

t the second trial the plaintiff again prevailed, and recov- l the judgment now under review.

he instructions given the jury conformed to the opinion ıis court on the first appeal, and the error now assigned ıe refusal of the trial court to set aside the second verdict he ground that it was contrary to the law and the evi- ce.

essentials, the evidence on both trials was the same.

appears that on Monday, January 8, 1900, a west-bound enger train, on which plaintiff's intestate, Cromer, was ıan, arrived at Pulaski behind time, and, while running high rate of speed, collided with some freight cars, which escaped from a siding, upon which they were stored, to nain track, and Cromer was killed.

ıe siding in question extends in a westerly direction from ılace of accident, by the Pulaski Iron Furnace, to another

point on the main line. It further appears that on Saturday, before the accident, 12 cars loaded with ore and coke for the furnace were stored on the siding, with brakes fastened and in safe condition.

As was said by this court on the first appeal: "The following occurrence is of interest as tending to show the sufficiency of the brakes to control those cars. On Saturday preceding the accident, the employees of the company charged with that duty were putting cars in upon the siding, some of which were loaded with coke, when they came in contact with cars laden with ore standing towards the east end of the siding. The coke cars, which were being pushed, and the ore cars, which were at rest, did not couple, and the latter were put in motion by the jar. A brakeman sprang from the car upon which he was standing, overtook the ore cars, seven in number, which were moving off, applied brakes sufficient to stop them, and then at least two more brakes, out of abundant caution.

"It would seem that brakes which were sufficient to stop cars when in motion would be ample to hold them when at rest."

Just how these cars were set in motion on the evening of the accident is wholly a matter of conjecture.

The plaintiff introduced the yard engineer, who stored the cars on the siding, and he propounds two theories on the subject, namely, that the brakes had been either tampered with, or that the cars were started by the impact of 22 or 23 loaded cars which were brought on the siding from the west by the employees of the company. In support of the latter theory, it appears that a few moments prior to the accident, after the yard engineer had left the siding, and while he was in the switch office, he heard these shifting cars come in contact with the stationary cars. The reasonable inference, therefore, would seem to be that the latter were set in motion as a result of that impact. And that inference is strengthened by the incident of Saturday, referred to in the opinion of the court.

So far as the liability of the company is concerned, however, it is immaterial which theory is adopted. If the brakes, which were shown by experience, as well as by direct evidence, to be amply sufficient to hold the cars in position, were tampered with, the company would, of course, not be responsible; and, if the cars were displaced and sent adrift by contact with the shifting cars, it was due to the negligence of fellow servants of the deceased, for whose negligence the company was not liable under the then existing law. Norfolk & Western Ry. Co. v. Nuckols' Adm'r, 91 Va. 193, 21 S. E. 342. Therefore upon neither theory has actionable negligence been brought home to the company.

It likewise appears that six months prior to the accident there was a derailing switch on the siding near its eastern

:minus, the presence of which, it is insisted, would have evented the accident, and the removal of which constitutes gligence on the part of the company.

The same contention was urged at the first trial and before s court on appeal. With respect to it the court said:

'In view of the evidence in the case tending to show that : cars on the siding were provided with all the appliances :essary to keep them stationary, and that these appliances l all the rest of the machinery were in good order, it was or to instruct, or to assume in an instruction, that the duty ordinary care, which the defendant owed to its servant, ld only be met by a derailing switch to prevent the moving :ars from the siding to the main track.

'It is the duty of the master to exercise reasonable care for safety of his servant, but he is not bound to provide the :st inventions or the most newly-discovered appliances. is not bound to use more than ordinary care, no matter how ardous the business may be in which the servant is en- ed."

hese observations are as applicable to the evidence upon second trial as they were to that on the first trial, and are :lusive in regard to the present contention.

ourts and juries cannot dictate to railway companies a ce between methods, all of which are shown to be reasona- adequate for the purposes intended to be subserved. Thus ibject them to the varying and uncertain opinions of s in questions of policy, and to substitute the discretion e latter for their discretion, would be wholly impracti- :, and would prove alike disastrous to the companies and public. Tuttle v. Ry. Co., 31 Am. & Eng. R. Cas. 217, J. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114.

order to hold a master liable for injuries sustained by a nt while engaged in his employment, the burden rests the servant to prove affirmatively the negligence of the er, or a state of facts which warrants an inference of neg- :e, and that such negligence was the proximate cause of ijury. To justify a recovery in such a case, the evi- : must show "more than a probability of a negligent The existence of negligence must not be left entirely to cture, and courts cannot uphold the tentative conclu- of juries, based upon no sure grounds of inference. C. Ry. Co. v. Sparrow's Adm'r, 98 Va. 640, 37 S. E. 302.

iin, it is to the proximate cause, and not to the remote , that courts must look in determining the rights and ties in this class of cases.

/as urged in argument that this is a case of concurring :ence. But that doctrine cannot be invoked under the ice in this record. It was held on the former appeal oncurring negligence of a master and servant, in order der the master liable, must be simultaneous, operative, fectual at the time of the accident, and must not stand

in the relation of remote and proximate cause to the event, for, if they so stand, and the servant can, by the exercise of ordinary care, avoid the effect of the master's negligence, there is no liability on the master.

It is believed, however, that a brief consideration of the circumstances immediately attending the accident will conclusively show that it was proximately due to the negligence of the engineman in disregarding a plain duty imposed upon him by the rules of the company, negligence in which Cromer participated, to the extent, at least, of not keeping a proper lookout on reaching the yard at Pulaski.

As remarked, the accident occurred within the yard limits, near the eastern junction of the siding with the main track. The profiled map introduced in evidence shows a slight descending grade from the summit of the siding, in an easterly direction, to the bottom on the main line near the junction, at which point the ascending grade would stop a loose car within a short distance in the yard, and within the jurisdiction of the yard force.

It likewise appears that a car escaping to the main track would pass through a switch provided with automatic switch signals, which when open display a red light, and when closed a white light (the former signifying danger; the latter, safety); and when from any cause, these signals are obscured their absence is a notification of danger.

The eastern limit of the yard is about one-half mile from the scene of the accident, and the intervening track is perfectly straight, and the view unobstructed.

Ordinarily, an accident from collision, under the physical conditions adverted to, would be most unlikely to occur, and the conclusive inference is that the casualty in question would not have happened if the engineman and fireman had observed the rules promulgated by the company for their guidance and protection.

These rules require that, "when within the limits of the various yards, all trains must be run with great care, and under the control of the engineman."

"Switching engines will have the right to work within yard limits, upon the time of second and succeeding class trains, and also upon the time of delayed first class trains, but must clear the track immediately upon their arrival. The main track must be kept clear for first-class trains that are on time. 'First-class' trains means passenger trains, and 'second class' trains means freight trains."

Rule 164, which is especially applicable to firemen, reads as follows: "When running upon the road they must keep a constant lookout ahead when not engaged in firing, and give notice to the engineman of any signals or indications of danger. If the engineman has to look away from the track in front for any reason, the fireman must maintain the watch until the engineman can resume it They will not put coal in

igines when coming into stations or at such other points safety requires that they keep a lookout ahead."

That these salutary rules were set at naught by the engine-an on the evening of the accident, cannot be denied. He proached the scene of disaster, under existing conditions, a reckless rate of speed. His train was an hour and a half e, and he therefore knew by the rules that he was not en-led to the right of track, and was likely to encounter obstruc-ns within the precinct of the yard. He also knew that it s his duty to keep a constant lookout ahead, and to run train with great caution, and keep it under control. So from running with the care required, and reducing the eed so as to bring the engine under control, the undisputed idence is that he maintained a speed of at least 30 miles an ur until his train was actually in collision with the drifting s. Had the rules been obeyed in the particulars referred to, is inconceivable that the engineman and fireman would th have failed to discover either the freight cars on the ck, or the switch signals, or the absence of such signals, or any of which would have warned them of danger in e to stop a train under control, and thus to have averted accident.

From the foregoing statement, it plainly appears, that the ect and proximate cause of the accident was the negligence the engineman, in which the fireman participated, and their negligence the company is not responsible.

For these reasons the judgment complained of must be ersed, the verdict of the jury set aside, and the cause anded for a new trial to be had, not in conflict with the ws expressed in this opinion.

McKEON v. NEW YORK, N. H. & H. R. Co. (two cases).

Supreme Judicial Court of Massachusetts, Hampden, May 21, 1903.)

[67 N. E. Rep. 329.]

kemen—Pushing Trespasser from Train—Liability of Carrier.*

brakeman on a passenger train has authority to remove from the form one who is stealing a ride; but, if he wantonly and reck-ly push him from the train while it is going at a dangerous of speed, the carrier is liable for the injury.

Exceptions from Superior Court, Hampden County; Elisha Maynard, Judge.

Two actions—one by Joseph McKeon, per prochein ami,

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s to whether it is within the scope of the implied authority of brake-to eject trespassers from trains, see foot-note appended to O'Ban-v. Missouri Pac. Ry. Co. (Kan.), 4 R. R. R. 929, 27 Am. & Eng. R. , N. S., 929.

s to whether the company is liable for reckless acts of trainmen in ting trespassers from moving trains, see foot-note appended to nson v. Chicago, etc., Ry. Co. (Iowa), 1 R. R. R. 504, 24 Am. & Eng. as., N. S., 504.

and the other by Ann McKeon—against the New York, New Haven & Hartford Railroad Company. Verdicts for plaintiffs. Defendant brings exceptions. Exceptions overruled.

J. B. Carroll and W. H. McClintock, for plaintiffs.
Walter S. Robinson, for defendant.

MORTON, J. These are two actions of tort, which were tried together. That of the plaintiff Joseph is for personal injuries alleged to have been caused by his being pushed off a train while in motion by a brakeman of the defendant. The other, by the plaintiff Ann, who is the mother of Joseph, is for expenses and loss of service consequent upon the injury to Joseph. There was a verdict in each case for the plaintiff, and the cases are here upon exceptions by the defendant to the refusal of the court to give certain rulings that were requested. There was also an exception in regard to the notice, but, as that has not been argued, we treat it as waived. The court submitted to the jury the following question, which was answered in the affirmative: "Was the plaintiff pushed off the train by the brakeman Wilson?" Wilson was the brakeman whom the plaintiff charged with having pushed him off. The principal questions are (1) whether the evidence warranted a finding that the plaintiff Joseph was pushed off by the brakeman; (2) whether, if he was pushed off, the evidence warranted a finding that it was done wantonly and recklessly by the brakeman, and (3) whether the defendant is liable for the conduct of the brakeman.

1. The evidence was conflicting on the question whether the plaintiff was pushed off, or whether he jumped off, and fell and slipped under the train. But without undertaking to review it in detail, we deem it enough to say that we think that the evidence was ample to justify a finding that the plaintiff Joseph was pushed off the train by the brakeman. That was the testimony of the plaintiff and his companions. The weight of it, and the degree of credibility to which it was entitled, were for the jury.

2. We also think that the jury were warranted in finding, as they must have found under the instructions of the court, that the act of the brakeman was wanton and reckless. There was testimony tending to show that the train was going at a dangerous rate of speed when the plaintiff was pushed off. This fact alone, if it was a fact, would show that the act of the brakeman was wanton and reckless. It tended to show such a disregard of consequences that it could be found that his conduct was entirely inexcusable, and therefore reckless and wanton. It is immaterial that he did not intend to inflict the injury that occurred. If he was acting within the scope of his duty, the defendant is liable, as matter of law, for the consequences, whether they were, in fact, contemplated or not. The plaintiff was stealing a ride, and was a trespasser, but neither the defendant nor its servants had the right to

flict wanton and reckless injury upon him. Leonard v. B. A. R. R., 170 Mass. 318, 49 N. E. 621, 13 Am. & Eng. R. ıs., N. S., 825; Planz v. Same, 157 Mass. 377, 32 N. E. 356, 17 R. A. 835. The proximate cause of the plaintiff's injury was e act of the brakeman in pushing him off while the train ıs in motion, and therefore, although the accident would t have happened if the plaintiff had not attempted to steal ·ide, that fact did not contribute, except remotely, to the ury, and had no tendency to show that the plaintiff was t at the time of the accident in the exercise of due care. : was wrongfully on the platform, but he would have escaped thout injury, save for the act of the brakeman. Due care s regard to the actual situation in which the party is at the ıe of the alleged injury. The fact that he is a trespasser es not, of itself, show that at the moment of the injury he not or may not be in the exercise of due care. Lovett v. lem, etc., R. Co., 9 Allen, 557, 563.

;. The remaining question is whether the defendant is liable the conduct of the brakeman. It is not unless his action ne within the general scope of his authority. If it did, n, even though he may have gone beyond the proper limits ıis authority, and have been guilty of an unjustifiable spass, the defendant is liable. Ramsden v. B. & A. R. , 104 Mass. 117, 6 Am. Rep. 200. It is not every servant ı railroad corporation that has authority to eject tres- sers from its property. In order to justify him in doing and to render the corporation liable for his acts, the serv- must be acting within the scope of his authority, either ress or implied. A conductor has implied authority by ue of his employment to eject a trespasser from the train er his control. Ramsden v. B. & A. R. Co., supra, and cases d. An engineer would probably have like authority to t a trespasser from his engine. A brakeman has less au- ·ity than either. His duties primarily relate, as his name lies, to the management of the brakes. But common ob- ation shows that on passenger trains they embrace much e, and that, so far as the management of the brakes on ı trains is concerned, their duties have been largely super- ·d by the appliances in use. On passenger trains, :emen are required to look after the safety and comfort of passengers, to protect the property of the company, and :e that fares are not evaded. The rules of the defendant pany, as well as common observation, show this. And e the brakeman in question was not in any just sense a uctor, or even a subconductor, we think that the jury : warranted in finding, as they must have found, under nstructions of the court, that it was within the scope of authority to remove the plaintiff, in a lawful manner, the platform, if he was there for the purpose of evading are. Hoffman v. N. Y. C. & H. R. R. R., 87 N. Y. 25, ı. & Eng. R. Cas. 537, 41 Am. Rep. 337. In Lovett v.

Salem, etc., Ry. Co., supra, it was said that it was the right, as well as the duty, of the driver of a street car, to protect the property of the defendants which had been intrusted to his care and management; and the company was held liable for his conduct in compelling a child who had wrongfully got upon the car to leave it while in motion, under such circumstances as to render the attempt to get off dangerous, and who, while attempting to get off in consequence of the threats of the driver, was injured. In Planz v. B. & A. R. Co., 157 Mass. 377, 32 N. E. 356, 17 L. R. A. 835, the court said it preferred to assume, without deciding, that it was a question for the jury whether the brakeman, from his general employment as such, had authority to represent the defendant in ordering a trespasser to leave the train; the implication, so far as there was any, appearing to be that, even in the case of a freight brakeman, he would have authority, by virtue of his employment, to eject trespassers from the train. Unless brakemen upon passenger trains have, as incident to their employment, the power to remove trespassers, it would seem that the companies would not receive the full benefit from their services to which they were entitled, and that the brakemen would or might be embarrassed in the discharge of their duties. We think that the jury were warranted in finding that the brakeman was justified in believing, from the circumstances under which he found the plaintiff and his companions on the platform, that they were there for the purpose of evading their fare, and that, in doing what he did, he was acting upon that belief, and within the general scope of his authority. It is manifest that the duties of a brakeman on a freight train would or might be different from those of a brakeman on a passenger train, and that fact distinguishes this case from Marion v. Chicago, etc., Ry., 59 Iowa, 428, 13 N. W. 415, 8 Am. & Eng. R. Cas. 177, 44 Am. Rep. 687, and Coal Co. v. Heeman, 86 Pa. 418, which, with other similar cases, are relied on by the defendant.

We have not taken up seriatim the rulings requested by the defendant, but they are all embraced, so far as material, and except so far as given by the court, in the questions which we have considered.

The result is that the exceptions must be overruled in both cases. So ordered.

DE CAIR v. MANISTEE & G. R. R. CO.

(Supreme Court of Michigan, June 30, 1903.)

[95 N. W. Rep. 726.]

Injury to Brakeman—Contributory Negligence—Custom to Go between Moving Cars to Couple Them.

In an action by a railroad brakeman to recover for injuries sustained by being run over by a car while he was walking in front of the same in an endeavor to adjust a coupling, in the performance of his duty,

ridence that it was the custom of employees of defendant to go in ont of moving cars, in coupling them, was admissible.

ame—Same—Evidence.

Where a brakeman, who was injured while passing in front of a mov-g car, alleged that he was in the performance of his duty as a brake-an, and was using due care, at the time, it was competent for him to stify for what purpose he got down from the car and started to pass front of it while it was moving.

ame—Negligence—Condition of Track.

A railroad superintendent, after a washout, caused a ditch to be con-ructed across the main track, 18 inches wide and 12 inches deep. ome days later the ditch was filled with snow, even with the ties; and aintiff, a brakeman, while passing in front of certain moving cars, hich he was about to couple, stepped into the ditch, and was thrown own and run over: *held*, that the condition of the track tended to show gligence on the part of the railroad company.

ame—Condition of Track.

During a period while plaintiff, a brakeman in defendant's employ, as absent from service, defendant constructed a ditch across its main ack without plaintiff's knowledge. The ditch subsequently became led with snow, even with the ties; and plaintiff, without knowledge the ditch, while walking in front of certain moving cars to couple em, fell into it, and was run over: *held*, that plaintiff was not guilty contributory negligence, as a matter of law.

Grant, J., dissenting.

Error to Circuit Court, Manistee County; Aaron V. Mc-lvay, Judge.

Action by Frank De Cair against the Manistee & Grand apids Railroad Company. From a judgment in favor of fendant, plaintiff brings error. Reversed.

Kellogg & Carbys (F. W. Houghton, of counsel), for appel-nt.

T. J. Ramsdell and Charles A. Withey, for appellee.

MONTGOMERY, J. The plaintiff was a brakeman on e defendant road on the 1st of February, 1900. He left e service of defendant temporarily, and was away until the h. He returned and resumed work on February 10th. In e meantime, and on February 7, 1900, there was a heavy infall, causing a washout in the yard of defendant company Filer City. On the morning of February 8th the superin-ndent of defendant company caused a ditch to be constructed ross its main track, from the west side to the east side, out 18 inches wide and 12 inches deep. Some four days er the ditch was filled with snow, up even with the ties. n the morning of February 26th the plaintiff left Filer City, th his train and crew, and returned between 3 and 4 in the ernoon. He was acting as rear brakeman. The train con-ted of the engine, two box cars, and about thirty flat cars aded with logs, and, beyond this, a merchandise car and a ssenger coach. As the train neared the south switch at ler City, plaintiff uncoupled the two rear cars, and they re left about 150 feet south of the south switch. The other rs were pulled ahead, and made a flying switch for the logs; d the engine, with two Manistee & Grand Rapids box cars,

loaded with wood, backed up towards the dock switch, which is about 600 feet north of the south switch. After the plaintiff had uncoupled the two rear cars, he stepped off the merchandise car, and walked down the east side of the track, close to the rail, towards the dock switch. The bed of the track was covered with snow. He paid no particular attention to the roadbed between the rails. He went north on the east side for a distance of about 200 feet beyond the south switch. He then stepped across to the west side, because the bank was narrower on the east side. In the meantime the logs had been switched onto the dock tracks, and the engine, with the two cars loaded with wood, had backed up near the dock switch. The engine then started to back the two cars loaded with wood past the south switch, in order to couple onto the two cars left standing, and push them back south of the crossing, and clear the main track for Manistee. The plaintiff met the engine and the two box cars, backing slowly, a little south of the dock switch. He stepped on the ladder at the southwest corner of the car further from the engine, and rode along upon the car. When the plaintiff met the cars, they were going at the rate of 6 or 8 miles an hour. When about 150 feet from the south switch, plaintiff gave the fireman a signal to back slowly, and, as they passed the south switch, the speed had been reduced so that they were then running about 4 or 5 miles an hour. Just after they passed the south switch, plaintiff observed that the coupler on the car on which he was riding was closed, and needed adjustment. He had now passed onto the reverse curve, so that he could no longer see or signal the fireman. Plaintiff then stepped down from the ladder, and in front of the moving car, for the purpose of crossing over to the other side, where he could signal the engineer. The roadbed was free from obstruction, and apparently all right. In passing, he attempted to adjust the coupler, by opening it, so that it would couple onto the standing car left down by the crossing. He took hold of the coupling pin with his left hand, and the knuckle of the coupler with his right, and at the same time traveled towards the south, in front of the moving car; the track being apparently all right. He stepped into this ditch, fell down, and the car passed over and crushed his leg, just above the ankle. The circuit judge directed a verdict for the defendant, and the plaintiff brings error.

The plaintiff offered to show that it was the custom of employees of defendant company, in coupling cars, to go in front of moving cars. The court excluded this testimony. The testimony was admissible, under our former holdings. Hunn v. Ry. Co., 78 Mich. 526, 44 N. W. 502, 7 L. R. A. 500; Eastman v. Ry. Co., 101 Mich. 597, 60 N. W. 309; Fluhrer v. Ry. Co., 121 Mich. 212, 80 N. W. 23; Jones v. F. & P. M. Ry. Co. (Mich.) 86 N. W. 838.

We think it was also competent for the plaintiff to testify for

ıat purpose he got down and started to pass through in front the moving car. The declaration averred that he was in : performance of his duty as a brakeman, and was using due re and prudence. If the purpose in which he was engaged ıs one necessarily connected with the performance of his duty a brakeman, it would tend to support this allegation.

That the testimony of the condition of this track was such as ıded to show negligence on the part of the company is not en to doubt. Ragon v. Ry. Co., 91 Mich. 379, 51 N. W. ɔ4; Palmer v. R. Co., 87 Mich. 281, 49 N. W. 613; Sweet v. Co., 87 Mich. 559, 49 N. W. 882; Anderson v. R. Co., 107 ch. 591, 65 N. W. 585; Hollenbeck v. Mo. Pac. Ry. Co. (Mo. p.) 34 S. W. 494; Chi. & A. R. Co. v. Maroney (Ill. Sup.) 48 E. 953, 62 Am. St. Rep. 396; Hannah v. Conn. Riv. R. Co., ı Mass. 529, 28 N. E. 682.

The chief contention of defendant is that the plaintiff was ılty of contributory negligence, as matter of law, and the ıe of Secord v. R. Co., 107 Mich. 540, 65 N. W. 550, is cited sustain this contention. That case was determined upon : doctrine of assumed risk. The injury to the plaintiff re- ted from his hand being pinched in coupling two cars, it be- ; claimed that the couplings were defective. But it was d that the condition was as apparent to the plaintiff as to : defendant, and that he must be held to have assumed the k. It was added that the condition of the drawbar was dis- 'ered when three car lengths from the place of coupling, l that plaintiff "testified that he could have raised the wbar without taking hold of the link, thus avoiding any ıger of his hand being pinched, and that he would not keep d of the bar so long again, in making such a coupling." think the case is not controlling of the present. In the sent case the testimony tended to show that the plaintiff ı following a custom in passing in front of moving cars in performance of his duty. This is not, as matter of law, ıtributory negligence. See Ashman v. R. Co., 90 Mich. 576, N. W. 645; Eastman v. Ry. Co. and Jones v. Ry. Co., ra; and Jarvis v. Ry. Co. (Mich.) 87 N. W. 136.

t does not appear that the injury resulted from conditions ıwn to the plaintiff to exist. On the contrary, it is at least :n to an inference, to be drawn by the jury, that plaintiff ld have completed all he started out to do, without injury ıimself, but for the concealed defect in this track, not n to observation. We are not prepared to hold, as matter aw, that it was his duty to anticipate such an excavation the main track of the defendant railway.

'he judgment will be reversed, and a new trial ordered.

IOORE and CARPENTER, JJ., concurred with MONT- 'MERY, J.

IOOKER, C. J. I concur in the reversal of this case, upon ground that plaintiff's negligence was not conclusively ıved. In the absence of a rule, or, if there be a rule pro-

hibiting employees from entering between moving cars to couple them or adjust couplers, if there be evidence showing its waiver, it is doubtful if the fact of such entry can be said to be negligence per se, under the circumstances of this case, where, although the estimated speed of the train was 4 miles an hour, or more, the plaintiff was able, after his fall directly in front of the car, to scramble upon his hands and feet, for a distance of 12 or 14 feet, and then get all of his person from the track, but one foot. There is evidence indicating that it was good railroading to enter and adjust the coupler in the way attempted, and that it is necessary for both couplers to be open, when the cars are to be coupled on a sharp curve, and that opening them could not be done from the side of the car. While we know that there is always some risk in entering between moving cars, and can imagine cases where we will take judicial notice that it is so, we cannot make such a rule applicable to all cases of entering between moving cars to couple them or adjust couplers. No rule forbidding the practice was proven in this case. Therefore proof of the custom upon this road was unnecessary, to prove a waiver of a rule. It was competent to prove the general custom of well-conducted roads, to prove whether this act was negligent or not. But this does not warrant proof of the custom upon this or any other particular road, except as it may appear on cross-examination, and the court properly excluded such proof. The test is what is the common or generally recognized method and practice. That is no more to be proved by the practice upon defendant's road than any other. To rest the case on the method followed by defendant's employees would practically be to make it liable for accidents resulting from whatever practice its employees should follow, whether it could be shown to be good railroading or not. Our attention is called to no Michigan case where such a practice has been followed. All, where proof of custom of the defendant road has been held proper, were cases where it was claimed that a rule had been violated by the plaintiff, and a waiver or abrogation of the rule was sought to be shown by the practice of the defendant's employees. That was true in the case of Ashman v. Railroad Company, 90 Mich. 576, 51 N. W. 645, which might, at first blush, seem to justify the claim that such testimony is admissible when a rule is not relied on, but there is no such adjudication in that case. Carrier v. Pa. Ry., 61 Kan. 447, 59 Pac. 1075. It may be doubted if the rule as to waiver has not been carried beyond reasonable limits by some of the courts. See Elliott, Railroads, § 1282; 19 A. & E. Enc. of Law, 822.

GRANT, J. (dissenting). I think the court properly directed a verdict for the defendant. The act of walking or running in front of a railroad train for the purpose of arranging or making a coupling has always been regarded as exceed-

gly dangerous. It requires no argument to show that it is . In doing it, the brakeman is required to walk sidewise, th his eyes fixed upon the coupling apparatus, and not upon e track where he is walking or running. Railroad com- nies for many years experimented in the attempt to devise coupling apparatus which would relieve brakemen from this ngerous work. It was at last accomplished by the device own as the "Automatic Coupler," wherein the coupling uld be made by the brakeman outside the track. This de- ce commended itself not only to railroad men, but to the ople, through their Legislatures. We find, therefore, that e Congress of the United States, in 1893, enacted that "on d after the first day of January, eighteen hundred and nety-eight, it shall be unlawful for any such common car- r to haul or permit to be hauled or used on its line any r used in moving interstate traffic not equipped with coup- s coupling automatically by impact, and which can be coupled without the necessity of men going between the ds of the cars." Act March 2, 1893, c. 196, 27 Stat. 531 . S. Comp. St. 1901, p. 3174]. The Legislature of this ate, as early as 1885, enacted a similar provision. Comp. ws, § 5511. This defendant company had complied with ese provisions of the law, and had in use upon this train ese devices, which obviated any necessity of going in front the car to effect a coupling. The plaintiff himself testi- d: "The couplers were both in good condition, and in od working order." They were supplied with levers for ising the pins from the outside of the track. The train s under the exclusive control of the plaintiff. If neces- ry to go in front of the car to arrange the coupling pin, he uld have done it before he started the train. He could have pped it, if necessary to do it. Instead of arranging the upling pin in ways which were open to him and perfectly fe, he deliberately chose one full of danger. He entered on the track at a place where neither the engineer nor the eman could see him, without any notification to them of his tended conduct—upon a track covered with snow—when he s 164 feet from the car to which he was to make the coup- g, and the train running, as he testified, at from four to five les an hour. He describes his action as follows: "I placed left hand on the pin, and my right hand on the knuckle, the act of opening it. I immediately started then to open e knuckle on this moving car. I did not attempt to get er on the other side of the track first, and give a signal to cken, but immediately started to open the coupler on s moving car." If this is acting with due care and with per regard not only for one's own safety, but for the bene- of his employer, I can hardly comprehend what negligence uld be. There was no rule of the company requiring such ks on the part of its brakemen, and, if there had been, as said in Loranger v. Railroad Co., 104 Mich. 80, 86, 62 N. 137, "such a requirement would be at once condemned as

cruel and inhuman." No one is justified in taking such risks, unless absolute necessity demands it. I think the court correctly excluded all evidence of custom on the part of the brakemen to go in front of moving trains to make couplings, on the ground that this was not a case for the application of the rule in regard to custom. Employees cannot create a custom, however universal, against their employer, by continually doing things in a wreckless and negligent manner, when the employer has provided every means possible to do it with safety. I do not think such a doctrine finds approval in the decisions. There are cases holding that it is not negligence per se to go in front of a moving train to effect a coupling. But these are cases where there is also evidence tending to show that the work on the railroad could not be satisfactorily done otherwise. They do not apply to cases like the present one, where no possible excuse exists for doing the work in the manner this was done. We said in Loranger v. Railroad Co., supra, "It is abhorrent to reason and common sense to say that it is good and safe railroading and careful conduct for a brakeman to step in front of a train moving as fast as a fast walk, and perform a service which requires him to step sideways to keep out of the way, knowing that death is almost sure to follow, should he miss his footing."

I think the judgment should be affirmed.

GULF, C. & S. F. RY. CO. v. GARREN.

(*Supreme Court of Texas, June 11, 1903.*)

[74 S. W. Rep. 897.]

Injury to Employee—Defective Engine Step—Promise to Repair—Assumption of Risk.

Some time before plaintiff, a locomotive fireman, was injured in attempting to use a defective engine step, the engineer had noticed that it was defective, and, after having made an ineffectual attempt to repair it, had turned it under the engine, saying, "I will have it fixed": *held* not to constitute a promise or assurance to repair, preventing plaintiff from assuming the risk.

Same—Same—Same—Evidence.

Evidence of the engineer's remark was relevant on the issue as to whether the fireman was justified in believing that the step had been fixed.

Error Not Cured.

Error in a charge allowing a recovery on a theory having no foundation in the evidence was not cured by a subsequent charge basing the right of recovery on a correct theory.

Evidence—Testimony of Counsel.

In an action by a locomotive fireman for injuries, in which plaintiff alleged by amended petition that the engineer had promised to have the defective engine step which caused the injury repaired, plaintiff was cross-examined concerning statements which he had made of the facts of the accident in which he did not mention this promise of the engineer, and it was also made to appear that in his original petition he made no

:gation of that fact: *held*, that evidence by counsel for plaintiff that iis statement of the case to him, plaintiff did include the promise as stated it on the stand. was admissible to rebut the inference that the ience of such promise was fabricated as an afterthought.

:rror to Court of Civil Appeals of Fifth Supreme Judicial :trict.

ıction by B. F. Garren against the Gulf, Colorado & Santa Railway Company. From a judgment for plaintiff, de- ıant appeals. Reversed.

W. Terry and Ballinger Mills, for plaintiff in error.
. C. Padelford and Stanford & Watkins, for defendant in ɔr.

/ILLIAMS, J. Defendant in error was a fireman on one the passenger engines of plaintiff in error, and was hurt le attempting to get upon the engine at Saginaw, 40 or niles south of Gainesville, by the turning of a step which in a loose and dangerous condition. The loose condition he step had been brought to his attention earlier during same trip at Purcell, Ind. T., by the engineer, who, ac- ling to the testimony of defendant in error, said: "Here loose step. Hand me the wrench." Defendant in error her testified that, after trying to tighten the step, the engi- r found he could not do so with the only wrench at hand, turned it under the side of the engine, saying, "I'll have ixed." This is all that took place at that time. At nesville, which is between Purcell and Saginaw, the com- y had shops and car inspectors and repairers, and the :ct could have been remedied in a few minutes with the ɔer wrench. There is a dispute as to the character of de- s in engines and cars which were usually repaired at nesville, into the details of which we need not enter. re is evidence to the effect that, when the train stopped ;ainesville, there were inspectors and repairers present, ı whom the engineer was seen by defendant in error in ′ersation. Defendant in error left the engine, and was nt 10 or 20 minutes to get his supper, and on his return train proceeded southward. When it reached Saginaw, ndant in error descended from the engine to perform a , and, in attempting to ascend again, was hurt, as stated. of his contentions is that he believed the step had been l at Gainesville, and was in proper position and condi- for use. The evidence was not conclusive on this point, was such as to make it necessary for the jury to deter- : whether or not he in fact acted on this belief, and whether ɔt he was justified by the circumstances in so believing acting.

ıe charge of the court, among other things, contained the wing:

6) The servant, by entering the service of the master, as- :s all the ordinary risks incident to the business, but not

those arising from the master's neglect, if the master should be guilty of negligence. It is the duty of the master to exercise ordinary care to furnish the servant machinery and appliances, and the servant has the right to rely upon the presumption that the master has done his duty in this regard; but, if he learns that the appliances furnished are defective, he assumes the risk incident to that condition of affairs, unless the master is informed of such defects, and promises the servant to remedy the defects, if any. In this latter event, so long as the servant has reasonable grounds to expect and does expect that the master will fulfill his promise, the servant does not, by continuing in the employment, assume the additional risk arising from the master's neglect. If the servant then be injured, he may recover, provided that it be found that a man of ordinary prudence, under all the circumstances, would have encountered the danger by continuing in the service; and if the master has promised to repair such defect, if any, the servant may presume that the master has complied with the promise, and the servant is not required to inspect the appliance before using it, to ascertain whether the repairs have been made, unless there is something in the condition of the appliance which would cause an ordinarily prudent person to make an examination of said machinery.

"(7) If you find from the evidence that it was the duty of the engineer on said engine upon which the plaintiff was working at the time of his injury to have any defects on said engine, if any there were, repaired, then the promise by said engineer to make repairs of said defects would be the promise of the defendant."

This relieved the servant from the effect of an assumption of risk arising from knowledge of the defect, by force of a promise of the master to repair, assuming that there was evidence of such a promise as would give application to this doctrine. The remark of the engineer cannot be so construed. The true doctrine relates only to promises or assurances made by the master to the servant upon discovery of defects in tools or appliances, to the objection of the servant to using them and to induce him to continue in the service. Lewis v. New York & New England Ry. Co. (Mass.) 26 N. E. 431, 10 L. R. A. 513; Sweeney v. Envelope Co., 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722; Bodwell v. Manufacturing Co. (N. H.) 47 Atl. 613. There is nothing of the nature of such a promise in the casual remark of the engineer to the defendant in error, and the doctrine laid down in the case of Tex. & New Orleans Railway Company v. Bingle, 91 Tex. 287, 42 S. W. 971, and like cases, has no application. There being no such facts, the question whether or not a promise otherwise filling the requirements of the rule, made by the engineer, who had no power to employ and discharge defendant or other servants, would be treated as that of the master, does not arise. In the second appeal of the Bingle Case, there was an expres-

in the opinion of the Court of Civil Appeals concerning effect of the promise of the engineer in that case, which ›ably led the trial court in this case to treat the promise of engineer as that of the company. The facts of that case ting to the question, which are not fully stated in any of reports, were very different from those here in question; the point now made was not passed on by this court in sing a writ of error, and probably not by the Court of l Appeals. As the question is not now involved, we deem ınecessary to point out the differences between the two s, or to pursue the subject further than to say that we do regard the decision referred to as authority for the propo- n that a promise to a fireman, made by an engineer in ge of a train, with no power of employing and discharg- servants, is to be imputed to the master. It is not to be red that the statement of the engineer is not admissible idence upon the true issues in the case. Although a serv- nay at one time have known of the existence of a defect, ıay not know of it at the time he undertakes to use the iance, and the circumstances may justify him in believing the defective condition has been remedied. Some of the ence tended to raise that question, and to it the statement ıe engineer that he would have the step fixed was rele- ; and the circumstances, taken together, raised the ques- whether or not the defendant in error, when he used the knew or should have known that it was still in the erous condition, or believed that it had been repaired, was justified in such belief; and whether or not he was stified would depend upon the inquiry whether he judged ıcted upon the facts with ordinary prudence. N. P. R. v. Babcock, 154 U. S. 200, 14 Sup. Ct. 978, 38 L. Ed.

It was contended in the argument that this view of the vas embodied in the charge, and that under it the facts ied the recovery. It may be true that the charge author- a recovery upon this theory, but it also instructed as to ffect of a promise by the master, giving to it the weight ated by the passages which we have quoted, and it can- e said that those instructions did not influence the ver-

Conflicting theories were thus embodied in the charge, one of which the servant must have been ignorant of ondition of the step when he used it, while under the he may have known it, but, because of the promise, is eld to an assumption of the risk.

ring the trial, defendant in error was cross-examined rning statements which he had made of the facts of the ent in which he did not mention the so-called promise e engineer, and also the fact was developed that in his ıal petition he had made no allegation of that fact; the on of counsel for plaintiff in error being that the evi- of such promise was fabricated as an afterthought. In tal, the attorney who drew the petition was allowed to

state that his client, in his statement of the case, did include the promise as he stated it on the stand. One of the assignments questions the ruling admitting this testimony. In the case of Insurance Company v. Eastman, 95 Tex. 34, 64 S. W. 863, this court had occasion to examine the question as to the admissibility of statements by a party to the suit corroborative of his evidence given on the stand, when such evidence has been contradicted by proof of contrary statements made elsewhere, and the rules generally obtaining were stated in the opinion of Chief Justice Gaines. How far the rules laid down might be applicable, had there been no attempt to inferentially contradict the witness by the absence of mention in the petition of the fact in question, we are not called upon to consider. The evidence objected to tended to show that such omission was not that of the defendant in error, but of his counsel, and to rebut the inference contended for, and was therefore admissible. The question as to the propriety of the refusal of the court to permit counsel for plaintiff in error, on re-examination of the witness Paxton, to draw from him an explanation of his answer given in cross-examination, will not probably arise again; but, as the record shows the matter, we think the question should have been allowed. It appears from the statement of the facts that there was occasion for the explanation asked, and it does not appear that there was an effort at undue repetition of the same statement.

Reversed and remanded.

CHEAVES v. SOUTHERN RY. CO. IN MISSISSIPPI.

(*Supreme Court of Mississippi, May 18, 1903.*)

[34 So. Rep. 385.]

Railroad Fireman—Injuries—Negligence of Engineer—Declaration—Sufficiency.

A declaration for injuries to a fireman, which avers that they were caused by the negligence of the engineer, his superior officer, who was charged in the very language of the Constitution, § 193, to have had "the right to control and direct his [the fireman's] services," is good on demurrer.

On Suggestion of Error. Overruled.

For opinion, see 33 South. 649.

The attorneys for appellant filed a lengthy suggestion of error reviewing the allegations of the declaration, and making the following points: "The question calls for a construction of a most important provision of our state Constitution. Judge Terral, is we understand his opinion, holds that as a matter of law the engineer was a superior officer of the fireman. He also affirms that the fireman was under the direction of the engineer. No allusion is made by him to the rules of the company, although it was expressly agreed that the rules of the company should be considered as especially

aded. In our brief we referred to a number of rules ich are clearly pertinent, and, in our judgment, control- g, and, as Judge Terral refers to none of them, we assume t our brief was by some means mislaid, and not before the irt at all. Judge Terral affirms there is absolutely no room construction; that the Constitution is so plain and unam- uous that it needs no interpretation. This does not accord h the view hitherto taken by this court of this constitu- ial provision. In the case of Richmond & Danville R. R. v. Rush, 71 Miss. 987, 15 South. 133, its meaning was con- ered so doubtful that Judge Campbell declined to hold t a conductor, within the meaning of the Constitution, is a rson having the right to control or direct the services of the kemen.' He did carefully consider and interpret that vision of the Constitution in the case of Evans v. R. R. , 70 Miss. 529, 12 South. 581. In that case the plaintiff a brakeman, who was injured by the negligence of the ineer, who had signaled for brakes, and while they were ig applied in pursuance of the signals caused a movement he train without proper warning. It was claimed by isel for Evans that the engineer was the superior agent fficer or person having the right to control or direct the ices of the brakeman, for the reason that the engineer had right to signal for brakes, and that when he did so he di- ed, as he had a right to do, the services of the brakemen ie matter of applying the brakes. This was the case as ented to the court, and upon this case Judge Campbell eeded to interpret the Constitution. He stated that it not designed by the Constitution to abrogate the rule of applicable to the fellow servant in a common employ- t, but merely to modify it to the extent as indicated by on 193 of the Constitution. He denied that the engi- was a superior agent or officer of the brakeman, or that as a person having the right to control or direct his serv- within the meaning of the Constitution. He declared the doctrine that one employee is the superior agent or r or person having the right to control or direct the serv- of another employee contains no room for application i the two employees are engaged in the performance of ordinary duties prescribed for them respectively by the of the company and the nature of the service. Judge pbell then elaborated this view, and in language so per- ious and virile that no man can add any strength to it. ivided the section of the Constitution in two parts; the having reference to an injury resulting from the negli- e of a superior agent or officer, and the second having ence to the negligence of a person having the right to ol or direct the services of the party injured. As to ieaning of the expression 'superior agent or officer' he 'The constitutional provision has reference to a supe- agent or officer of the sort well known as such.' The rior agent or officer of the sort well known as such is one

whose position, powers, and duties mark him out plainly as being a vice principal, and it cannot be said that an engineer of a train while discharging his ordinary duties can be put in the position of a vice principal. Judge Campbell thus defines what is meant by 'a person having a right to control or direct the services of the party injured': 'A person in the company's service, by whatever name, who may be intrusted with the right to control and direct the services of others according to his discretion and judgment; one to whom is committed the direction and control of others for the accomplishment of some end depending on his independent orders born of the occasion, sprung from him as a director, and not consisting of the mere execution of routine duties in pursuance of fixed rules by various employees, each charged with certain parts in the general performance.' Judge Campbell continues: 'It may be that under some circumstances the engineer may be the superior of the brakeman in the meaning of the Constitution, but in the operation of the train in accordance with the rules one is no more superior than the other, and they are not within the rule established by the Constitution.' Judge Campbell iterates and reiterates throughout his opinion that this provision of the Constitution can never apply where both employees are engaged in the discharge of routine duties in pursuance of fixed rules established by the company for the general government of the various employees. We submit that this opinion, which contains no allusion to the opinion by Judge Campbell, is diametrically opposed to it, and overrules it. We respectfully submit that it abundantly appears from an inspection of the rules of the company that the engineer occupies no such relation to the fireman as that contemplated by the Constitution." Counsel here quote and comment upon a number of the rules of the company regarding the relations of the engineer and fireman, insisting that they are largely upon the same footing.

WHITFIELD, C. J. The cause of action is stated in the very language of the Constitution. How could a cause of action thus stated be demurred to? The opinion of Brother Terral correctly said, speaking of the declaration, "It comes within the direct provision of the Constitution, and yet it is demurred to." The Constitution provides not only that "a superior agent" is not a fellow servant of those over whom he is such superior agent, but it also expressly declares that "any person having the right to control or direct the services of the party injured" is not a fellow servant of such person. The question is, not what the rules of the company may provide, but whether the fact is, as shown by the proof, that the person suing was injured by the negligence of some other servant of the company who was either a "superior agent or officer," or, if not, was a "person having the right to control or direct the services" of the party injured. It is not a question whether the duties are what are called "rou-

:" duties in the Evans Case, 70 Miss. 529, 12 South. 581.
: question is simply and merely whether the person suing
been injured by the negligence of another servant having
"right to control or direct his services," whether that
ıt to so control and direct springs from any rules of the
ıpany or from the course of business as shown by the tes-
ɔny. Now, this declaration distinctly avers the cause of
on to be that the appellant was injured by the negligence,
ul and wanton, of the engineer, who is averred to have
"the right to control and direct his services." The de-
rer admitting this, must, of course, be overruled. The case
ıld be developed on its facts, and, if the testimony shall
v that the engineer did not have the "right to direct and
rol the services of the fireman," the defendant can seek the
:fit arising from such testimony by proper instructions.
nsel himself concedes that circumstances may arise under
:h an engineer would have such right. This admission
vs that the action of the court in overruling the demurrer
proper, since the declaration stated the identical cause
:tion the Constitution declares shall be good. Whether
servant is under the control or direction of another serv-
is not to be determined by the rules of the company. It
be determined always by the facts in the case and the
re of the act performed. The facts surrounding the act
f, and the actual relation of the two servants to the act,
: facts are the only proper tests of whether one servant
nder the control or direction of another. If the mere
:r rules are to determine this question, then they would set-
ıe matter in those cases even where the facts plainly
' that the servant suing was clearly under the control
direction of the servant whose negligence caused the in-
The rules of the company are, of course, competent
:nce, but they are simply evidences at last; and when-
the facts in any given case show that, notwithstanding
ules, what occurred in the particular case demonstrates
ne servant to have been injured by the negligence of
ıer servant, who had the right to control and direct his
:es, the facts, and not the rules, must govern. But it
d that the rules here were agreed to be treated as part of
declaration. If this be granted, we find nothing in the
to aid appellant. On the contrary, on page 112 of the
of the railroad company (rule No. 574) we find the fol-
g: "When with the engine they [meaning the firemen]
obey the orders of the engineman." This shows clearly
even according to the rules, the fireman when with the
e is not a fellow servant of the engineer. We wish to
hat the very able and learned brief of counsel for appel-
vas not overlooked on the first hearing of this case. It
ead and re-read, and all the authorities examined. The
was considered for some months, and the deliberate con-
ɔn reached is, in our judgment, clearly correct.
ggestions of error overruled.

NORMAN *v.* MIDDLESEX & S. TRACTION CO.

(*Court of Errors and Appeals of New Jersey, March 2, 1903.*)

[54 Atl. Rep. 835.]

Fellow Servants—Employment by Agent.

If plaintiff, when injured by the negligence of defendant's servants, was employed and paid by one who in so doing acted as the mere agent of defendant, plaintiff could not recover, as he was a co-servant of those whose negligence caused his injury.

Transfer of Services—Consent of Servant—Question for Jury.

If plaintiff, when injured by the negligence of defendant's servants, was employed by one who had a contract to repair defendant's tracks, the question as to whether he had transferred plaintiff's services to defendant with plaintiff's consent should have been submitted to the jury.

Error to Supreme Court.

Action by Charles Norman against the Middlesex & Somerset Traction Company. A verdict was directed for plaintiff, and defendant brings error. Reversed.

Willard P. Voorhees, for plaintiff in error.
Alan H. Strong, for defendant in error.

PER CURIAM. This was an action in the Middlesex circuit, originally brought against the Middlesex & Somerset Traction Company and Thomas M. Lesher and Frank Lesher, named as partners. The purpose of the action was to recover for an injury of plaintiff occasioned by the alleged negligence of the defendants in running cars over a street railway of the defendant company. The action was discontinued with respect to the defendants Thomas M. Lesher and Frank Lesher, and was brought to trial upon the issue made by the plea of the general issue filed by the Middlesex & Somerset Traction Company.

At the trial there was no question but that the collision injured the plaintiff, and was the result of negligence on the part of employees of the defendant company. The question tried was whether the plaintiff was not also in the employment of the same company, so that the negligence by which he was injured was that of a fellow servant. The trial judge directed the jury to find a verdict for the plaintiff, and an exception was duly taken. In this respect, the judge manifestly erred. There were two views which could have been taken of the evidence. One possible view was that Thomas M. Lesher, who employed and paid the plaintiff, acted in so doing as the mere agent of the defendant company. In such case the plaintiff was a co-servant with those whose negligence occasioned his injury, and there should have been a direction for a verdict for the defendant if the jury found such agency existed. The other possible view was that Lesher had some contract with the defendant company respecting the repair of its tracks, and, having employed the plaintiff in respect to his business, had transferred plaintiff's services pro hac vice

the defendant company, with plaintiff's consent. In this :w, there should have been a submission to the jury of the estion whether there had been such transference of serv- :s with plaintiff's consent (there being evidence sufficient submit to the jury on that subject), with direction to find for fendant if such transfer of services was found proved.

As the case will doubtless be tried again upon evidence ich may vary from that now before us, it is deemed unnec- ary to express any opinion as to the effect of the evidence. either of the possible views of the evidence above noticed, action of the judge in directing a verdict for plaintiff was lefensible.

XAS & PACIFIC RAILROAD COMPANY, Plff. in Err., v. ABE BEHYMER.

(*Argued March 20, April 6, 1903. Decided April 20, 1903.*)

[23 Sup. Ct. Rep. 622.]

ıry to Brakeman—Assumption of Risk—Sudden Jerk of Freight Train.

he risk of injury from a sudden bump or jerk in the management of eight train is not, as a matter of law, assumed by a brakeman stand- , in obedience to orders, upon the icy roof of a car in such train.

ıe—Care Required of Master.

'hether a freight train was handled with ordinary care, and not ther it was handled in the usual and ordinary way, is the test by ch to determine the liability of a railroad company for injuries re- ed by a brakeman because of a sudden bump or jerk while he was ıding, in obedience to orders, on the icy roof of a car in such train.

ructions.

n instruction that it was the duty of an injured employee to submit ll treatment that a reasonably prudent person would have submitted n order to improve his condition, and that his employer was liable ıo damages which might have been prevented by reasonable care, ɔt objectionable as authorizing the inference that as a prudent man employee might have postponed recovery from his injury to re- ry of damages.

ı Error to the United States Circuit Court of Appeals for Fifth Circuit to review a judgment which affirmed a judg- ıt of the Circuit Court for the Eastern District of Texas in ɔr of plaintiff in an action for personal injuries, brought by :mployee against a railroad company. Affirmed.

ee same case below, 50 C. C. A. 106, 112 Fed. 35.

he facts are stated in the opinion.

essrs. David D. Duncan, John F. Dillon, and Winslow 'ierce for plaintiff in error.

r. Cone Johnson for defendant in error.

he opinion of the court was delivered by MR. JUSTICE LMES:

his is an action for personal injuries, brought by an em- ee against a railroad company. It was tried in the cir- court, where the plaintiff had a verdict. It then was

taken to the circuit court of appeals on a writ of error and bill of exceptions by the company, and now is brought here on a further writ of error, the company being a United States corporation. A good deal of the argument for the railroad is devoted to disputing the testimony of the plaintiff below and arguing that the verdict was excessive, but of course we have nothing to do with that. New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, 75, 36 L. Ed. 71, 80, 12 Sup. Ct. Rep. 356; Lincoln v. Power, 151 U. S. 436, 38 L. Ed. 224, 14 Sup. Ct. Rep. 387. We must assume the most favorable statement of the plaintiff's case to be true, unless some particular request for instructions makes it necessary to deal with conflicting evidence. That statement may be made in a few words.

Behymer had been in the employ of the company as a brakeman about three months. On February 7, 1899, at Big Sandy, in Texas, he was ordered by the conductor of a local freight train to get up on some cars standing on a siding and let off the brakes, so that the engine might move them to the main track and add them to the train. The tops of the cars were covered with ice, as all concerned knew. He obeyed orders; the engine picked up the cars, moved to the main track, and stopped suddenly. The cars ran forward to the extent of the slack and back again, as they were moving up hill. The jerk upset Behymer's balance, the bottom of his trousers caught in a projecting nail in the running board, and he was thrown between the cars. It is true that the jury might have drawn a different conclusion from his evidence, or have disbelieved it in essential points, but they also were at liberty to find, as they must be taken to have found, that the foregoing statement is true. The car belonged to another road, but was in the charge of the defendant company, and, according to the statement of the counsel for the plaintiff in error, had been inspected before the accident, although we should have doubted whether the testimony meant to go so far. Behymer based his claim upon negligence is stopping the cars so suddenly with knowledge of his position and the slippery condition of the roof of the car, and upon the projection of the nail, which increased the danger and contributed to his fall. It should be added that, by a statute of Texas, if there was negligence, the fact that it was the negligence of a fellow servant was not a defense. Tex. Gen. Laws 1897, Special Session, chap. 6, § 1; 2 Sayles's Tex. Civil Stat. 1897, art. 4560f.

The fundamental error alleged in the exceptions to the charge is that the court declined to rule that the chance of such an accident as happened was one of the risks that the plaintiff assumed, or that the question whether the defendant was liable for it depended on whether the freight train was handled in the usual and ordinary way. Instead of that, the court left it to the jury to say whether the train was handled with ordinary care; that is, the care that a person of ordinary

ıdence would use under the same circumstances. This :eption needs no discussion. The charge embodied one of commonplaces of the law. What usually is done may be dence of what ought to be done, but what ought to be done ixed by a standard of reasonable prudence, whether it usu- / is complied with or not. Wabash R. Co. v. McDaniels, U. S. 454, 27 L. Ed. 605, 2 Sup. Ct. Rep. 932, 11 Am. & g. R. Cas. 158. No doubt a certain amount of bumping and :ing is to be expected on freight trains, and, under ordinary :umstances, cannot be complained of. Yet, it can be ided, if necessary, and when the particular and known dition of the train makes a sudden bump, obviously ıgerous to those known to be on top of the cars, we are prepared to say that a jury would not be warranted in find- that an easy stop is a duty. If it was negligent to stop he train did stop, the risk of it was not assumed by the intiff. Texas & P. R. Co. v. Archibald, 170 U. S. 665, , 42 L. Ed. 1188, 1191, 18 Sup. Ct. Rep. 777.

lowever, the plaintiff did not rely on the management of train alone. The projecting nail was another element in case. The jury were instructed with regard to that, that railroad company was not liable unless there was a nail :e improperly projecting, and a reasonable inspection ıld have discovered and remedied the defect. The car in the custody of the company. There is no suggestion : the company had not had an opportunity to inspect, and contrary was assumed by a request for instructions on the : of the company. Indeed, as we have said, its counsel rprets the evidence as meaning that the car had been in- :ted before the accident. It is not pressed that there was ır on this point. See Mackin v. Boston & A. R. Co., Mass. 201, 15 Am. & Eng. R. Cas. 196, 46 Am. Rep. 456; nn v. Central R. Co., 175 Mass. 510, 512, 56 N. E. 698, ım. & Eng. R. Cas., N. S., 482. The jury were instructed ɔerly on the subject of assumption of risks and contribu- negligence, and we think it unnecessary to deal more :ifically with this part of the case.

was argued that Behymer had aggravated the injury by sing proper surgical treatment. With regard to this the were instructed in substance, but at more length, that it his duty to submit to all treatment that a reasonably lent person would have submitted to, in order to improve :ondition, and that no damages could be allowed which ıt have been prevented by reasonable care. It is sug- ed that, as a prudent man, he might have postponed re- :ry from his injury to recovery of damages. The :uctions plainly excluded such a view. The argument lly is serious. We have examined all the minute criti- ıs on the rulings and refusals to rule, and discover no r. We deem it unnecessary to answer them in greater il.

ıdgment affirmed.

SAMS v. ST. LOUIS & M. R. CO.

(Supreme Court of Missouri, March 20, 1903.)

[73 S. W. Rep. 686.]

Fellow Servants—Car Starter and Motorman.

A car starter, having authority to direct motormen and conductors of electric cars to start from a terminus of a street railway, and whose authority to regulate the time space between cars extends all along the line, is a fellow servant of such employees.

Injury to Conductor—Negligence of Motorman in Causing Sudden Starting of Car.

An electric car stopped at a terminus, and the conductor stepped off to reverse the trolley. The company's car starter, seeing that the wheels had not cleared a switch, directed the motorman to move up. The latter set the apparatus, and as the car did not move, owing to the fact (which neither he nor the starter noticed) that the trolley was off, he started towards the other end of the car, where he was to stand on the return trip, without closing the apparatus. When the conductor placed the trolley on the wire, the car shot forward and injured him: *held*, that the negligence was in the act of the motorman in attempting to execute the order without looking to see what the conductor was doing, and in leaving the apparatus without closing it against the current.

Employers' Liability Act—Applicability as Affected by Fact That Street Railway Company Was Authorized to Operate Steam Railroad.

If a corporation and its servants, who in fact are engaged only in operating a street railroad, are not covered by the fellow servant statute, then the fact that the charter of the corporation authorizes it to own and operate a trunk line steam railroad will not bring them within the statute, or estop the corporation from showing the fact.

Same—Not Applicable to Street Railways *

Rev. St. 1899, § 2873, which provides "that every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant thereof," does not apply to street railroads.

Gantt, Brace, and Burgess, JJ., dissenting.

In Banc. Appeal from St. Louis Circuit Court; Franklin Ferris, Judge.

Action by Robert L. Sams against the St. Louis & Missouri Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Suit for damages for personal injuries. The petition states that the defendant is a railroad corporation owning and operating a railroad from a point named in the city of St. Louis to a point named in St. Louis county, and is engaged in carrying passengers and freight by means of cars propelled by steam and electricity; that on each car the defendant has two employees—a motoneer, whose station is on the front platform, where he manipulates the machinery through which the electric power is applied, and a conductor, who has cer-

*As to whether "railroad" includes street railways, see Mass. L. & T. Co. v. Hamilton (C. C. A.), 11 Am. & Eng. R. Cas., N. S., 771; Fidelity Loan & Trust Co. v. Douglas (Iowa), 9 Am. & Eng. R. Cas., N. S., 713; Board of Railroad Com'rs v. Market St. Ry. Co. (Cal.), 23 Am. & Eng. R. Cas., N. S., 21, and foot-note.

ı other duties to perform; that there was also at the time
l place of the accident a third employee of the defendant,
ɔm the plaintiff calls a "car dispatcher," whose station was
he eastern terminus of the road, who had authority to
:ct the movements of the car, and to command the moto-
r and conductor in reference thereto; that upon the occa-
ı in question the plaintiff was the conductor on one of
se cars, one Horn was the motoneer, and Hogan the car
ɔatcher; that Horn was without skill or training; that on
uary 27, 1898, at the eastern terminus of the road, at
:h and Locust streets, in St. Louis, while the plaintiff, in
due discharge of his duties as conductor, was on the
ınd, in front of the car, in the act of shifting the trolley
everse the direction, the car, through the negligence and
: of skill of the motoneer and the negligence of the car
ɔatcher, was suddenly projected against the plaintiff,
ıhing him against another car which was standing on the
k, and inflicting on him great bodily injuries. Specifica-
s of the conduct of the motoneer and car dispatcher con-
ıting the alleged negligence are set out in the petition, as
wise are the particulars of the injuries suffered by the
ntiff. The answer was a general denial, contributory
ligence of the plaintiff, and a special plea that defendant
a street railroad corporation, organized for the purpose
engaged in the business only of conducting a street rail-
l, and the plaintiff, the motoneer, and the car dispatcher
e fellow servants employed in operating the car, and there-
defendant was not liable to plaintiff for the negligence of
fellow servants. The reply was a general denial.
n the trial plaintiff introduced in evidence the charter
ıe defendant, by which it appeared that defendant was
rporated as an ordinary railroad company under article
42, Rev. St. 1889 (now article 2, c. 12, Rev. St. 1899);
evidence showing that it had claimed and exercised the
t of eminent domain to condemn private property for a
of its right of way outside of the city; that its road in
:ity was in the city streets, and of the same character as
nary street railroads, whilst in the country it was partly of
character and partly of the character of the ordinary
m railroads; that the cars of defendant were moved by
:ricity under the ordinary trolley system, and for the carry-
ɔf passengers only, except that defendant had one car,
ɔelled in like manner as its passenger cars, which was
to carry the United States mails, and one-half of it was
ıged to carry freight or express packages, and was so
; that from its eastern terminus at Sixth street, west to
y-First street, the road was used jointly for the same
ose by defendant and a street railway company called in
:vidence the Suburban. The car on which the plaintiff
conductor was an ordinary street car, and was being
as such, like the cars of the Suburban Company operat-

ing over the same road, only the defendant's car was red, and the Suburban's yellow. There was evidence tending to show that Hogan, the car starter, had authority to direct the conductor and motoneer when to start, and that his authority to regulate the time space between cars applied not only to the starting at the eastern terminus. but extended all along the line, and that in that matter the conductors and motoneer were ordered to obey him; that if his orders were disobeyed he would report the offender, who was therefor liable to be suspended. There was no evidence to support the charge that the motoneer was inexperienced or deficient in skill. The evidence as to the accident tended to show as follows: The road was a double track, ending at Sixth street on Locust. The mode of operating was: The cars would come east on the south track. The machinery would be reversed without turning the cars, and they would be passed over a switch to the north track, on which they would return west. This car came in a little late, and Hogan, the car starter, spoke angrily to the motoneer, asking him where he had been. The car stopped, and the conductor stepped off to reverse the trolley; passing on the south side, holding the cord. Hogan was standing on the north side, and, seeing that the rear trucks of the car had not cleared the switch, motioned or called to the motoneer to move up. The motoneer, as if in obedience to that direction, set the apparatus to receive the electric current, but the car did not move, owing to the fact (which neither the motoneer nor Hogan seemed to have noticed) that at that moment the conductor was in the act of reversing the trolley, and therefore the connection of the machinery with the wire overhead was broken. The motoneer, still seeming not to see what the conductor was doing, took off the controller, leaving the apparatus open to receive the current, and started to the other end of the car, where he was to stand when going west. His duty, under the circumstances, was to have closed the machine against the admission of the current until the conductor had readjusted the trolley; but this he neglected to do, and on the instant the trolley touched the wire the car shot forward and crushed the plaintiff against one of the Suburban cars which was standing on the track, and inflicted on him great injuries.

At the close of the plaintiff's evidence the court, at the request of the defendant, gave an instruction to the effect that the plaintiff was not entitled to recover. Thereupon he took a nonsuit, with leave, and, his motion to set the same aside having been overruled, brings this appeal.

C. A. Schnake and O J. & R. Lee Mudd, for appellant.
McKeighan & Watts and Robt. A. Holland, Jr., for respondent.

VALLIANT, J. (after stating the facts). 1. There is nothing in the case to justify a conclusion that the car starter

s a vice principal of the defendant. He had certain duties perform, and in that his word was the word of the master his fellow servants; and if they refused to obey him in that ticular they were, on being reported to the manager, liable be suspended. But each of the other servants had his peculduty to perform, and in which his word was that of the ster. The conductor, by word or signal to the motoneer, lers him to start or stop the car; and if he should refuse obey, and the fact was reported to the manager, doubt- he would be disciplined. And there may be events in operation of the car when the motoneer may be in duty nd to give orders to the conductor, which he is to obey. t it would never be contended that the conductor and toneer were not fellow servants. And so is a car starter, o has no more authority than this man had, the fellow serv- of the conductor and motoneer. Although the motoneer, eeming obedience to the order of the car starter, did a negli- t act, yet the car starter did not order him to do what he . The order was to move the car forward so as to clear switch. That was a proper thing to do, and could have n done in a proper manner. The argument is made that order should not have been given at the instant the con- tor was in the act of readjusting the trolley. Assuming, ve should, that the car starter saw what the conductor was ng when he gave the order, still the order did not mean t the motoneer should move the car with the trolley off, ch would have been impossible, but that he should do it . proper way. The negligence was in the act of the moto- r attempting to execute the orders without looking to see t the conductor was doing, and in removing the con- ler and starting to the other end of the car without closing apparatus against the current which he was bound to w would pass into the machinery as soon as the trolley ld touch the wire. We do not perceive any negligence in act of the car starter, but undoubtedly the act of the moto- r was negligence; and, if the defendant is liable to the ntiff for the negligence of his fellow servant, the trial t erred in giving the instruction which forced the nonsuit. s brings us to the main question in the case.

The General Assembly passed an act which was approved ruary 9, 1897 (Acts 1897, p. 96), the first section of which ng now section 2873, Rev. St. 1899) is: "That every rail- l corporation owning or operating a railroad in this state l be liable for all damages sustained by any agent or serv- thereof while engaged in the work of operating such oad by reason of the negligence of any other agent or ant thereof: provided, that it may be shown in defense the person injured was guilty of negligence contributing proximate cause to produce the injury." The question oes that statute apply to the defendant, which claims to corporation owning or operating a street railroad, and to

its servants engaged in the work of operating such street railroad?

(a) Appellant's first point is that the defendant is not a street railroad corporation, but that it is a railroad corporation, in the fullest sense of the word, possessing all the corporate powers of such. The defendant's charter, in evidence, shows that to be the fact. To this point appellant's main argument is addressed. It is urged that not only has the defendant such corporate powers granted by its charter, but that it has asserted them in court, and has been permitted to exercise the right of eminent domain; that in a suit which reached this court it was heard to say that it was a railroad corporation of general powers and duties, and, as such, that it could not be restricted, nor could it by contract restrict itself, to the carrying of passengers only. St. L. & M. R. R. Co. v. Kirkwood, 159 Mo. 239, 60 S. W. 110, 53 L. R. A. 300. And the argument is pressed that defendant cannot be heard to claim the rights, yet deny the liabilities, of a general railroad corporation. Referring to the case just cited (St. L. & M. R. R. v. Kirkwood), in which this defendant asserted its powers as a general railroad corporation, and resisted the effort of the city of Kirkwood to restrict it to the dimensions of a street railroad company, we find that this court did not sustain the company in its assertion; but, on the contrary, the court, per Gantt, J., said: "We think the facts in evidence constitute the plaintiff, so far as the city of Kirkwood is concerned, a street railway, with the right to transport passengers only." That essential differences exist between railroads and street railroads is recognized by the learned counsel for appellant in their briefs. They review the cases and texts cited in the briefs for respondent, and cite many in their own briefs, showing the recognized differences, and mark the points that distinguish the one kind from the other; but they answer all that those law writers say on that subject by saying that this is not a street railroad company, but it is a railroad company, in its broadest sense of the term, because its charter so declares, because it was incorporated under article 2 of chapter 42, Rev. St. 1889 (article 2, c. 12, Rev. St. 1899), and not under article 8 of the same chapter, under which street railroad companies at the date were usually incorporated; and they say, referring to a corporation organized under article 8: "When a corporation so organized, and actually confining itself to the technical street railway business, is sought to be held amenable to the fellow servant act, it will be time enough for this court to decide that question." The argument of the learned counsel for appellant proves this proposition, viz.: The defendant, having by its charter acquired and assumed all the rights and privileges appertaining to a general railroad corporation as such, is bound to assume, also, all the duties and burdens imposed by law on a general railroad corporation as such. If, therefore,

fellow servant statute imposes on every railroad corpo-
on having the charter powers given in article 2, c. 12,
. St. 1899, liability for injury to any one of its servants
ugh the negligence of his fellow servant, and if the statute,
onstrued, is constitutional, then this defendant is liable in
case. And so it would be, if that were the law, regard-
of the particular business the corporation was engaged in
he time, or of the kind of work the injured servant and
fellow servant were doing. If the corporation, on its
account, was erecting a depot building, and a carpenter
aged in the work was injured through the negligence of
ther carpenter in the same work, both being employees of
company, the company, on that theory, would be liable.
such case it would not avail the company, when
l, to say: "We were not at that time engaged in an
ation peculiar to a general railroad corporation.
were building a house, conducting the work in manner
any other house builder would do, and our employees were
subject to any greater or different risk than other
enters in like work." For to all that, on appellant's
ry, the conclusive answer would be: "Your charter de-
ines your character, and fixes your relation to the fellow
ant statute." But that cannot be the law. Our fellow
ant act itself draws a distinction which appellant's argu-
t overlooks. It does not impose the liability on railroad
orations because they are railroad corporations, nor does it
y to them without reference to the business in which they
n fact engaged, nor to their employees in every capacity.
language of the statute is: "Every railroad corporation
ng or operating a railroad in this state shall be liable for
mages sustained by any agent or servant thereof engaged
he work of operating such railroad by reason," etc.
we see that by the very words of the statute the
lity is not imposed on railroad corporations quia rail-
corporations, but on concerns that own and operate
ads in this state; and the liability is not for damages
ined by any servant of the company, but only by a serv-
ngaged in the work of operating such road. From
t is clear that the lawmakers had in mind the kind of
in which the men whom they aimed to protect were en-
l. The peculiar character of the work of operating a
ad was, to the minds of the lawmakers, the reason for
ng a peculiar class of the men engaged in that work, and
ling them relief not afforded to other hired servants, and
sing on their employers a liability not imposed on other
ers. It is the peculiar character of the work that justifies
atute in the eyes of the Constitution, and it is upon that
d alone that its validity has been upheld. It is the con-
, and not the theory, that justifies the law. This law
es to a master who, as a matter of fact, owns or oper-
railroad, and to a servant who, as a matter of fact, is

engaged in its work of operating that railroad. It applies to no other master, to no other servant.

The business in which the corporation was engaged may have been such as its charter did not authorize. Still, when the attempt is made to bring the act within the scope of this statute, the question is not what was the company authorized to do, but what in fact was it doing, and in what work was the injured servant engaged? The charter gives no answer to those questions. It is conclusive evidence of what the company had a right to do, but it is no evidence of what in fact it was doing. Whether, under its charter, defendant could lawfully engage in the street railroad business, is a question between the state and the defendant. It is not in this case. If, therefore, a corporation and its servants, who, as a matter of fact, are engaged only in operating a street railroad, are not covered by the fellow servant statute, then the fact that the charter of the corporation authorizes it to own and operate a trunk line steam railroad will not bring them within the statute, nor estop the corporation from showing the fact. The facts of this case afford an illustration of this principle. The evidence shows that from Sixth to Forty-First street, a distance perhaps of three miles, through a densely populated portion of the city, this defendant operated its cars over the same tracks over which the Suburban Company operated its cars, and the cars of both companies were operated in the same manner. The only means by which the cars of one company could be distinguished from those of the other was that the defendant's cars were red, while those of the Suburban Company were yellow. It was against a yellow car that this car of defendant's was crushed, inflicting the injuries on the plaintiff. It could just as well have been the yellow car that was crushed against the other, and the conductor of the yellow car injured by the negligence of that motoneer. And suppose that had been the case; could we say that the Suburban Company was not liable, because its charter called for a street railway, while the defendant, in like circumstances, was liable, because its charter called for a regular steam railroad? Where there are two concerns engaged in precisely the same business, and both conducting it in precisely the same manner, a statute which would undertake to impose a liability on the one, and not on the other, could not be sustained in the face of either our state or our federal Constitution. The defendant's charter is not decisive of this case.

(b) The question remaining to be considered is, does the fellow servant statute apply to concerns operating street railroads, and to their servants engaged in that work? In pursuing this inquiry, we must keep in mind the fact that we are dealing with an act of class legislation that marks off certain employers of men, and imposes on them a liability for injuries to their servants under certain circumstances

ich is not imposed on other masters; and we must remem-
r that there is a reason that justifies that class discrimina-
n, and that a case, to fall within the operation of the
tute, must come within its reason.

t is conceded that the term "railroad," when used in a
tute, does not always include in its meaning a street rail-
d. The learned counsel for appellant, in their brief, say:
or some purposes the law recognizes several species of
lroads and railroad companies, and recognizes a distinc-
n between a railroad and a street railroad. Statutes
ng the general term 'railroad' may or may not apply to
reet railroad." That is undoubtedly the law, and there-
, when the word "railroad" is used in a statute, if we
nt to know if it is intended to embrace in its meaning a
et railroad, we must look at the connection in which it is
d.

n support of the contention that street railroads are in-
led in the scope of the fellow servant statute, we are re-
ed to St. Louis Bolt & Iron Co. v. Donahoe, 3 Mo. App.
, and Koken Ironworks v. Ry. Co., 141 Mo. 228, 44 S. W.
. Those two cases decide that the statute giving contract-
and materialmen a mechanic's lien on the property of
road companies for their labor and materials entering
the construction of the roads applies to street rail-
d companies. Although the mechanic's lien law is to
e extent class legislation, yet the lines circumscrib-
the class or classes embraced within it are by no
ns as closely drawn as in the statute now in question.
re was no reason seen in those cases for a legislative policy
would give a mechanic or materialman who should con-
ute to the building of a steam railroad a lien for the
e of his work or materials, and not give a like remedy to
who should build or furnish materials to build a street
road. In the first of those cases the court, per Bakewell,
: "It is also a fact that acts of the Legislature may be
ed, and that sections of certain laws are to be found in
ch railroads are spoken of, and when it is quite clear,
ertheless, that street railroads are not meant." But after
gnizing that such distinctions existed, the court, with
rence to the mechanic's lien statute then in hand, said:
e can see no reason for giving the remedy provided in this
in the case of one railroad which would not equally apply
very other railroad." That is to say that the reason upon
ch that statute was founded was in every way as applicable
ne kind of railroad as to another. In the second of those
cases (Koken Ironworks v. Ry. Co.), which was also a
hanic's lien case, this court referred to the first case with
roval, and per Barclay, J., said: "When we bring into
the various statutes affording liens for materials or labor
ished for the improvement of land, and consider the
d objects sought by such legislation, it seems clear that

street railroads were not intended to be exempt from liability to respond to such lien claims in a proper case." The first of those cases was decided a good many years ago, when the only street railroads in the city were horse railroads, and it was a horse railroad that the court was discussing. The court saw no difference between a horse railroad and a steam railroad, so for as the mechanic's lien law was concerned, and we see none; but, if that case is authority for construing the fellow servant statute to include street railroads, it would be equivalent to saying that the reason upon which the fellow servant statute is founded applies as well to horse railroads as to steam railroads.

Appellant's cause in this court has not lacked for ability and industry of counsel. They have favored us with three separate briefs, showing zealous research and learning, yet they have given us on this point reference to only those two cases. They refer, also, to section 1163, Rev. St. 1899: "The term 'railroad corporation' contained in this chapter shall be deemed and taken to mean all corporations, companies or individuals now owning or operating or which may hereafter own or operate any railroad in this state." But that section of the statute does not reach this question. It is conceded that the defendant is a railroad corporation, and that it is operating a railroad, but the contention is that the kind of railroad it is operating is not the kind referred to in the fellow servant statute. The section just quoted throws no light on that subject. We have a statute (section 1953, Rev. St. 1899) making it a felony to place an obstruction upon or to tear up a railroad track with intent to obstruct the passage of a car or cars thereon, and under that statute men have been convicted, with the affirmance of this court, for attempting to blow up with dynamite a passenger car on a street railroad. State v. Brennan, 164 Mo. 487, 65 S. W. 325; State v. Northway, 164 Mo. 513, 65 S. W. 331. It is also made a misdemeanor (section 1956) to throw a stone or other missile into or at a train or car or locomotive, and our St. Louis Court of Appeals has held that the offense was committed by throwing a stone at a car on a street railroad. State v. Lang, 14 Mo. App. 247. Although those are penal statutes, and therefore to be strictly construed, yet, with the strictest construction, it is impossible to see any sound reason why they should not apply to persons maliciously threatening the lives and safety of passengers in a street car, as well as in a car on a steam railroad. The danger against which those statutes were aimed were not that which might result from mismanagement within, but from felonious assault without. The danger to the life of the passenger from such source in the street car is exactly of the same nature as that to the life of the passenger on the car of the steam railroad. The difference, if any, is only in degree, and such difference is not obvious. But neither the mechanic's lien law nor the

al statutes just quoted rest for their constitutionality on ı narrow grounds as does the fellow servant act—grounds were earnestly contested until the question was finally ded. The foregoing are the only Missouri decisions to ch our attention has been drawn that can be said to bear he question at all, and they are clearly distinguishable ı the case at bar.

efore persons or corporations can be marked out for s legislation, there must be in them, or in their business ɔroperty, some peculiar characteristic that, in the judg- t of the lawmakers, justifies the distinction. State v. mis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789. An act ıass legislation, to stand in the face of the Constitution, t include all who belong to the class—not all who bear larity in some characteristic to those included, but all cannot be distinguished from them in that particular ·acteristic which justifies the act. And it must include ɜ who do not belong to the class, for, if the Legislature t resort to the peculiarity of the business in which ɔorations operating steam railroads are engaged to find jus- ation for the act in the eyes of the Constitution, it must t the act to those in whose business is the same pecul- :y found. When the validity of such an act is in question courts will look into the nature of the class to see if it ɜesses peculiar features which might reasonably call for ɜlative action, but beyond that they will not interfere with policy of the Legislature. In the statute we are now con- ring the Legislature has marked out railroad corpora- s owning or operating railroads, and their employees ıged in the operation of their railroads, and has made a applicable to them as a class. We must look into the ıre of the business thus distinguished, and ascertain what e is in it that justifies the act, and what object the Leg- ure had in view in making the law. Then if we find that street railroad business is of the same nature, and the engaged in that business are within the class intended he Legislature, we must decide this case in appellant's r.

1874 Kansas enacted a fellow servant law applica- to railroad corporations alone, and very similar our act of 1897. The constitutionality of the act contested upon the ground that it was class legis- ın, but the Supreme Court of the United States, Railway v. Mackey, 127 U. S. 205, 8 Sup. Ct. , 32 L. Ed. 107, in deciding the question, said: "But hazardous character of the business of operating a rail- would seem to call for special legislation with respect to oad corporations, having for its object the protection ıeir employees as well as the safety of the public. The ness of other corporations is not subject to similar dangers ıeir employees, and no objections, therefore, can be made

to the legislation on the ground of its making an unjust discrimination." There was no question in that case as to the application of the statute to any other than a corporation operating a steam railroad. What is there said of the peculiar hazard of the business to justify the statute refers to steam railroads.

In 1887 Minnesota enacted a fellow servant statute, of which ours is almost a literal copy. The Supreme Court of that state in June, 1895, had for decision the very question now before us, in Funk v. St. Paul City Ry. Co., 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep. 608. As the decision of that court construing its statute was rendered nearly two years before our statute, in almost the same words, was enacted, we may presume that our Legislature was aware of the interpretation that court put upon it. That court, in two able opinions in the case, held the statute did not include street railroads. The court, per Buck, J., said: "It is a matter of common knowledge that street cars operated by cable or electricity are more readily managed than those operated by steam, where long passenger and freight trains, with their weight and momentum, are not so easily controlled. Street cars are generally run separately, rarely with more than two or three coupled together, and there is but little danger of collision. They do not run so rapidly, their movements are easily and quickly checked, and the roadbeds are constructed upon level or graded streets, without deep cuts, and generally lighted. Nor do street railways carry freight. The greatest railroad hazard and danger of personal injury to railroad employees arises from operating freight trains. * * * Especially is the danger in coupling freight cars entirely absent." And in the same opinion it is said: "If we were to hold that the term 'railroad,' in the law of 1887 (Laws 1887, p. 69, c. 13), applied to street railways, because the word is broad enough to cover all roads constructed of iron or steel rails for wheels of cars to run upon, we see no reason why it should not be so construed whenever found in other legislation of this state." Then the court goes on to mention some of the requirements of other statutes in that state referring to railroads, which it is manifest were not designed to apply to street railroads. And the same is true of our statutes in general relating to railroads. In a separate concurring opinion by Mitchell, J., in that case, it is said: "The difference in conditions affecting the risks to which employees are exposed is sufficiently substantial to authorize the Legislature to make the law applicable to ordinary commercial railroads alone, and furnishes, in my judgment, ample reason for concluding that they so intended, and that they used the word 'railroad' in its ordinary, popular sense, and in the sense in which they themselves had generally used it in other statutes." We have felt justified in quoting at length from the opinions in that case because they

: dealing with precisely the same question that is now be-
us, and construing a statute of their own which we after-
ls copied. That is the only case to which we have been
red where the question as to whether street railroads
: included in a fellow servant act like ours was decided;
:here are many cases, referred to in the briefs of counsel,
ng under other statutes, in which the distinction between
oads and street railroads is drawn and the general doc-
: runs through them all that the term "railroad" does
nclude "street railroad," unless so expressed, or neces-
y understood from the context; that, as a rule, the term
ıs steam railroad only, and it is the exception when it
ıs street railroad.

Arkansas they have a statute authorizing a city to grant
ight of way through its streets "to any railroad com-
," but the statute requires the railroad company to pay
property owners the damages they may sustain thereby.
'illiams v. City Electric Street Ry. Co. (C. C.) 41 Fed.
43 Am. & Eng. R. Cas. 215, it was decided that the
ision of the statute requiring damages to the property
: paid did not apply to the owners of a street railroad.
court, per Caldwell, J., said: "The difference between
t railroads and railroads for general traffic is well under-
l."

Iowa a statute made a judgment against "any railway
ration" for injury to persons or property a lien superior
at of a mortgage. But it was held (Manhattan Trust
v. Sioux City Cable Ry. [C. C.] 68 Fed. 82) that it did
pply to a street railroad company. Mr. Justice Shiras
ered the opinion of the court, in which he said: "It
ot be questioned, on the one hand, that a company en-
l in operating street cars upon lines of rails laid down
; the streets of a town or city for the transportation of
ngers, is, in one sense, a railway corporation, nor, upon
ther hand, that there is a marked difference and recog-
. distinction between street railway lines and those en-
l in the general passenger and freight traffic of the
try."

Oregon a statute gave the right to condemn land to "all
ay corporations," but it was held that that did not in-
street railway companies. Thomson-Houston E. Co.
non, 20 Or. 60, 25 Pac. 147, 10 L. R. A. 251, 23 Am. St.
86.

va adopted a fellow servant law applicable only to rail-
companies in 1862, and the Iowa court has recognized
arrow constitutional ground on which the statute stands,
ıas been careful to keep it on that ground. In Deppe v.
ıgo, etc., Ry., 36 Iowa, 52, the court said: "The mani-
urpose of the statute was to give its benefits to em-
es engaged in the hazardous business of operating
ads. When thus limited, it is constitutional. Extended

further, it is unconstitutional." The peculiar hazardous business of operating railroad trains, distinguished from other kinds of business, as the ground upon which the statute is founded, is emphasized in other cases in the same court. Schroeder v. Ry. Co., 41 Iowa, 344; Stroble v. Ry. Co., 70 Iowa, 555, 31 N. W. 63, 28 Am. & Eng. R. Cas. 510, 59 Am. Rep. 456; Butler v. Ry. Co., 87 Iowa, 206, 54 N. W. 208; Larson v. R. Co., 91 Iowa, 81, 58 N. W. 1076; Akeson v. R. R., 106 Iowa, 54, 75 N. W. 676, 11 Am. & Eng. R. Cas., N. S., 430. Although the question of the applicability of the fellow servant statute to street railroads does not seem to have come before the Iowa court, yet what is said in those cases as to the purpose of the statute leaves us to infer that it would place men engaged in operating street cars outside of the pale of that statute.

It is not the mere fact that men engaged in operating railroads are subjected to hazard that has called forth the legislative action, for men to whom no such protection is afforded are engaged in other kinds of business that are hazardous to as great or greater degree—as, for example, some kinds of mining, tunneling, etc.; but it is the peculiar nature of the hazard incident to the railroad business that makes the foundation of this statute. Reference to this peculiarity runs through all the cases sustaining the validity of the fellow servant statutes. In R. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, Mr. Justice Brewer said: "The business in which they are engaged is of a peculiarly dangerous nature, and the Legislature, in the exercise of its police powers, may require many things to be done by them in order to secure life and property. Fencing of railroad tracks, the use of safety couplers, and a multitude of other things, easily suggest themselves." In Lavallee v. Ry. Co., 40 Minn. 249, 41 N. W. 974, 38 Am. & Eng. R. Cas. 115, the court said: "The frequency and magnitude of dangers to which those employed in operating railroads are exposed; the difficulty, sometimes impossibility, of escaping from them, with any amount of care, when they are seen; the fact that a great number of men are employed, laboring in the same work, so that no one of them can know all the others, their competency, skill, and care, so that they may be said to voluntarily assume the risks arising from want of skill or care by any one of the number—are sufficient reasons for applying the rule of liability of the employer to employees so employed, different from that ordinarily applied between master and servant; but no just reason can be suggested why such difference should be founded, not on the character of the employment, nor the dangers to which those employed are exposed, but on the character only of the employer." In Johnson v. R. R., 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419, the court was considering what employees were within the scope of the fellow servant statute, and said: "Therefore, after mature considera-

, our conclusion is that if any limitation is to be placed he courts upon the application of this statute (and, on stitutional grounds, there must be), the only one which furnish any definite or logical rule is to hold that it only lies to those who are exposed to the peculiar hazards in- nt to the use and operation of railroads, and whose in- es are the result of such dangers."

en engaged in the operation of street railroads are ex- d to hazards, but not to the peculiar hazards which dis- uish men engaged in operating steam railroads, and which made them a class for special legislation. In 1897, when law was enacted, there were still some street railroads in state operated by horse power. If the law applies to t railroads at all, it applies to street railroads of all kinds; if it applies to them now, it applied to them when it first enacted, and, if so, then there was no difference in pplication to the driver of a horse car and a brakeman on ight train. There are employments attended with even ter hazard than the operating of a railroad, but men en- d in those employments are not included in this class, use the hazard is not of the same character. And there nen in the employ of railroad corporations who are not in the class because they are not engaged in operating ailroad. Thus the lines around the class are drawn, and who do not fill the description are not within those lines. nning through all our statutes on the subject there is an ous distinction shown between railroads and street rail- s. No one can read article 2 of chapter 12, Rev. St. 1899, gather the idea that it has any reference to street rail- s. Then follows article 3, which relates to street rail- s only. The very fact of the frequent use of the term road" in our statutes in such connection as to indicate the Legislature understood that it would be taken, as a er of course, to mean a steam railroad, shows that the use of the word is with that meaning, and when some meaning is intended some additional word is used. section 1180, Rev. St. 1899: "It shall be the duty of street railway company or corporation operating a railway across the tracks of a railroad company to its cars to a full stop at least ten and not more than y feet before reaching the tracks of the railroad com- and it shall be the duty of the conductor or some employee of the street railway company, to go forward tracks of such railroad company for the purpose of ascer- ig whether a train is approaching such crossing." In connection the word "railroad" is brought into sharp ct with the words "street railway," and the Legislature it for granted that any one reading the section would stand that "railroad" meant steam railroad, and there- lid not add any word of qualification or explanation. In ession Acts of 1897, p. 96, is this fellow servant law, in the term "every railroad corporation" is used, and im-

mediately following on the same page is another act, in these words: "The railroads of this state are required to carry peddling cars of watermelons or cantaloupes, strawberries, blackberries and other perishable fruits," etc. The word "railroads," in the latter act, is used as unqualifiedly as the word "railroad" in the former, yet the lawmakers took it for granted that every one would know what the word "railroad" meant. Then on the next page of the same book there is an act having in view the construction of a street railway, and the term "street railway" is used. The title to article 2, c. 12, is "Railroad Companies." That to article 3 is "Street Railroads." Then comes article 4: "Railroad Classification. Charges—Commissioners." The first section of article 4 is: "All railroads in the state of Missouri are hereby divided into three classes, to be known as Class A, Class B, and Class C." Then follow definitions of the classes, and regulations as to charges for passengers and freight, duties of railroad commissioners, etc. Although the words of that statute are "all railroad corporations in the state of Missouri," yet manifestly it does not include street railroads. Article 7 of the same chapter, which points out the procedure to be followed in condemning private property for public use, refers in general terms to "any road, railroad, telephone, telegraph or other corporation created under the laws of this state." There not only is the term "railroad corporation" used in unlimited form, but it is followed by the still more general and comprehensive term, "other corporation created under the laws of this state," yet no street railroad chartered under article 3 of that chapter has ever been accorded the right of eminent domain. The only right of way such corporation can obtain is by grant from the city over its streets, or by grant from private owners. Section 1187, Rev. St. 1899. There are many other sections of our statutes referred to in the briefs of the learned counsel in which the term "railroad" or "railroad corporation" is used without qualifying words, yet manifestly referring only to steam railroads, but we will not now discuss them, because this opinion is already too long. In almost every instance where street railroads are intended in our statutes, street railroads are named. In every instance where steam railroads are intended, the word "railroads" only is used. The fellow servant law of 1897 does not designate street railroads by name, nor by any words necessarily indicating an intention to include them; and, as such companies are neither within the letter nor reason of the law, it does not apply to them. This is the view the learned trial judge took of the law, and he was correct.

The judgment is affirmed.

ROBINSON, C. J., and MARSHALL and FOX, JJ., concur. BRACE, GANTT, and BURGESS, JJ., dissent.

GANTT, J. (dissenting). This is an action for damages growing out of personal injuries alleged to have been suffered

he plaintiff through the negligence of defendant, a railroad pany organized under the laws of this state, and operating ilroad from the corner of Sixth and Locust streets, in the of St. Louis, to Meramec Highlands, a point on the Mer- c river, in St. Louis county, in this state. The petition ;es that plaintiff was a conductor and employee of defendant aid railroad on the 27th day of January, 1898, and on said one Jesse B. Horn was also an employee of said railroad pany as motoneer of car No. 348, of which plaintiff was con- or; that said car was propelled by electricity; that in ating said car it was the custom, when a car reached the ern terminus of said road, at Sixth and Locust streets, in Louis, to change the operating machinery so as to return car westwardly over the tracks on which it had come; the motoneer would bring his car to a standstill, and turn he electric current from the machinery; the conductor would release the rope which held the trolley pole to the , alight from his car, pull down the trolley pole from overhead wire, and, by means of a rope which attached to one end of the trolley pole, move the ey pole around to the opposite end of the car, and n, by releasing the rope, raise the trolley pole to the head wire, and while the conductor was so engaged the oneer was required to keep the power or electric current ed off, so that the car would remain stationary, but that he time and on the day mentioned in the petition, while itiff, as conductor, was carrying the trolley pole around e opposite or east end of said car, Horn, the motoneer, gently failed to withhold the electric current from the inery, but did, without the knowledge of plaintiff, and e plaintiff was reversing the trolley pole, so arrange the inery as to admit of the entrance of the electric current the overhead wire into the machinery of the car, and e the said car was thus arranged the plaintiff, unaware of negligent act of Horn, raised the trolley pole to the over- wire, thus connecting the car with the overhead wire, mmediately the electric current, by reason of the negli- act of Horn as aforesaid, entered the machinery of the and caused it to suddenly bound forward with great force violence against and upon plaintiff, whereby plaintiff was ked and forced upon and against the platform of another fendant's cars, then and there standing upon the track ont of said car; that his right hand was crushed and ied so that he has lost the use of it permanently; that his leg was crushed and disabled forever—from all of which ies he is permanently disabled, to his damage in the sum 23,000. The answer contains, first, a general denial; id, a plea of contributory negligence; and, third, the wing special defense: "Said defendant, further answer- aid petition, states that it was on the occasion in ques- is now, and has been for a long time, a street railroad

corporation only, organized and existing under the laws of the state of Missouri for the purpose only of operating, and it was, has been, and is only operating, a street railroad by electricity for the carriage of passengers, and said railroad company was neither organized nor incorporated for operating a railroad by steam, nor has it ever operated a railroad by steam, nor was it on the occasion in question, nor did it then nor has it at any time since operated any other than a street railroad for the carriage of passengers on its said line, beginning at or near Sixth and Locust streets, in said city of St. Louis, and running in a westerly direction over various streets in said city to the western boundary of said city; that on the occasion in question the agents and employees of defendant named in plaintiff's petition, and charged with negligence in the performance of their duties, to wit, James B. Horn, motorman, and —— Hogan, were the fellow servants of the plaintiff in and about the operation of the car of which the said plaintiff was conductor, and which was one of the cars that the said defendant used in the operation of its said street railroad on its line of street railroad aforesaid, and said defendant further says that the said plaintiff, by virtue of his employment as fellow servant of said Horn and Hogan, assumed the risk on his part of any negligence on the part of said agents or employees of defendant, or either of them, as fellow servants of him, the said plaintiff, and that if, on the occasion in question, the plaintiff was injured in consequence of any negligence of either said Horn or said Hogan, the said plaintiff, by virtue of his said employment, and by virtue of the said Horn and Hogan being his fellow servants in the operation of said car at the place where he was injured, and on the occasion in question, assumed the risk of said negligence, by virtue of the nature and character of his, the said plaintiff's, employment by said defendant, and said defendant is not liable to said plaintiff for any injury caused on the occasion in question by any negligence, if any, which the said Horn or the said Hogan was guilty of, causing the injuries complained of by said plaintiff in his petition." Plaintiff replied, denying all the new matter set up in the answer. There was substantial evidence tending to prove the allegations of the petition as to the manner in which the injury to plaintiff occurred. Plaintiff also offered and read in evidence the articles of incorporation of defendant, showing it was organized under the general railroad law of this state, known as article 2, c. 42, Rev. St. Mo. 1889, and evidence showing its proceedings as such to condemn lands for a right of way in St. Louis county; also evidence of the extent and nature of his injuries. At the close of plaintiff's case the defendant prayed and the court gave an instruction that under the pleadings and evidence the verdict must be for defendant, and thereupon plaintiff took a nonsuit, with leave to move to set the same aside, and after-

ls, and within four days, moved the court to set aside said suit, and, among other things, assigned as error the giv- of said instruction, which motion the court overruled, thereupon plaintiff perfected his appeal in due form to court.

This record requires a construction by this court of the e and effect to be given to an act of the Legislature of state approved February 9, 1897 (Acts 1897, p. 96), and monly known as the "Fellow Servant Act." It is en- l "An act to define the liabilities of railroad corporations lation to damages sustained by their employees, and to e who are fellow-servants and who are not fellow-serv- and to prohibit contracts limiting liability under this ' The first section is as follows: "That every railroad oration owning or operating a railroad in this state shall able for all damages sustained by any agent or servant of while engaged in the work of operating such railroad ason of the negligence of any other agent or servant of: provided, that it may be shown in defence that the on injured was guilty of negligence contributing as a imate cause to produce the injury."

sustaining the demurrer to plaintiff's evidence, the court obviously held that defendant was operating a t railroad, and that the above-quoted statute had no ap- tion to street railroads; in short, that the words "every ad corporation owning or operating a railroad in this " do not mean "every railroad," but those only which or operate steam railroads, and the word "railroad" be restricted to those only who operate their cars in s, and by steam as the motive power. That the words e act, "every railroad corporation," are broad enough in selves to include street and electric railroads as well as railroads, will not be denied; that they are plain, unam- us, and comprehensive enough to include all railroads, t be doubted. Prima facie, the act applies to streets ll as any and all other railroads. Bloxham v. St. Ry. Fla.) 18 South. 444, 29 L. R. A. 507, 51 Am. St. Rep. The rule of construction is that where a law is clearly ssed it is the duty of the court to adhere to the literal ssion, unless such construction would lead to a palpable dity. Thus in Smith v. State, 66 Md. 215, 7 Atl. 49, a ed woman was sued jointly, with her husband, and she ed specially her disability of coverture, to which plaintiff rred. This brought the act of 1872 of that state before urt for construction, wh ch provided that "any married n may be sued jointly with her husband on any bond," Laws 1872, p. 442, c. 270. The contention was that t did not apply to official bonds, but said the court: tever latitude may at one time have been assumed by s in the construction of statutes, the more recent cases established the rule that, when the language of a legisla-

tive enactment is clear and unambiguous, a meaning different from that which the words plainly imply cannot be judicially sanctioned." Citing Green v. Wood, 7 Q. B. 185; Woodbury v. Berry, 18 Ohio St. 462; U. S. v. Ragsdale, 1 Hemp. 497, Fed. Cas. No. 16,113; Bosley v. Mattingly, 14 B. Mon. 89. "When the Legislature says she may be sued on any bond executed jointly with her husband, can the judicial department of the government undertake to say that the lawmakers meant she shall not be sued on some bonds executed jointly with her husband? Such a determination could only be reached by a species of judicial legislation not sanctioned by any authority, and extremely dangerous if once established as a precedent." In Woodbury v. Berry, 18 Ohio St. 458, the Supreme Court came to the conclusion that certain words had by accident or oversight been omitted from an act, but notwithstanding this they say: "Ita lex scripta est. The language, as it stands, is clear, explicit, and unequivocal. It is our legitimate function to interpret legislation, but not to supply its omissions." Citing Sedgwick on Stat. & Const. Law, 231. In Bradbury v. Wagenhorst, 54 Pa. 180, the statute required a copy of the instrument sued on to be filed with the clerk before judgment should be entered. It was contended that there was no necessity for a copy of claims, since the mechanic's lien law required a bill of particulars to be filed in order to make a lien, but the court answered, "Whatever may have been the legislative thought, no ambiguity exists in what they have said; and, when the words of a statute are plainly expressive of an intent, the interpretation must be in accordance therewith." So in Bennett v. Worthington, 24 Ark. 487, it was urged that the statute of limitations ought not to run during the time the courts were closed on account of the war between the states; but the Supreme Court held that, as no such exception was included in the statute, the court could not enforce the equity in behalf of plaintiff, saying: "The correct rule to be extracted from the authorities is that, where the will of the Legislature is clearly expressed, the courts adhere to the literal expression of the enactment, without regard to consequences, and every construction derived from a consideration of its reason and spirit should be discarded."

At the time this law was enacted there was a general provision in our statutes defining the term "railroad corporations" as follows (section 1163, Rev. St. 1899): "The term 'railroad corporation' contained in this chapter shall be deemed and taken to mean all corporations, companies or individuals now owning or operating, or which may hereafter own or operate, any railroad in this state.' But it is plausibly and ably contended that in the various laws of this state governing railroad corporations the word "railroad" has a well-defined and clearly understood meaning, and is never confounded with "street railroad," and various sections of the

ral railroad law are cited to show that they have no ref-
:e to street railroads. That there are many provisions
e various acts in regard to railroads which do not apply
:eet railroads may be, and is, conceded; but the state-
of counsel is entirely too broad, when they assume that
: laws do not apply at all to street railroads, as an exami-
n of the decisions of this court will clearly demonstrate.
:oken Ironworks v. The Robertson Avenue Ry. Co., 141
228, 44 S. W. 269, it was contended by the defendant, a
: railway company, that sections 6743, 6744, 6747, 6754,
Rev. St. 1889, giving a lien for work and material upon
ɔadbed, depots, rolling stock, station houses, etc., did
ı terms, and were never intended by the Legislature to,
ace street railways; but this court held adversely to its
ntion, saying: "Undoubtedly much of the language of
aw is applicable to railroads operated by steam. Those
the roads to which the act was chiefly designed to apply.
he general terms of the law are also susceptible of appli-
ı to street railroads, and we find nothing in any part of
:nactment to indicate that such application is not in-
d. * * * Laws of this nature should receive a fair
ational interpretation, and full effect be given to the re-
ıl purpose that constitutes their spirit." The St. Louis
of Appeals had previously given those sections the same
ɔretation in St. Louis Bolt & Iron Co. v. Donahoe et al.,
App. 559, in which Judge Bakewell, speaking for the
says: "It is a fact that acts of the Legislature may be
d and that sections of certain laws are to be found in
ı railroads are spoken of, and where it is quite clear,
theless, that street railroads are not meant. But we do
:e how these facts affect the question here. A street
ad or horse railroad is none the less a railroad because
altimore & Ohio Railroad is also a railroad; and, where
egislature cites the term without limitation, it will be
to use it in its broadest sense, unless it appears from
ce of the enactment that it meant to restrict the word
e class of railroads or the other." But again, section
Rev. St. 1899, makes it a crime to obstruct any railroad,
his court, in the cases of State v. Brennan, 164 Mo.
5 S. W. 325, and State v. Northway, 164 Mo. 513, 65 S.
ı, held that the term "railroad" was broad enough to
e cable and electric street railroads. The same conclu-
as reached by the Supreme Court of California upon an
ther similar criminal statute. People v. Stites, 75
70, 17 Pac. 693. And the identical point was again
ɜd in Price v. State, 74 Ga. 378, and Com. v. McCaully
2 Pa. Dist. Rep. 63; Millvale Borough v. Ry. Co., 131
18 Atl. 993, 46 Am. & Eng. R. Cas. 219, 7 L. R. A. 369.
ger v. Railway Co., 136 Pa. 104, 20 Atl. 399, the Supreme
of Pennsylvania laid down a very satisfactory rule, to
ıat "railway" and "railroad" are synonymous, and in

all ordinary circumstances are to be treated as without distinction, and when either of them is used in a statute, and the context requires that a particular kind of a road is intended, that kind will be held to be the subject of the statutory provision; but if the context contains no such indication, and either of the words is used in describing the subject-matter, the statute will be held applicable to every species of road embraced within the general sense of the word used. In Hestonville v. R. Co., 89 Pa. 210, it was held that the word "railroad" applied to street railways. Indeed, as pointed out by Judge Bakewell in St. Louis Bolt & Iron Co. v. Donahoe, the first street railroads constructed in the city of St. Louis were constructed under the then existing general railroad corporation laws of this state, and it was not until 1866 that the general act concerning corporations was passed, authorizing the formation of manufacturing and business companies for the purpose of constructing horse railroads. In Illinois an act passed in 1855 (Laws 1855, p. 304), whilst horse railroads were in existence in Illinois, giving certain powers to "railroads," was held to include horse as well as steam railroads. Chicago v. Evans, 24 Ill. 52. These cases sufficiently indicate that it is not accurate to state that the word "railroad" always refers to steam railroads, and that when street railways are to be included they are specifically named as such. On the contrary, the great weight of authority is that, if the context contains no such indication, a statute containing the word "railroad" will be held to include every species of railroad which is embraced within the general sense of that word.

Looking now more closely to the act, we find it is a short, remedial act, of four sections only, and not a word in it to indicate that it was the intention of the Legislature to restrict it to steam railroads operating long trains. Being remedial, the universal rule is that it should receive a liberal construction, to cure the evil which it was intended to remedy. "The old law, the mischief, and the remedy must be kept in mind." Prior to the enactment of this statute the course of decision was that a master, in this state, was not liable to his servant for injuries occasioned by the negligence of his fellow servant. For many years counsel endeavoured to get this court to change this rule, but the answer was that this was a legislative function; that it was the duty of the court to declare, not to make, the law. It is within the knowledge of all of us that this ruling occasioned the passage of this law. But counsel urge that the reason of the law would exclude its application to street railways, because they say in the operation of the car two persons only were employed—a conductor and a motorman—and the reason for changing the law was that steam railroads had a large number of employees operating freight and passenger cars in trains, and there resulted a consequent want of opportunity on the part of the employees

erve and watch their co-employees in the same serv-
nd thus discover their negligence, and an opportunity
: the service if these negligent co-employees were not
rged. Doubtless this was one of the reasons, but it
: be that it was the only one, because, if it was, if an
yee, as a fireman, closely associated in the same cab
n engineer, was injured by the negligence of the latter,
l be urged with the same plausibility that, being so
associated, they did not fall within the reason which
ted the passage of the act, to wit, that they had no op-
ity to watch the conduct of each other. There is no
:ception written in the law. Under its terms an em-
injured by the negligence of another servant of the same
ıy would not be turned out of court because his
ment brought him so closely in contact with him that
d observe his conduct. If a fireman or engineer, then,
over for injuries occasioned by the other, whose duties
m together on the same cab, how can it be maintained
motorman or conductor, operating at different ends
same car, is not equally entitled to be protected
he negligence of the other? Moreover, since the
tion of electricity, and the operation of cars by
it is not true that only one car can be operated,
equently it occurs that two and three cars are
:ed in the same train. Neither can it be said that
:h rate of speed of steam cars makes it necessary
y a different rule, as the modern electric car easily
from 18 to 25 miles an hour. It is true that the
e Court of Minnesota, a tribunal whose opinions
gments entitled it to our highest respect, attached
ıportance to these considerations in Funk v. St. Paul
Co., 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208,
St. Rep. 608. It is proper to remark, moreover, that
nesota court based its opinion upon an additional rea-
'n page 439 of the report, page 1101, 63 N. W., 29 L.
)8, 52 Am. St. Rep. 608, it is said: "It is claimed by
ıt's counsel, and not denied by the counsel for re-
ıt, and such we believe to be the fact, that on Febru-
1887, when the general law of that year was passed,
ere no cable or electric street railways in existence
tate. If so, what was the legislative intent in using
l 'railroad' in the law of 1887, to be deduced from the
nd every part of the statute, taken together, upon
ject of railroads? 'When the words of a statute are
icit, the intention is to be collected from the context,
: occasion and necessity of the law, from the mischief
the object and remedy in view.' Potter's Dwarr.
note 13. What was the mischief felt which resulted
assage of this law? Was it a danger known or un-
We must assume that it was dealing with and act-
ı existing facts within its knowledge. Of course, if

the language used was entirely free from ambiguity, and broad enough to include unknown things which might spring into existence in the future, they would be deemed to come within and be subject to the evident meaning of the terms used." Much weight is given by both the learned judges who filed opinions in that case to the fact that in the previous legislation in that state the word "railroad" had not been applied to street railways. It must be apparent that the first reason given, to wit, that at the time the Minnesota fellow servant act was passed, to wit, in 1887, there was no such thing as a cable or electric car in Minnesota, could have no force in interpreting our act of 1897, which was enacted years after our cities and towns in Missouri were gridironed with both systems of street railroads, and therefore our Legislature could not be charged with legislating in ignorance of the character of such roads. Neither has our Legislature or courts made the distinction between "railroads" and "street railroads" that the learned justices discovered in Minnesota, as we have already shown; and, while the history of railroad legislation in that state may have justified the conclusion reached by that court, the facts upon which that adjudication was bottomed do not and did not exist in Missouri when the act of 1897 under consideration was passed.

The statute before us has been construed by the St. Louis Court of Appeals in the case of Stocks v. St. Louis Transit Co. (at the October term, 1902, of said court) 73 S. W. —, and held to apply to street railways; citing with approval Rafferty v. Central Traction Co., 147 Pa. 579, 23 Atl. 884, 30 Am. St. Rep. 763; City of Clinton v. Ry. Co., 37 Iowa, 61. Bland, J., in Stocks v. Transit Co., supra, referring to the contention that by using the word "railroad" this act must be construed with reference to our general railroad act, pertinently remarks: "The act of 1897 is not a railroad act, and is not in pari materia with any of the general laws of the state concerning railroads, and for this reason cannot be interpreted by them. It is a fellow servant act, intended for the benefit of the employees of railroad corporations, and designed to place them on the same footing as to the right to recover damages caused by the negligence of their co-employees. The act confers on a class of employees of railroad corporations a right of action which they did not have before, and we can see no sound reason for confining the benefits of the act to but one class of railroad employees."

But it is earnestly insisted that in construing this act we must bear in mind that this is class legislation, and, to sustain the constitutionality of the act, we must be convinced, in applying it to street railways, that they fall within the reason of the statute; otherwise the act is unconstitutional. This is a grave contention, because, if sound, it must result in our holding not only that the language of this act does not include street railways, but that it would not be in the

r of the Legislature, even by using the words "street ays," to make them amenable to its provisions. To sus- :heir position the learned counsel have recourse to the on of the Supreme Court of the United States, sustain- ıe constitutionality of the fellow servant act of Kansas, in 'ay v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. n which it is said in justification of that law against the e of unnatural and unreasonable classification that "the dous character of the business of operating a railway seem to call for special legislation with respect to rail- orporations, having for its object the protection of their ıyees as well as the safety of the public. The business er corporations is not subject to similar dangers to their yees, and no objections, therefore, can be made to the ıtion on the ground of its making an unjust discrimina- The fellow servant act, applicable to railroads only, ɜen upheld by the same court, for a similar reason, in . v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, the various states adopting a like statute. Lavallee v. ɔ., 40 Minn. 249, 41 N. W. 974, 38 Am. & Eng. R. Cas. ohnson v. R. R., 43 Minn. 222, 45 N. W. 156, 8 L. R. ı; Powell v. Sherwood, 162 Mo. 605, 63 S. W. 485; :on v. Ry. Co., 165 Mo. 543, 65 S. W. 745, 23 Am. & R. Cas., N. S., 634; Ry. Co. v. Herrick, 127 U. S. 210, Ct. 1176, 32 L. Ed. 109. Because the courts, in sus- ; these acts, have pointed to the peculiar hazards to railroad employees are exposed, to defend the statutes t the charge of unjust discrimination, it is assumed fellow servant act applicable to street railways would onstitutional, because the employees of such corpora- re not subjected to all the hazards that beset employees m railroads. It is admitted that employees in the ion of street railroads—especially those engaged in ing cars on which electricity is the motive power—are d to great hazards; but it is said they are not the ır hazards which attend the operation of steam rail- and therefore they do not, and, if the argument is cannot, come within the same class as employees of railroads. We cannot subscribe to this contention. In inion, it was entirely competent for the Legislature to nacted a general fellow servant law, which would have l to all masters and servants; and it was also within its to enact this law governing the liability of railroads r employees, and to include therein, as we hold they the employees of all railroads—street and electric rail- .s well as steam railroads.

not to be questioned that, in the exercise of its gen- nedial and police powers, the Legislature may enact r the health and safety of our citizens, and, when a ubject is within its power, the extent to which it is to cised is within the discretion of the Legislature. It is the common knowledge of us all that at the time this

act was passed nearly all the street railways in this state were being operated by electricity, and those that were not were rapidly being converted into electric roads; that this motive power was exceedingly hazardous and dangerous. It is not insisted that it would not be wise and humane legislation to throw around the employees operating these cars the same protection that is given an operative on a steam railroad, but only that the general words do not include them, and, if they did, they are not in the same class. To this we answer that, when it is conceded that their avocation subjects them to perils from the negligence of their fellow servants, it is not for this or any other court to say to the Legislature, "You shall not enlarge the class so as to include the employees of all railroads, but shall restrict it to steam railroads alone." In a word, we hold that an act of the Legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for doubt. Ogden v. Saunders, 12 Wheat. 213, 6 L. Ed. 606; Sinking Fund Cases, 99 U. S. 700, 25 L. Ed. 496; State v. Layton, 160 Mo. 499, 61 S. W. 171, 83 Am. St. Rep. 487. As said by the Supreme Court of Ohio in State v. Nelson, 39 N. E. 24, 26 L. R. A. 317: "The appliances and construction of cars, and in fact all kinds of machinery, are continually changing; and it is within the exclusive authority of the General Assembly, in the exercise of its police power, to determine by general laws what, if any, regulations are required for the protection of the health, safety, and comfort of the operatives." Because the Supreme Court of the United States and this court and all other courts now hold the fellow servant acts applicable to railroads is not unconstitutional classification. Because the business is hazardous, it by no means follows that this class should not include all railroads. On the contrary, the classification would seem less objectionable when it includes in it all who are subjected by their employment to similar hazards, albeit not exactly the same. We hold that a construction of the act before us which makes it applicable to the employees of street railways would not render it unconstitutional.

In view of the remedial character of this act, the absence of any thing in any portion of the act indicating a purpose to restrict it to steam railroads, and the decisions in this state which have applied certain general provisions of our railroad laws alike to street railways and steam railroads, and because the plain, unambiguous words of the act are broad enough to include street railways, we hold that the act means what it says, and that street railroads are liable in the same manner as steam railroads to their employees for the negligence of their co-employees or fellow servants.

2. But were this not so, in our opinion, the defendant in this case would still be liable, for the reason that it is a railroad corporation organized under the general railroad laws of this state, with all the powers and subject to all the liabilities of any other railroad corporation. The evidence shows

nd question that it was incorporated under and by virtue ticle 2, c. 42, Rev. St. Mo. 1889, for the purpose of conting, maintaining, and operating a standard gauge railfor public use in the carriage of persons and property, 'to be constructed from a point in the city of St. Louis general southwesterly direction through or near the s of Maplewood, Old Orchard, Tuxedo Park, Webster es and Kirkwood to a point on or near the Meramec within the limits of St. Louis county." It further ap- that by virtue of its charter it exercised the right of ent domain in condemning a right of way under and by : of the powers conferred upon steam railroads in this There was also evidence that it carried express and nited States mails between St. Louis and Kirkwood. rue that the motive power employed by defendant is icity, but all the cases agree that the motive power is determining feature in distinguishing a street railway a general railroad which carries both freight and pasrs. So that we have a case in which the corporation has d to take its charter under the general railroad law of ate, and has voluntarily placed itself in the class of to which it concedes the act of 1897 properly and necly applies. But defendant argues that because it only s passengers over that part of its road which lies along the streets of St. Louis, and by express permission in eets of Kirkwood, it should to that extent be regarded s a street railroad, but we do not think its contention is e. It is still a railroad, notwithstanding the city of uis and other municipalities would not permit it to run ght trains over their streets. These cities are empowy the Constitution and general laws to exclude it from streets; and, if it has entered into conventions with vhereby it denies itself in those localities the right to freight on condition that it may operate cars on their for passengers only, it has not thereby changed the :, which alone authorizes it to exist as a corporation, us relieved itself of its obligation to state laws. It rea railroad corporation operating a railroad in this state, ls within both the language and spirit of the act of 1897. be that, if this accident and injury had occurred to ff on defendant's line out in St. Louis county, defendld be heard to say, under its charter, that it was not a d, within the meaning of the act of 1897? Assuredly But it would in that case still be the same railroad that to and delivers its passengers in the city of St. Louis. e corporation, and operating one railroad, and it is ject to a different liability in the city from what it is country. In our opinion, it is clearly within the pro- of the act of 1897, and the circuit court erred in holderwise. It is said, however, the liability is not imposed ilroad corporations because railroad corporations, but

on concerns that own and operate railroads," and that therefore the charter of this defendant does not determine its liability. But how can that affect the defendant's liability, when it is confessedly both a "railroad corporation," to which this act, in terms, applies, and at the same time owns and is operating a railroad, by every test known to the law? We fully agree that the servant who can avail himself of the protection of this statute must be one engaged in the work of operating such road. In Callahan v. Merchants' Bridge Terminal Company Railroad (decided at this term by the court in banc) 71 S. W. 208, we held that this right was not limited to those who are engaged in running trains, but extends to those employees, also, whose work is directly essential to enable trains to run; and in so doing we were fully supported by the decisions of the Supreme Court of Kansas in R. Co. v. Pontius, 52 Kan. 264, 34 Pac. 739, and of the Supreme Court of the United States affirming that view. Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675; Stubbs v. R. R., 85 Mo. App. 192. It may be well to note that the Supreme Court of the United States, in enumerating the grounds upon which it sustained the Kansas law, noted that it applied "to all railroad corporations, without distinction," and so does the act of 1897. So that we have not a case where some corporation other than a railroad or some person is operating a railroad, but we have a case within the exact language of the act, to wit, "a railroad corporation owning and operating a railroad in this state," and the servant who is suing was a servant engaged in operating such railroad, and was hurt by another servant engaged in operating the said railroad; and the question is, shall the act of the Legislature, made for identically such a case, be enforced, or shall we turn the plaintiff out of court simply because the car which said employees were operating was not operated by steam, and was not one of a long train, or that said railroad company was permitted to run only passenger cars in the streets of St. Louis and Kirkwood by the ordinances of said cities, the right having been conferred on said municipalities by our Constitution and General Statutes to allow said company to run its trains within the corporate limits, or to deny it that right? In the case supposed of the Suburban car crushed against the car on which plaintiff was employed, we have no doubt whatever that the conductor of the Suburban car could recover against the defendant for the negligent act of its servant; and we also agree, as already said, that the Suburban or any other street railway company, under the unrestricted terms of this act, is a railroad, and liable to one of its servants who is injured in the operation of its road by another servant of said company. In our opinion, the judgment should be reversed, and the cause remanded for a new trial in accordance with the views we have expressed.

BRACE and BURGESS, JJ., concur in my views.

ERIE R. CO. *v.* KANE.

(*Circuit Court of Appeals, Sixth Circuit, August 15, 1902.*)

[118 Fed. Rep. 223.]

r and Servant—Fellow Servants—Railroad Employees under hio Statute.

ler the second clause of section 3 of Act Ohio April 2, 1890 (87 Laws, p. 150), which provides that every person in the employ of oad company "having charge or control of employees in any sep- branch or department shall be held to be the superior and not servant of employees in any other branch or department who no power to direct or control in the branch or department in they are employed," as such provision has been construed by preme court of the state, an engineer, although having control of single employee, may be the constructive superior of a fireman in rent branch of the service.

—Separate Branches of Service.*

ain the meaning of such provision as construed by the supreme of Ohio, two switch crews handling different trains in the same re engaged in separate branches or departments of the service.

—Contributory Negligence of Servant—Violation of Rules.†

e violation by a railroad employee of a reasonable rule made by mpany for the government of employees in the discharge of their, and of which he has knowledge, causes or contributes to his , he is guilty of contributory negligence, as matter of law, which s the right to hold the master liable for such injury.

—Railroad Firemen.

petition in an action against a railroad company to recover for ath of a fireman on a switch engine who was killed in a collision nother switch engine alleged that at the time of collision the ed was standing on the front of his engine, engaged in cleaning mber, which was below the headlight; and the evidence tended port such allegation. A rule of the company provided that fire- ust "attend to the fires of the locomotives when on the road, taking water and oiling the machinery; assist the engineman in ng for signals and obstructions; clean and polish their locomo- t the end of each trip; and assist in making repairs when neces- The engine was engaged in switching, having cars coupled in of it, and was moving backward slowly, when it met another ing train backing in the opposite direction: *held*, that the court n refusing to instruct the jury that there could be no recovery if eased voluntarily violated the rule requiring him to assist the engi- watching for signals and obstructions, and but for such viola- would not have been injured, and in leaving it to the jury to ine whether the violation of the rule, if proved, constituted ence.

Riding in Dangerous Place.

deceased was also guilty of contributory negligence, under the ce and allegations of the petition, which defeated the right of re- irrespective of the rule, in that he left his proper place in the ithout necessity, and placed himself in a position of obvious dan- ile the engine was in motion; it further appearing that he would ve been injured if he had remained in the cab.

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to the different department limitation of the fellow-servant rule, e appended to Louisville & N. R. Co. *v.* Stuber (C. C. A.), 22 Eng. R. Cas., N. S., 840.

notes appended to Galveston, etc., Ry. Co. *v.* Adams (Tex.), 20 Eng. R. Cas., N. S., 274.

Erie R. Co. *v.* Kane

Contributory Negligence.

One may be guilty of contributory negligence in failing to anticipate and act upon the contingency of another's negligence.

Evidence—Presumption from Failure to Call Witness.

It was error to instruct that an inference unfavorable to a party to a civil suit might be drawn from his failure to place on the stand a witness who was present in court in obedience to a subpœna issued by the other party, and equally accessible to both.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

This is an action by the defendant in error against the plaintiff in error to recover damages for the wrongful death of her intestate, in which she obtained judgment for the sum of $4,000. The accident by which the decedent lost his life happened on the morning of December 17, 1897, after daylight. It was a collision between two trains which were being switched in the yard of the plaintiff in error at Niles, Ohio, by two switching crews. In that yard there are two main tracks, extending through it east and west. The north track is used by through trains going west, and the south one by such trains going east. The depot is located north of both of them. The collision occurred on the north or west-bound track, a short distance west of the depot. The easterly one of the two trains was composed of a yard engine, at its western end, headed eastward, and without a pilot or cowcatcher, and 10 or 11 freight cars; that next to the engine being an empty gondola. It was proceeding west slowly, and had about come to a stop. It had come in upon that track from a side track to the north of it, and had not yet cleared the switch; and the purpose was for it, as soon as it had done so, to proceed eastwardly. The westerly train was composed of a yard engine and 8 freight cars. The engine was at its western end, headed eastward. The car next to the engine and that on the end were box cars; and those between, gondolas,—all loaded with coal. It was proceeding eastwardly at a much higher rate of speed than the other. It had come in upon that track from the south or east-bound track by means of a cross-over between the two, the western end of which connected with the former just west of where the westerly train was about to come to a stop, and upon the south or east-bound track from the New Lisbon branch of the plaintiff in error, east of the depot. As it passed the depot it also passed the other train, going in the same direction at a slower rate of speed; and its conductor left it, to enter the depot. The decedent was the fireman on the engine in the easterly train, and at the time of the collision was at the front end thereof, upon the pilot, or bunting beam, or head bar, as it is variously termed, in front of the boiler, engaged in cleaning the number of the engine, located just below the headlight. The effect of the collision between the two trains was to cause a collision between decedent's engine and the empty gondola

t to it, and, by reason thereof, to force the body of the
er up against the head of the former, catching decedent
veen them, and, as it seems, killing him instantaneously.
ground upon which it was claimed that the plaintiff in
r was liable in damages for the death of decedent, thus
ied, was that the collision between the two trains was due
ne negligence of the engineer of the westerly train, named
'ker, in proceeding eastwardly on the north or west-bound
k, with knowledge that decedent's train was thereon and
the right of way, at a high rate of speed, without orders
o do, without keeping a proper lookout, and without giv-
varning of the approach of his train by bell or whistle.
as not seriously contended that Bowker had not been
igent, and there can be no doubt but that he was. The
ntiff in error sought to defeat the recovery upon two
nds: One was that Bowker was the fellow servant of the
dent; and the other, that decedent was guilty of contrib-
negligence. In support of the latter contention, it
ed that amongst the rules of the plaintiff in error, which
dent knew and had agreed to be governed by, was one in
words: "They [firemen] must report for duty at the
inted time; attend to the fires of the locomotives when
e road, and to taking water and oiling the machinery;
the engineman in watching for signals and obstructions;
and polish their locomotives at the end of each trip;
ssist in making repairs when necessary."

n H. Clarke, for plaintiff in error.
McNamara and George F. Arrel, for defendant in error.

fore LURTON and SEVERENS, Circuit Judges, and
HRAN, District Judge.

CHRAN, District Judge, after making the foregoing
nent, delivered the opinion of the court.
The plaintiff in error requested the lower court to give
jury two instructions, in these words:
o. 1. The court says to you, as a matter of law, that,
the evidence introduced upon this trial, the plaintiff's
ent, Thomas Kane, a fireman upon one engine and with
ain crew, was, at the time of the accident complained
his case, a fellow servant with Bowker, the engineer of
er engine, with another train crew, whose negligence,
laimed in this case, was the proximate cause of the acci-
esulting in Kane's death, and that therefore the plaintiff
t recover in this case, and you should return a verdict
or of the defendant railroad company."
o. 10. The court instructs you that the plaintiff cannot
itled to recover in this case unless you shall find from
vidence introduced in this trial that the engineer,
er, had charge or control of other employees of the
ny; and, if you conclude that the plaintiff has failed
w that fact by a preponderance of the evidence, she

cannot recover in this case, and you should return a verdict in favor of the defendant railroad."

It refused to give either one of these instructions, and, on the contrary, instructed the jury that Bowker was not the fellow servant of the decedent. The refusal to give these instructions was duly excepted to, and has been assigned as error. The lower court so acted because it was of the opinion that the second clause of the third section of an act of the legislature of Ohio passed April 2, 1890 (87 Ohio Laws, p. 150), as construed by the supreme court of Ohio in the case of Railroad Co. v. Margrat, 51 Ohio St. 130, 37 N. E. 11, applied to this case. That section is in these words:

"That in all actions against the railroad company for personal injury to or death resulting from personal injury of any person, while in the employ of such company, arising from the negligence of such company or any of its officers or employees, it shall be held, in addition to the liability now existing by law, that every person in the employ of such company, actually having power or authority to direct or control any other employee of such company, is not the fellow-servant, but superior of such other employee; also, that every person in the employ of such company having charge or control of employees in any separate branch or department shall be held to be the superior and not fellow-servant of employees in any other branch or department who have no power to direct or control in the branch or department in which they are employed."

The syllabus of the Margrat Case, which was prepared by the court, and expresses the law thereof, is in these words:

"(1) An engineer in charge of a locomotive on one train of cars of a railroad company is in a branch or department of its service separate from that of a brakeman on another train of the same company, within the meaning of the terms 'separate branch or department,' as those terms are employed in section 3 of the act of April 2, 1890 (87 Ohio Laws, p. 150).

"(2) An engineer in charge of a locomotive, who has authority to direct or control a fireman serving on the same locomotive, is a superior within the meaning of the above-named section.

"(3) Whether an engineer or other employee of a railroad company has authority to direct or control other employees of the same company is a question of fact to be determined in each case. This may be done, however, either by proof of express authority, or by showing the exercise of such authority to be customary, or according to the usual course of conducting the business of the particular company interested, or of railroads generally."

In the opinion, Judge Bradbury presents the reasoning upon which these conclusions were founded, in these words:

"The relation of superior and subordinate, however, did

actually exist between Margrat and the engineer by whose igence he was injured; for, as we have seen, the latter had uthority to command or direct the former in discharging luties. But the statute, we think, declares that relation xist, as matter of law, for the purpose of charging the pany, if the engineer was the superior of—that is, was iorized to command or direct—any co-employee whatever, Margrat was without such authority. They must have ı in 'separate' branches or departments of the company's ice, for the section so declares. The section, however, es no attempt to define the terms 'departments' and nches,' but these terms should not be limited so as to em- e merely those large divisions created for convenience in inistering the affairs of the company. On the contrary, it ore reasonable to suppose that they relate to those mi- ones which concern the daily duties of the employees. se terms are general and comprehensive, but, as the legis- e discloses no purpose, in this connection, to regulate nternal affairs of a railway company, it should not be umed to refer to divisions of its business made for its own ; and, if not to such divisions, what divisions could it ı, but those which divide up the employees while in al service? The section expressly declares a purpose to ge the remedy of the employees for accidents occurring e course of their employment. This declaration empha- the presumption that the terms under consideration ld be construed as referring to conditions affecting them, er than to those which are established by the company ts own purposes. Without pursuing the matter further, old that, under the section of the statute under consider- ı, an engineer on one train is in a separate branch of the pany's service from that of a brakeman of another train nging to the same company."

ıe facts of the case were these: The train to which the ıtiff brakeman belonged was being coupled to two cars e yard of the railroad company at Deshler, Ohio. Whilst vas proceeding along a parallel track to reach the place ıupling, he was negligently run into by a locomotive ıed by an engineer and fireman. Whether the plaintiff's had come in off the road, and it was the intention for it, the coupling was made, to proceed on its journey, or it ı train in charge of a switching crew, and being switched e yard, does not clearly appear. It is stated, however, it was part of plaintiff's duties to help switch cars in de- ınt's yard at Deshler. Nor does it clearly appear that ocomotive which ran plaintiff down belonged to the yard, d connection with any other cars.

unsel for plaintiff in error contend that the second clause d statutory provision does not apply to this case, for two ıns: One is that the employee who is thereby made the ructive superior, and hence not fellow servant, of certain

other employees, is one who is the actual superior of more than a single employee, and in this case Bowker was the actual superior of but a single employee, to wit, his fireman. The ground upon which they base this construction of the clause is in the use therein of the plural word "employees." And it was in view thereof that instruction No. 10 was asked. This construction is undoubtedly too narrow, but, whether so or not, there can be no question but that the Margrat Case has settled that the clause may apply to an actual superior of a single employee. For in that case the engineer who was adjudged not to be the fellow servant of the injured brakeman was the actual superior of a single employee, to wit, his fireman. Hence that instruction was properly refused.

The other reason assigned for the nonapplicability of said clause to this case is that Bowker and decedent were not in separate branches or departments, within the meaning thereof, but in the same branch or department, to wit, the yard. And it was in view of this construction that instruction No. 1 was asked. The Margrat Case is against this construction, also. Counsel for plaintiff in error suggest that it is not, because it had relation to two trains out on the road, and not to two trains in a yard being handled by two switching crews, as here. The position is that in such a case the consociation between the two crews is so much greater than in the case of two road trains that they should be held to be not in separate branches or departments, but in the same branch or department. But it appears from the facts of the case that the accident involved therein happened in the yard of the railroad company at Deshler, Ohio, and the probability is that the two trains were being handled by two yard crews, or at least two crews whose duty it was to do yard service. This, though, is not entirely clear. The matter, however, is put beyond question by the decision of the supreme court of Ohio in the case of Railway Co. v. Munger, 61 N. E. 1147, rendered May 21, 1901, without opinion, the record in which has been furnished us by counsel for defendant in error. These two trains were being handled by two switching crews in the yard of the railroad company at Ashtabula, Ohio, and the brakeman on one was injured through the negligence of the conductor in charge of the other. The plaintiff recovered in the lower court, and that judgment was affirmed by the supreme court. The trial court was requested by the defendant to instruct the jury that "the two crews and all the members thereof were engaged and consociated in the same department and branch of duty, work, and line of employment, and that each member of the one crew was the fellow servant of each member of the other crew." It refused to so instruct the jury, and charged them that the two trains "were separate branches of the executive force" of the railway company.

There is, however, another possible view of the clause in

tion, which has not been suggested, but which, if a true may render it inapplicable to this case. It is that the al superior to whom it applies, and whom it makes the tructive superior, and hence not fellow servant, of certain oyees of whom he is not the actual superior, is one who e actual superior of all the employees other than himself e branch or department to which he belongs, and hence ead of that branch or department. Reasons for such a may be found in the contrast between the language used e two clauses of the statute in describing the actual supe- o which they respectively apply, that in the first apply- o an actual superior of one or more employees, without ence to the question as to whether they are all the em- es, other than himself, in the branch or department to h he belongs; in the description of the employees covered e actual superiority of the actual superior to whom the d clause applies, as having relation to a separate branch partment; in the effect of the insertion of the definite arti- 'the," before the word "employees," in said clause; in mission to make the constructive superiority cover em- es in the same branch or department, not covered by the l superiority; and in the probability that the origin of tatute was to change the law as adjudged in the case of oad Co. v. Devinney, 17 Ohio St. 198, where it was held he conductor of one train was the fellow servant of a man on another train. According to such a view of atute, it may apply to an actual superior of a single em- e, provided such single employee is the only employee than himself in the branch or department to which the l superior belongs. In such a case the plural word, loyees," would apply to him, for, though but one, he sents the whole. And it may be claimed that this view statute is not foreclosed by the decisions in the Mar- nd Munger Cases. Certainly not by the latter, because the actual superior, who was held not to be the fellow t of the injured brakeman, was the conductor of the train, who had charge of all the employees on it, and was the head of that branch or department. In the at Case the effect of the decision was that the engi- f an engine running light is an actual superior, within use in question. This is hardly a decision that the er on an engine in a train in charge of a conductor is n actual superior, either because said clause is not d to an actual superior who is the head of the branch or ment to which he belongs, or because an engine in such lition is a separate branch or department by itself. is, though, language used in the syllabus and opinion ay be construed to mean that an engineer, even in such is within the clause. But to this it may be said, as id by Judge Taft in Narramore v. Railway Co., 37 C. 505, 96 Fed. 298, 305, 17 Am. & Eng. R. Cas., N. S.,

502, 48 L. R. A. 68, "The syllabus and opinion are, of course, to be restrained to the facts."

But we will not determine in this case whether this view of the clause in question is the correct one, or the effect upon it of the decision in the Margrat Case. It appears from the facts herein that the conductor was not on Bowker's train at the time of the collision, having left it as it went east on the south track past the depot, and entered the depot. Owing to this fact, it is possible that, according to the usages or rules of the railroad company, Bowker, as engineer, acquired charge of the train and all employees on it, pro tempore, just as in the case of Railway Co. v. Howe, 3 C. C. A. 121, 52 Fed. 362, upon the breaking of a freight train in two, according to the rules of the railroad company, the engineer became conductor, pro tempore, of the forward part of the train, and hence was an actual superior, within the meaning of said clause, even according to said view. The evidence, however, did not disclose, whether there was any such usage or rule. Besides, as hereinafter set forth, the decedent, Kane, was guilty of such contributory negligence as to preclude any right of recovery for his death. In view of these considerations, we do not deem it necessary to dispose of those questions herein, or to pass upon the further question, dependent upon them, as to whether instruction No. 1 should have been given. We have, however, felt it incumbent upon us to direct attention to this alleged error, and the questions upon which it depends, so as to avoid any misconstruction as to the bearing of this case upon the applicability of said clause to an engineer on an engine in a train of which he is not in charge.

2. The plaintiff in error requested the lower court to give to the jury the following instruction, to wit:

"No. 6. The court charges you that if plaintiff's decedent, Kane, for the purpose of cleaning his engine at the time when he was not required by the company to clean it, voluntarily violated the rule of the defendant company requiring him to assist the engineer in watching for signals and obstructions, and if you also find that, but for such violation of the rule of the company, he would not have been injured, the plaintiff cannot recover in this case, and you should return a verdict in favor of the defendant railroad company."

This it refused to do. Its ruling was duly excepted to, and is assigned as error.

This court, in the case of Railway Co. v. Craig, 19 C. C. A. 631, 73 Fed. 642,—Id., 25 C. C. A. 585, 80 Fed. 488,—which was twice before it on writ of error, had occasion to consider and determine the effect, on the right of a servant to recover for an injury sustained by him whilst engaged in the master's business, of the fact that at the time of his injury he was violating a rule prescribed by the master for the transaction of his business. The particular rule which it was claimed had

violated in that case was one prohibiting employees from ng between cars, whilst in motion, to uncouple them. e first hearing the question involved was as to whether leged violation could be said to have caused or con- ed to the injury. On the second, two questions were 'ed: One was whether the rule had been abrogated by an ıal disregard thereof to the knowledge of the master's ntendent; the other, whether the violation of the rule, l of itself, if it caused or contributed to the injury, was ent to defeat the servant's right to recover. The lower on the second trial, had instructed the jury as to this question in these words:

: might violate the rule itself, strictly construed, and not ;ligent; that is, the rule providing that no one should n between cars while in motion. He might violate that y stepping in between cars when going at the rate of two an hour, under such circumstances that it would be a .on of the rule, and yet not be negligence."

had refused to give this charge:

ıat if Craig violated the rules, and their observance would ›revented the injury, or if he had observed the rules the would not have occurred, then he is not entitled to re- ''

se rulings this court held to be erroneous. In :ing the opinion of the court on this point, Judge : said:

may be well, in considering the separate parts of the paragraph, to refer to certain rules now well settled, › longer the subject of question. It is, for example, .ized that a duty rests upon a railroad company, in the ion of a complex and dangerous business, to make nd regulations for the government of its servants and ;ees. Railroad Co. v. Camp, 31 U. S. App. 213, 13 C. ;33, 65 Fed. 952; Railway Co. v. Dye, 16 C. C. A. 604, . 24; Wood, Mast. & S. 403; 3 Wood, R. R. 382; Reagan way Co., 93 Mo. 348, 6 S. W. 371, 3 Am. St. Rep. 542. company being under a duty to make reasonable rules, s hardly to be said that there no longer exists any ›n of its right and power to do so, and that a servant ing employment with knowledge of such rules, and ıllly when his attention is directed thereto, is under ion to fully conform to such rules when and so long are really maintained in force, and that a servant or em- failing or refusing to observe such rules takes upon : the risk of the consequences of such disobedience, as matter of law, guilty of negligence which defeats his › hold the master liable for an injury of which such nce is the proximate cause. Russell v. Railroad Co. 47 Fed. 204; Brooks v. Railroad Co. (C. C.) 47 Fed. :ailroad Co. v. Reesman, 19 U. S. App. 596, 9 C. C. A. Fed. 370; Railway Co. v. Dye, 16 C. C. A. 604, 70

Fed. 24; Railroad Co. v. Finley, 25 U. S. App. 16, 12 C. C. A. 595, 63 Fed. 228; Gleason v. Railway Co., 19 C. C. A. 636, 73 Fed. 647, 43 U. S. App. 101; Railway Co. v. Wilson, 88 Tenn. 316, 12 S.W. 720; Railroad v. Reagan, 96 Tenn. 128, 33 S. W. 1050. If negligence of the servant in violating a reasonable rule is either the sole proximate cause of an injury, or if, without being the sole proximate cause, the servant's negligence concur with that of the master in producing the injury, the master is exonerated from liability, and the servant is without remedy. Railway Co. v. Hoedling's Adm'r, 10 U. S. App. 422, 3 C. C. A. 429, 53 Fed. 61; Railroad Co. v. Howe, 6 U. S. App. 172, 3 C. C. A. 121, 52 Fed. 362."

And again:

"In the ordinary case of this character the questions of negligence and contributory negligence, as known to the common law, are questions of fact for the jury. In such a case, whether the servant's mode of performing his duties is negligent, as well as whether such negligence is the proximate cause of the injury, are both questions of fact to be submitted to the jury under all the circumstances of the particular case; whereas, in a case like this, with a rule in force, the violation of the rule by the servant is, as a matter of law, negligence, as has often been declared, and the only question left open and to be submitted to the jury, as one of fact, is whether or not such negligence was the proximate cause of the injury, or concurred with the negligence of the master in producing the injury."

Such being the law as to the effect of the violation of a rule, if its violation causes or contributes to the injury complained of, it follows necessarily that if decedent, Kane, at the time of his injury, was violating that portion of the rule of plaintiff in error referred to in the statement preceding this opinion, which requires a fireman to assist his engineer in watching for signals and obstructions, and such violation caused or contributed to his injury, his personal representative was not entitled to recover herein. That decedent at the time of his injury was acting in violation of such portion of said rule is clear. It is certain that he was then engaged in cleaning the number of the engine on the front end of the boiler, below the headlight, with his back to the east and his front to the west. It was alleged in the petition that he had gone out on the "front of his engine for the purpose of cleaning the number of said engine, which number is just below the headlight," and whilst "at work cleaning the number of said engine" the collision took place, catching "plaintiff's decedent between said car and engine, crushing and mangling him to death," and there was nothing in the evidence to impugn the truth of these statements. On the contrary, it all went to confirm them. The engineer on decedent's train testified that the last he saw of him was out on the running board, opposite the bell, with a piece of waste in his hand. A bystander testified that he did not know whether the gondola "hit him or

:rk knocked him, but he fell in between, and it ketched
' and that he "thought he was wiping something"; he
dn't exactly say." And trainmen and bystanders testified
ıe was found on top of the draft timbers of the gondola,
the body, with his head towards the engine and feet from
d crushed through the back.

: court, in its charge to the jury, submitted to it the ques-
vhether decedent's action was a violation of that portion
d rule which requires firemen to "clean and polish their
otives at the end of each trip," intimating to them that,
opinion, it was not; and counsel for defendant in
earnestly contend the same thing. The point
by the court in support of this position was that
ıortion of the rule has no application to fire-
working upon yard engines, because it presupposes
the locomotives to which it does apply take
and an engine at work in a yard does not do this.
ıly this point is well taken, and possibly, also, it is
Each day's work of such an engine may be regarded as a
vhen it goes out to work being the beginning of the trip;
ıen it comes in, the end thereof. But though, in this
f the matter, it may be properly said that this portion
rule has application, it would seem that the object of it
ecure the cleaning and polishing of each locomotive at
nt and regular intervals,—the time fixed upon being the
each trip it makes,—and not to prohibit such cleaning
ılishing at other times. As, for instance, it is hardly to
that doing this at the beginning of each trip, or at in-
liate stations, or on side tracks, when the locomotive is
motion, is prohibited. And if not at other times when
motion, so not at other times when in motion. We are
ıre inclined to the view taken by the lower court, that
nt's action was not a violation of this portion of the
ıough not for the same reason, and we do not under-
counsel for plaintiff in error to be contending that it
But it does not follow from this that his action was
iolation of that portion of the rule which required him
t in watching for signals and obstructions. It must be
:d, in view of the absence of permission to clean and
ıt other times than at the end of each trip, that it is
:ion thereof to be so doing when on the road,—certainly
he engine is in motion. A fireman is required by said
do several things when his locomotive is on the road.
ly, he is required to do that which will enable the engine
to wit, fire, water, and oil; secondarily, that which
ble it to run efficiently and without accident,—to watch
als and obstructions. When not occupied with the
it is his duty to be doing the latter, and doing any-
at interferes with its performance is a violation of that
of said rule. Nowhere is there greater necessity for
cient performance of this duty than in a yard, where

there is much more shifting and making of couplings and uncouplings, and more likelihood of running into something —other engines or cars or individuals—or being run into. There can, therefore, be no question but that decedent was violating this portion of said rule at the time of his injury. It would seem to be certain, further, that, even if to any extent, whilst engaged in cleaning the number of the engine, he was watching for signals and obstructions,—a matter, however, of very great improbability, if not impossibility, and, at best, of pure speculation, without anything in the facts proven to justify an inference that he was,—he was not in his proper place. That place was in the cab, on the left-hand side, where he could more readily catch signals and observe obstructions, and more promptly and correctly communicate information received to the engineer. That such was his proper place when not engaged in the performance of a primary duty was proven by decedent's engineer, and is a matter of common knowledge. The requirement that he should be there when not so employed, as well as that he should promptly and correctly communicate the information received to the engineer, may be said to be implied elements in that portion of the rule providing that he should assist the engineer in watching for signals and obstructions. But whether so or not, it was his duty to perform the duty so required from that vantage point. This he was not doing at the time of the collision. And, in addition to this, irrespective of the question as to whether his being out on the front of the engine was a breach of such a duty, and as to whether he was violating the requirement to assist the engineer in watching for signals and obstructions, it would seem that it was negligence for the decedent to be where he was, because of the great danger of that position, and the absence of reasonable occasion for his being there. In the cases of Railroad Co. v. Jones, 95 U. S. 439, 24 L. Ed. 506, and Kresanowski v. Railroad Co. (C. C.) 18 Fed. 229, 5 McCrary 528, laborers had been injured whilst riding upon the front of engines. In the first case a box car had been provided for plaintiff and other laborers to ride in, and he chose to ride on the engine. He was injured by a collision between his train and cars upon the track. Mr. Justice Swayne, in alluding to the place where plaintiff was riding, said that it was "obviously a place of peril, especially in case of collision." In the other case there was no room for the plaintiff to ride, save on that part of the engine, where he was injured by a collision between the engine he was riding on and another one. Concerning the place where plaintiff was riding, Judge Shiras said:

"I think it is apparent to every one—it cannot be questioned —that a person placing himself upon the pilot of an engine certainly puts himself in a very dangerous position. There can be no more dangerous one to be thought of, upon a train

n a locomotive. It is apparent to every one that it is a
hat is exposed to the very greatest danger. In case of
:cident, there is scarcely any protection at all to pre-
ıe party from being thrown off from the locomotive.
ɔt a place gotten up or intended to be used for the pur-
persons riding upon, and in case of collision, where the
ɔn comes from the front part of the engine, it is the
ɔf all others, that is exposed to the greatest danger."
e case of Railroad Co. v. Egeland, 163 U. S. 93, 1
t. 975, 41 L. Ed. 82, Mr. Justice Peckham, in referring
: two cases, said:
: persons injured in those cases were seated, in the first
ı the pilot of the engine, and, in the other, on the
:am of the engine, with his feet over the pilot. The
ıs were most dangerous, and the danger was plain and
at the first sight. No other place on either train was
:erous, and yet each of the plaintiffs substantially
his position as a fit and proper place to ride in. The
ıd obvious danger of the positions in which the plain-
untarily placed themselves is the material and con-
fact upon which the cases were decided."
gain:
ı these cases * * * stand on the same ground,
; the exceedingly dangerous position taken by the
s upon the engines, the danger of which was open
ious to every one."
is this difference between this case and those
:ere the decedent was at work. There one
was riding from, and the other to, work. Besides,
be said that riding on the front end of an
with nothing in front of it, is more dangerous
riding with cars in front of it, as here. But as we
n, the work was not required or even authorized, and
g there was therefore entirely without reasonable
for it. And though riding in such a place may be
ıgerous when there are no cars in front of the en-
ı when there are cars there, in the latter instance it
gerous that it must be regarded that it is negligence
ɔ be there under such circumstances. In the event
ision, there in no place so dangerous for one to be
:n cars, or between a car and an engine, as here, ex-
: on the front of an engine, with no cars in front of it.
:or defendant in error contends that, because de-
standing on the beam in front of the engine
lace him entirely between the engine and gondola,
listance from where he was standing to the gondola
uch as 4½ feet, he was not in a dangerous place. But
: see that these two facts render the place where
anding so much less dangerous than it would have
l he been entirely between the two, and they were
:ether, as to make his standing there not negligence.

It is so uncertain what will happen in the event of a collision that the question as to negligence in voluntarily and without reasonable occasion being between cars, or between an engine and car, should not be affected by the mere distance between the two, or the extent that the party injured is between them. Again, counsel for defendant in error urge that it was not negligence for decedent to be there, because he was not bound to anticipate Bowker's negligence, through which the collision came about. It is never negligence, they say, for one not to anticipate negligence in anybody else. There is, however, no such general rule of law or prudent conduct. There are instances where, as a matter of law, it is negligence not to anticipate negligence in others. As, for instance, it is well settled in the federal courts that it is negligence for a highway traveler not to anticipate failure on part of an engineer to give appropriate signals of approach of his train to a highway crossing. He has no right not to look or listen because he has heard no such signals. Mr. Justice Field, in the case of Railroad Co. v. Houston, 95 U. S. 697, 24 L. Ed. 542, said:

"The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precaution for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen or look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into a place of danger."

And it is hard to understand how it was held in the foregoing cases that it was negligence for an employee to ride on the front of an engine, except upon the idea that he was bound to anticipate a collision from negligence or mishap. Mr. Beach, in his work on Contributory Negligence (2d Ed., §§ 38, 39), treats of this matter, and his conclusion is announced in these words:

"The rule that a plaintiff must exercise ordinary care under the circumstances in order to escape the imputation of contributory negligence will more often require him to act upon a presumption of the probable or possible negligence or wrongdoing of others than it will justify him in acting upon the contrary presumption. This, in the author's judgment, is a view that commends itself to the common experience and common sense of the average mankind, though it has found little sanction at the hands of the judges."

It seems to be equally clear that decedent's being out on the front of the engine, instead of in the cab, if not his violation of said portion of the rule requiring him to assist in watching for signals and obstructions, concurred with Bowker's negligence in bringing about, and therefore contributed to, his injury. There was room in the evidence for the inference that if decedent had been in the cab, watching for signals and

ctions, the approach of Bowker's train might have been
ed, and he warned through the whistle on dece-
train, or the course of the latter might have been
d, and in either or both of these ways the colli-
ight have been prevented. The engineer was engaged
time in looking east for a signal that his train had
the switch, and, had decedent been on the lookout
e cab whilst this signal was being looked for, one or
her of them could have been looking west. It is
, however, that if decedent had been in the cab,
t on the front of the engine, he would not have
urt, as the cab and the engineer in it sustained
ry. In the Jones Case, supra, Mr. Justice Swayne

hose in the box car, where he should have been, were
ed. He would have escaped, also, if he had been there.
ry was due to his own recklessness and folly. He
mself the author of his misfortune. This is shown
near an approach to a demonstration as anything short
ematics will permit."
n the Egeland Case, supra, Mr. Justice Peckham, in
g to the effect of the dangerous position occupied by
ies injured in the Jones and Kresanowski Cases, said:
as therefore held that the necessary inference or legal
ions to be drawn from these uncontradicted facts was
plaintiffs, in their choice of positions on the engines,
ilty of negligence directly contributing to the injury."
acts of this case, therefore, were such that the defend-
ht properly have asked a peremptory instruction on the
of decedent's breach of duty in being out on the front
gine, instead of in the cab, if not for his negligence
there without reasonable occasion for it, irrespective
uestion as to whether it was his duty to be in the cab.
ertainly entitled to have the question submitted to
as to whether said portion of the rule had been violated
lent, and the violation thereof had contributed to his
Of course, if the evidence had showed that said
of the rule had been abrogated to the exent of permit-
cleaning of engines under the circumstances of this
n plaintiff in error would not have been entitled to
ubmitted to the jury whether decedent's action was a
of said portion of the rule, and contributed to his in-
attempt was made to show that it had been, to that
brogated. The attempt, however, fell short of com-
the requirement as to what is necessary to show an
on. The conductor of Bowker's train and the engi-
ecedent's train both testified that firemen cleaned
gines in the yard at Niles when in motion, as well
standing. But knowledge thereof was not brought
any employee with whose knowledge plaintiff in error
geable, nor was the habit or custom of so doing

proven to such an extent as that it might be inferred that such employee had such knowledge. On the contrary, the superintendent of the division of plaintiff in error's railroad, in which the Niles yard was located, introduced as a witness by plaintiff in error, testified positively that he never knew or heard, before the trial of this case, that any fireman on his division of the road had engaged in cleaning his engine whilst in motion. This case, therefore, does not come within the case of Railway Co. v. Craig, 25 C. C. A. 585, 80 Fed. 488, where this court held that habitual disregard of a rule by employees, to the knowledge of the superintendent, amounts to an abrogation of the rule. It comes within the cases of Russell v. Railroad Co. (C. C.) 47 Fed. 204, and Railroad Co. v. Reesman, 9 C. C. A. 20, 60 Fed. 370, 23 L. R. A. 768, where it was held that prior disregard of a rule more or less habitual, even though to the knowledge of a conductor, did not amount to its abrogation. There was therefore nothing in this consideration to deprive plaintiff in error of the right to have said instruction given to the jury. And it was error to refuse to give it, unless it was substantially embodied in the charge that was given.

The lower court instructed the jury at three separate times. The first was the usual charge at the close of the evidence. The other two were upon recall of the jury from their room after the submission of the cause to them. On the last occasion they were simply instructed as to the burden of proof on the question of contributory negligence, and no further reference need to be made to it. Possibly the true effect of what the court said in its original charge, and on the first recall, upon the subject of decedent's contributory negligence, cannot be had without quoting it in full. But we believe we can do justice to it without so quoting it, and its length is such that to quote it in full would extend the opinion too greatly. As before stated, the court submitted the question as to whether decedent's action in cleaning the number on his engine was in violation of that portion of the rule which required firemen to clean and polish their locomotives at the end of each trip; intimating, however, that, in its opinion, for the reason heretofore stated, it was not. It not only intimated this, but also that there was some doubt as to whether decedent was out on the front of the engine, cleaning its number, at the time of the collision. After doing so, however, it added:

"I am willing to say to you that, both parties having assumed that that was his business there, you may try this case upon the theory that that was the purpose for which he was out on the front of the engine at the time this death occurred."

Indeed, in the course of the charge expressions were used indicating that, in the view of the court at that time, decedent might not have been on the front of the engine at all,

nay have been on the running board. Such intimations, : have seen, were contrary to the distinct allegations of etition and all legitimate inferences to be drawn from estimony in the case. But though the question as to the tion of this portion of the rule was submitted to the jury, were not told, at least in the original charge, that if they ved from all the evidence that it had been violated, and iolation thereof contributed to the injury, plaintiff could ecover. On the contrary, they were there told that, h they might so believe, yet if they further believed that, "all the" or "the particular facts and circumstances of ıse," decedent's action was that of a prudent and care- ın, plaintiff was entitled to recover. This was empha- by being repeated a number of times. One quotation the original charge is sufficient to present the court's ction to the jury therein on this point.

you find from all the circumstances in the case, and from roof that has been given to you by the superintendent verybody else about the management of these trains, ow these operatives were controlled, and also that he nder an obligation and rule not to clean his engine until l got back to the engine house, or until the engine had off duty, so to speak, and that he was on the running and polishing the engine under circumstances where he ot justified by the rule, and when he was not justi- the particular facts and circumstances in this case, e cannot recover, under the rule I have given you in ıce to contributory negligence. But if you find from all ts and circumstances that this rule does not apply to tuation, and that, whether it did apply or not, there ertain facts and particular facts and circumstances that nd there existed which justified a prudent man, in the ge of his duties, acting under the rule of ordinary hat he was doing that which was prudent and careful, ld still be entitled to recover, and it is a question for entlemen of the jury, to determine, as it was in the case, whether he was guilty of any such negligence, he rules and under the management and control of this s an ordinarily prudent fireman would not do."

court also submitted to the jury the question as to r decedent's action was a violation of that portion which requires firemen to assist the enginemen ıg for signals and obstructions. It did so in the origi- rge in these words:

re is another branch of this rule to which some of structions and much of the argument has been directed, is that he shall assist the engineman in watching for and obstructions. It is conceded by his learned coun- have argued this case for him, or for the plaintiff, hat he was bound by that rule; that that was his duty, k out; help the engineman to look out; but they say

it was just as necessary for him to look in the easterly direction as in the other direction, and he might have been engaged in that duty while he was cleaning the engine and polishing it,—might have been looking out in that direction. We have no proof to show that he was directed to go there for that purpose, or that there were any circumstances that made it necessary for him to go for that purpose; and yet, it might have been, for a watchful, prudent man, as his counsel say,—it might have been that he felt he could discharge that duty of keeping a lookout for obstructions as well there as elsewhere. And then, again, he might have felt that the situation there was such that there was no reason for him to be looking out for any train running back against him under the particular circumstances of that case. Was the situation such that he might expect that a train would be coming back against him, when he saw that Bowker's train had gone across, and was to stop at the crossing up there until he should receive a signal to come back? The same rule in determining his prudence and carefulness in respect to that obligation of the rule applies as in respect to the other. He was bound to do that which a prudent and careful man would do, charged with that duty and that obligation. And it is a question for you to determine, on all the facts and circumstances in this case, as it appears in that particular situation, and say whether or not he was doing that which an ordinarily prudent and careful fireman, charged with the duties of a fireman, under those particular circumstances, would do. If he was, he is entitled to recover. If he was acting imprudently and without due and ordinary care, under those circumstances, he is not. And that is a question for you to decide upon this proof, as you have had it before you from the witnesses."

The intimation in said portion of said charge that it might be prudent for a fireman, under the circumstances of this case, to watch for signals and obstructions, standing on the front of his engine, and that the jury might infer that decedent was in fact so doing whilst engaged in cleaning the engine, cannot be approved. Certainly, in so far as it and that part of the charge which related to the other portion of the rule left it to the jury to determine whether decedent's action was prudent and careful, even though it may have been in violation of the rule, it was erroneous. They contained the vice of the instruction disapproved by this court in the case of Railway Co. v. Craig, supra, on the last hearing herein. They left it to the jury to determine whether the violation of said portions of the rule was negligence, when the jury should have been told that such action was negligence, as a matter of law, and that, therefore, if said portions of said rule had been violated, and the violation thereof contributed to the injury, they should find for the defendant. The first recall was for the purpose, as the jury were told, to "correct some wrong impressions" that had been made by the original charge. Possibly it was

tention of the court upon the recall to withdraw the
ɔn embodied in the original charge,—that plaintiff was
:d to recover, notwithstanding decedent's action was in
:on of either portion of said rule, if they believed that it
ıat of an ordinarily prudent and careful man,—and to
em, if it was such a violation, it was negligence, as a
· of law, and no recovery could be had. If such was the
ɜe of the recall, the further instructions given did not
t those originally given in the above particular. At
they were so ambiguous that it is not reasonable to be-
hat they succeeded in removing the wrong impressions
by those given at the first. One quotation from the
ɔnal charge will make this good. It is in these words:
u are to look to all the duties that he had to perform,
you find he was not there for the purpose of looking
· signals and looking out for obstructions, and you find
.there for the purpose of cleaning or polishing up his
, then it is a question for you to determine, as it was
whether or not, under this rule, he was properly and
tly there, or whether he was there in violation of this
And if you find he was there in violation of this
bout cleaning the engine, then he cannot recover.
ı find he was there properly and prudently under
ıle, and that he might do it under the rule, or,
that the rule did not apply, and he might do that,
was according to the ordinary custom and habit of the
ı on this road to clean the engine under those circum-
, it is for you to say whether he was prudently there.
as following the rule, or ordinary custom and habit of
to do that, where the rule did not apply, then he
ıot be guilty of contributory negligence."
ɜvident, therefore, that the idea contained in instruc-
ɔ. 6 asked for by defendant was not embodied in the
to the jury. That being so, it was error for the
ɔ refuse to give it.
ıe defendant excepted to certain portions of the charge
ury originally and upon the first recall, and these por-
ıereof are assigned as error. Some of them are con-
n the portions of said charges already quoted. So far as
e contained, they express similar ideas, or ideas which
e already commented on and criticised. In making
ıotations, and commenting upon them and said ideas,
: had in view that the words conveying them were as-
ıs error, as well as their bearing upon the question as
her there was error in refusing instruction No. 6. A
:ation of them in connection with what we have al-
ıid is all that is sufficient to show to what extent and
y are erroneous.
wker was summoned as a witness at the trial by both
and attended in pursuance to the summons. He was
upon the stand by either party, and did not testify in

the case. The court instructed the jury upon this matter in these words:

"Much comment has been made by the plaintiff's counsel upon the fact that Bowker hasn't been here to testify about that circumstance; that he hasn't been put upon the stand by the defendant company to explain how it was that he came to move that train under the circumstances that he did. On the other hand, the defendant says that Bowker was under the subpœna of the plaintiff, and that the plaintiffs might have put him on the stand themselves, as they had him subpœnaed here, to have shown how it was, if they desired to do so. The rule of law upon that subject is this: Where it appears that there is in the possession and under the control of one of the parties evidence which would explain or which would in any way mitigate the proof that has been offered by the other side, and that testimony is not introduced, and no sufficient and satisfactory reason is given for not introducing it,—no good ground is shown for not introducing the witness, —the law presumes that the testimony of that witness, if produced, would operate against the party whose duty it would be to offer it."

And again it charged:

"On the other hand, where a party, the other side, has control of the testimony, or has the power to introduce the testimony, and does not do so, the presumption is to be taken most strongly against them,—that, if that testimony was offered on the witness stand, it would be against them, or it would be seen to tend to prove the issue against them."

Other language in the same line was used, but the above alone was excepted to, and has been assigned as error. We think it clear that the court erred in so charging the jury. Scovill v. Baldwin, 27 Conn. 316; Bleeker v. Johnson, 69 N. Y. 309; Arbuckle v. Templeton, 65 Vt. 205, 25 Atl. 1095; Crawford v. State, 112 Ala. 1, 21 South. 214; 1 Greenl. Ev. (16th Ed.) § 1956; Whart. Ev. § 1207. Counsel for defendant in error do not contend otherwise. Their position is that the error was not prejudicial, because plaintiff was entitled to a peremptory instruction to the jury to find that Bowker had been guilty of negligence. Counsel for plaintiff in error do not dispute that plaintiff was entitled to such an instruction, but contend that the instruction complained of was prejudicial, because it placed defendant in the attitude before the jury of suppressing the truth. Inasmuch as this case has to be reversed upon the other grounds stated, it is not necessary to determine this question.

For the reasons stated, the judgment of the lower court is reversed, and the cause remanded for proceedings consistent with this opinion.

BUMGARDNER *v.* SOUTHERN RY. CO.

(*Supreme Court of North Carolina, April 28, 1903.*)

[43 S. E. Rep. 948.]

/ to Brakeman—Instructions—Assumption of Facts.

ere a brakeman alleged that he was injured by a collision of two ns of a freight train which had broken in two, an instruction that conductor of the train was required to be in the caboose, and at me of plaintiff's injury he was, without necessity, on the second e of the train, and that if he had been in the caboose he could given signals to plaintiff, and assisted plaintiff in stopping the l section, and prevented the collision, and that such failure was the nate cause of the injury, and, if defendant failed to use ordinary lefendant was guilty of negligence, was error, as assuming that ain had become separated, and that the collision afterwards ed, which were material questions at issue.

—Res Gestæ.*

akeman who was injured by a collision between two sections of a vhich had broken in two testified that immediately on falling to ound he made an outcry, and that within a minute and a half or inutes after he was hurt, and when the train had pulled by not han 300 feet, S. came to where he was lying, and stated to him, rain was parted when it passed me, about two car lengths, and I it it was going to hit." On being subsequently recalled, plaintiff d that when he made such declaration the train had gone but a listance away, the rear end of the caboose being about 100 feet or way—"probably a little further than 100 feet": *held*, that the ition was a statement regarding a past fact, and not admissible as ıtæ.

eal from Superior Court, Iredell County; Neal, Judge.

ion by C. B. Bumgardner against the Southern Railway any. From a judgment in favor of plaintiff, defendant ls. Reversed.

C. Caldwell, for appellant.
B. Nicholson, for appellee.

NTGOMERY, J. This action was brought by the iff to recover damages for personal injuries alleged to een received by him through the negligence of the de- t. In his complaint the plaintiff alleges that, while he gaged in his duties as brakeman on a very long freight f the defendant, the train became uncoupled, and, upon tions coming together again with great violence, he rown to the ground and upon the track, and received ous and painful injuries. The allegations of negli- were a lack of sufficient number of employees to man- train, and that the conductor of the train was not at t of duty—in the caboose or cupola—where he was d to be by the rules of the company, that he might proper lookout; and because of such failure to furnish ient force to man the train, and because of the failure conductor to be at his post to give proper signals of

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enerally, extensive note appended to Louisville & N. R. Co. *v.* (Ala.), 6 R. R. R. 96, 29 Am. & Eng. R. Cas., N. S., 96.

the separation of the train, and of the subsequent collision, the plaintiff received his injury. The questions, then, whether a separation of the cars took place, and whether there was a subsequent collision of the sections, were the material points in the case. Upon these matters his honor gave at the request of the plaintiff the following instruction: "If the jury find by the greater weight of the evidence that the conductor on the train was required, under the rules of the company, to be in the caboose, and that at the time of the plaintiff's injury he was, without necessity, on the second engine, about 45 cars in front of the caboose, while the train was in motion, and you further find that if he had been in the caboose, according to rule No. 465, and on the lookout, that he could have given signals to the plaintiff, and could have assisted the plaintiff in stopping the second section, and prevented the collision and injury, and that this failure on his part was the proximate cause of the injury to the plaintiff, and that the defendant failed to use ordinary care, you are instructed to find the first issue (as to the injury of the plaintiff by the defendant's negligence), 'Yes.' There is clear error in that instruction, for it included the assumption that the train had become separated, and that a collision afterwards occurred—the very matters which were in contention between the parties.

Although there must be a new trial for the error pointed out, we think it better for all concerned to call attention to another error upon a question of evidence, because of its importance, and because it is almost certain that it will arise again on the next trial. The plaintiff, as a witness for himself, testified that when he fell from the car the wheels ran over and crushed his left leg; that upon hitting the ground he made an outcry for help—cried out very loudly; that he took off his suspenders, and was cording his leg to prevent further bleeding, when a Mr. Spurgeon (who was dead at the time of the trial) came up to where he was lying, having heard the outcries; that Spurgeon came up a minute and a half or two minutes after the plaintiff was hurt. At the morning session of the court the witness said that when Spurgeon came up the train had already pulled by, not more than 300 yards; that it was not out of sight. When the court convened after a recess, continuing his testimony, he said that when Spurgeon came up the train had gone but a short distance away, the rear end of the caboose being about 100 feet or more. Then he added, "Probably a little further than a hundred feet." Under those circumstances, the plaintiff was allowed, over the objection of the defendant, to testify that when Spurgeon came up he said to the witness, "That train was parted when it passed me about two car lengths, and I thought it was going to hit." We think the evidence should not have been admitted. It was not a part of the res gestæ. The law prescribes hearsay evidence, but there are certain

ssary exceptions to that general rule. Amongst those ptions are certain declarations made at the time of the transaction—the principal fact under investigation—if are connected with the transaction, and explain it as to naracter and purpose. Such declarations are often called bal acts indicating a present purpose and intention," and dmissible as original evidence, like any other material . It is said in Greenleaf on Evidence, § 108: "The prin- points of attention are whether the circumstances and rations offered in proof were contemporaneous with the fact under consideration, and whether they were so con- d with it as to illustrate its character." The same au- in the same book (section 110), further says: "It is to be ved that, where declarations offered in evidence are ly narrative of a past occurrence, they cannot be re- d as proof of the existence of such occurrence. They be concomitant with the principal act, and so connected it as to be regarded as a mere result and consequence of oexisting motives, in order to form a proper criterion for ting the judgment, which is to be formed upon the e conduct." There are decided cases in some of the s—notably that of Insurance Co. v. Mosley, 75 U. S. 407, Ed. 437—in which the original doctrine concerning this ct has been extended. In those cases the question of when the declarations are made is treated as of minor rtance, if they are made at a time recent after the trans- n—so recent as to preclude the idea of design; immedi- ss, as was said in Ward v. White, 19 Am. St. Rep. 887, tested by closeness, not of time, but of causal relation. e case of Insurance Company v. Mosley, supra, the said: "It is impossible to tie down to time the rule as clarations." There the declarations of Mosley were made his return to his bedroom from downstairs, between 12 1 o'clock at night, and they were that "he had fallen the back stair and almost killed himself." The plain- counsel, in his brief, learnedly and ingeniously argued ase from the standpoint of those referred to. But how- nclined we may be to adopt those views if the question ew, we think the numerous decisions of our court on the ct would prevent us. Upon a careful reading of our lecisions, we are satisfied that the time at which declara- are made is most material, and that they are not admis- as evidence in our courts unless they are made during ppening of the main transaction, or immediately and tly after the transaction, and in direct connection with it. must be forced out, as it were, as the utterance of

They must be declarations as to something being done, ot as to what has been done. In the case of State v. 61 N. C. 211, Chief Justice Pearson, for the court, dis- g res gestæ, said: "Acts frequently consist not only of ion or a thing being done, but of words showing the

nature and quality of the thing. In such cases, when the action or thing being done is offered in evidence, as a matter of course, the words which form part of it must also be received in evidence; as, if one seizes another by the arm, saying, 'I arrest you under a state's warrant,' these words are just as much a part of the act done as the action of taking him by the arm." In Harper v. Dail, 92 N. C. 394, the court said (Judge Ashe delivering the opinion): "Declarations, to become a part of res gestæ, must be made at the time of the act done, and must be such as are calculated to unfold the nature and quality of the facts they are intended to explain, and so to harmonize with them as to obviously constitute one transaction. In other words, they must be contemporaneous with the act, and must be consistent with the obvious character of the act." In Simon v. Manning, 99 N. C. 327, 6 S. E. 101, the court recites section 108 of Greenleaf on Evidence with approval. In State v. McCourry, 38 S. E. 883, the prisoner was indicted for murder. Melvin Ray, one of the witnesses, said at the time of the homicide, in answer to a question by a person who was present, "What that was?" (referring to a "lick"), "Elijah McCourry hit Bob Ray [the deceased] with a rock." This court said the evidence was competent because it was spoken at the instant the fatal blow was given. The court also quoted with approval from Underhill's Criminal Evidence, § 1, the following: "The exclamations of persons who were present at a fracas in which a homicide occurred, showing the means and mode of killing, are admissible for or against the accused, because of their unpremeditated character, and their connection with the event by which the attention of the speaker was engrossed." In Summerrow v. Baruch, 128 N. C. 202, 38 S. E. 861, the court said: "The question, then, is, were they [words spoken] a part of the res gestæ? Res gestæ is generally defined to be what is said or done contemporaneous with the fact sought to be established, or at least so nearly contemporaneous in point of time as to constitute a part of the fact to be proved, or to form a part of it or to explain it." Under those decisions the declaration of Spurgeon introduced in evidence in the case before us was not admissible as a part of the res gestæ. They were clearly a narrative of a past occurrence, and they ought not to have been heard as evidence of that occurrence. To illustrate, if Spurgeon had been standing by at the time of the collision (if there was a collision), and had said just before the cars came together, "The cars are apart and there must be a collision," or "There will be a collision, and that man will be hurt," or if he had said instantly upon the plaintiff falling to the ground and being hurt, "Those cars were two lengths apart. I saw it, and knew there would be a collision" —in either of these instances the declaration would have been a part of the res gestæ. In State v. Walker, 78 Mo. 380, the moment after the fatal shot was fired a bystander

med, "Don't strike him, for you have shot him now,"
ıe evidence was admitted as a part of the res gestæ. In
v. Duncan, 116 Mo. 288, 22 S. W. 699, it appeared that a
ıder remarked immediately after the homicide to an
, "There is the man who did it," and the evidence was
ompetent as a part of the res gestæ on the trial of the
ı so designated for murder. Those cases were cited
pproval by this court in the case of State v. McCourry,

' trial.
JGLAS, J., dubitante.

NCINNATI, L. & A. ELECTRIC ST. R. CO. v. LOHE.

(Supreme Court of Ohio, March 2, 1903.)

[67 N. E. Rep. 161.]

Railroad Classed as Street Railroad.
:erurban electric railroad is classed as a street railroad by the
of this state.

ıtory Negligence—Standing on Platform of Interurban Car.
such interurban railroad companies are subject to the same
ɔns and have all the powers of street railroad companies, so far
:able, the law of negligence governing the standing on a plat-
a moving street car in a municipality is not applicable to the
:anding on such platform of a moving interurban car in the open

ıame.
w of negligence governing the standing on a platform of a
nterurban car outside of a municipality is the same as in the
team cars; and where a rule of the company prohibits passen-
m standing on the platform, and notice thereof is properly
r where the passengers, upon request, refuse to enter the car,
ng in either case vacant seats, they remain on the platform at
il.

ırs—Contributory Negligence—Violation of Rules.*
ntract for safe carriage, there is an implied agreement that the
r will obey the reasonable rules of the carrier; and where the
r purposely violates such rule, and is thereby injured, he cannot
amages from the carrier in an action on the contract.
ıs by the Court.)

to Circuit Court, Hamilton County.

ı by Lohe, administrator, against the Cincinnati,
:eburg & Aurora Electric Street Railroad Company.
ıt for plaintiff was affirmed by the circuit court, and
ıt brings error. Reversed.

ıaintiff in error, the Cincinnati, Lawrenceburg &
Electric Street Railroad Company, is the owner of an
ın electric street railroad, extending from Cincinnati
:nceburg and Aurora, with a branch extending from

ıt-note appended to Lake Shore & M. S. Ry. Co. v. Kelsey
m. & Eng. R. Cas., N. S., 82.

Cleves to Harrison. The road is constructed with heavy rails laid on cross-ties, and equipped with large coaches, with seats on each side of the aisle, two compartments—one a smoker—a vestibule at each end, with steps leading to the ground, and propelled in the ordinary manner by electricity. On July 4, 1900, William Lohe was received as a passenger at Cleves to be carried to Harrison, paid his fare, and took a position on the rear platform or vestibule, where he remained, smoking a cigar, until the car became derailed and fell on its side, and he was killed. It was a rule of the company that passengers were not allowed on the platform, and a notice was posted on the platform where he stood: "Passengers not allowed on the platform." His attention was called to this notice by the conductor, and he was ordered to go into the car, as there were empty seats there for his accommodation. He refused, and said that he did not care about going in, as he was smoking a cigar. Shortly thereafter the assistant conductor requested him to step inside the car, but he remained on the platform until the car became derailed on going around a curve, and he was killed. Those in the car were not injured, except one man, whose leg was slightly injured. The petition of the plaintiff below avers that, in consideration of the fare so paid, the railroad company undertook to safely carry the deceased as a passenger from Cleves to Harrison, and that by the negligence of the company the car was thrown from the track, and, without any fault on his part, he was thereby killed. The railroad company answered, and denied all negligence on its part, and denied that his death was caused without any fault on his part. Upon a trial before the court and a jury, a verdict was returned in favor of the administrator and against the company. A motion for a new trial was overruled, and judgment entered on the verdict, to all of which proper exceptions were saved. The circuit court affirmed the judgment, and thereupon a petition in error was filed here by the railroad company, seeking to reverse the judgments of the lower courts. The errors complained of arise upon the charge as given, and upon refusal to charge as requested, and these will be noted in the opinion.

Peck, Shaffer & Peck and Shepherd & Shaffer, for plaintiff in error.

Isaac B. Matson and Alfred B. Benedict, for defendant in error.

BURKET, C. J. Counsel for the railroad company requested the court to give the following charges to the jury:

"(1) If the jury should find from the evidence that William Lohe was standing upon the platform of defendant's car at the time when the car was derailed, and that he had been notified by the conductor to go inside the car, and that there was room within the car, where he might have been seated, and that said William Lohe failed or refused to comply with said

t, but remained upon the platform, and that his death
ıe to the fact of his remaining in that position, your
t should be for the defendant.

If the jury should find from the evidence that the de-
t company had established a rule forbidding passengers
d upon their platforms, and had posted notices of such
on the platforms of its cars, and that there was such
e upon the platform of the car upon which William
vas riding upon the 4th day of July, 1900, and that
n Lohe was standing upon the platform at the time the
the track, and that he had been requested to leave
ıtform and go inside the car, and that there was room
within the car, and said William Lohe disregarded
tice and remained upon the platform, and if the jury
find that if he had gone into the car, and had not re-
upon the platform, he would not have been injured,
e verdict of the jury should be for the defendant in
ion."

ourt refused both of said charges, and proper excep-
ere saved.

attempting to so clearly define "proximate cause" and
outory negligence" as to enable the jury to understand
e, the court charged the jury as follows:

us now apply these rules to the case at bar. It is not
hat the deceased, William Lohe, was standing on the
tform of the car in question immediately before the
derailed. It is not contradicted by the evidence that
ased was warned or requested to go into the car, and
a matter of choice, he preferred to remain outside, on
orm; that the company's employees did not further
to enforce the rule that passengers should remain in-
he car. The deceased was found dead, with a part of
underneath the car of the vestibule. How he got
vhether by falling or jumping or by being jolted off
uted.

ssenger who is not coerced or induced by the railroad
or its employees to stand upon a platform, or who
ıpon the platform, not as a matter of necessity, but
om choice, although it may be caused by the dis-
of a crowded car, assumes the risks and hazards
sue from that position. The deceased therefore as-
e risks and hazards incidental and usual to that

Whether the company, through its employees,
ıch warnings upon the car, or whether prior to that
defendant company failed at all other times, or only
ıllv, whether such rule was disregarded by passen-
her times, will be immaterial in this case, because of
l notice given him by the employees.

leceased, William Lohe, by his position, therefore,
the risk of being jolted off the platform by collision
ıs, vehicles or other obstructions upon the highway,

or of being jolted off by the turning of sharp curves, or the sudden or quick stoppage of the car in case of emergency. The deceased did not, by the fact of standing upon the platform, assume the risk of a derailment or upsetting of the car. The fact that he stood on the platform was a condition, and not a cause, of the derailment or upsetting of the car. Therefore the mere act of standing upon the platform could not be a proximate cause of the injuries and death of the deceased. But whether by any other act alone, or connected with the act of standing upon the platform, was the proximate cause of the injuries and death of the deceased, is for you to determine."

The correctness of this charge and of these requests depends to some extent upon the character to be assigned to the interurban railroad upon which the accident occurred. The law of negligence, or, rather, of contributory negligence, of one riding upon a platform of a street railroad car, is not the same as of one riding upon the platform of a steam railroad car. The legislation in this state as to railroads and street railroads has been kept separate and distinct. For a full consideration of the subject, see Bridge Co. v. Iron Co., 59 Ohio St. 179, 52 N. E. 192. Interurban railroads, such as the one in question in this case, are classed by the general assembly as street railroads. Section 2780-17, Bates' Ann. St. The construction and operation of such railroads are authorized by the act of May 17, 1894 (91 Ohio Laws, p. 285), and carried into Bates' Annotated Statutes as sections 3443-8 to 3443-13. Section 6 of that act is as follows: "Such companies shall be subject to the same regulations now provided for street railroads, in so far as the same are applicable, and shall have all the powers, in so far as they are applicable, that other street railroad companies have."

It seems reasonably clear that, while operating the cars of an interurban railroad within a municipality, the regulations and powers of a street railroad company are applicable; but when it comes to running cars of such railroads in the open country, upon a track substantially the same as the track of a steam railroad, and at a high rate of speed, it would seem that the same rules as to negligence and contributory negligence should prevail as are applicable to steam railroads, and that a passenger standing upon the platform of an interurban car in the open country should be held to the same rules as if he were standing on the platform of a steam car. The danger is the same in either case, and where there is no difference in danger there should be no difference in the care required, nor in the rights and liabilities flowing from the neglect to observe the proper care. For an injury received by a passenger on a steam railroad by reason of a collision or derailment while standing upon the platform, in violation of the known rules of the company, there being vacant seats in the car, there can be no recovery against the railroad company. The au-

ies as to this seem to be uniform. Railroad v. Miles, k. 298, 48 Am. Rep. 10; Hickey v Railroad Co., 14 429; Railroad Co. v. Thomas' Adm'r, 79 Ky. 160, 42 ep. 208; Railroad Co. v. Moneyhun, 146 Ind. 147, 44 1106, 34 L. R. A. 141; Palmer v. Pennsylvania Co., 111 488, 18 N. E. 859, 2 L. R. A. 252; Wills v. Railroad Co., ıss. 351.

e are cases in which a recovery has been allowed where ssenger rushed to the platform to escape some other . Such was the case of Mitchell v. Southern Pacific , 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130, where an ; messenger became alarmed at the rate of speed of the hile descending a steep grade, and, fearing a derail- ıe rushed to the platform, intending to jump off into d. It was held that he could not be held to any par- course of conduct while attempting to avert a present ned danger. In the case at bar the deceased was or- nto the car by the conductor, and requested to go in assistant conductor; there were vacant seats inside; a ıs up, "Passengers not allowed on the platform;" and emained on the platform because he wanted to smoke a He remained there at his peril, and, even though the ıy may have been negligent in not preventing the ent, he was also negligent in standing upon the plat- Those inside the car escaped without injury, and, if gone inside when ordered to do so, the presumption ıe, too, would have escaped. It is a case where it re- he negligence of both himself and the company to ›out the disaster, and, where the injury is brought y the combined negligence of both, both are without Coal Co. v. Estievenard, 53 Ohio St. 43, 57, 40 N. and cases there cited.

w of the law as above stated, it is clear that the court ıon pleas erred in the charge as given, and also in re- › charge as requested, and that the circuit court erred ıing the judgment.

is another reason why there can be no recovery in : upon the facts appearing in this record. The action iolation of the contract of safe carriage. Such a con- ; implied therein that the passenger will obey the ›le rules of the carrier. The rule against standing on orm was a reasonable one, and this the deceased de- y, persistently, and purposely violated, and that vio- ded in causing the injury of which complaint is now Having himself first violated the contract, and that having brought about the injury, he has no cause of gainst the company for violating a contract by the which he first refused to be bound. As he, if alive, ve no cause of action, his administrator has none. d that the action might have been in tort. This is

true. He could sue either in tort or contract. He elected to sue upon the contract, and he is bound by his election.

The controlling facts of the case seem to be conceded, and the case seems to be one that might well be dismissed by this court after reversing the judgments below; but it may be safer to remand the case to the court of common pleas for further proceedings according to law and this opinion, and it is so ordered. Judgments reversed and cause remanded.

SPEAR, DAVIS, SHAUCK, PRICE, and CREW, JJ., concur.

ENSLEY *et al.* v. DETROIT UNITED RY.

(Supreme Court of Michigan, July 14, 1903.)

[96 N. W. Rep. 34.]

Injury to Stock on Track—Contributory Negligence—Evidence.

In an action against an electric railroad for death of a cow, evidence of plaintiff considered, and *held* not to show that he was guilty of contributory negligence in law.

Same—Res Gestæ.*

In an action against an electric railroad for death of a cow, testimony of a passenger that, when the car struck the cow, the motorman, while alighting, said: "There, that is running without a headlight," was properly admitted as part of the res gestæ.

Same—Failure to Carry Headlight—Liability—Instruction.

In an action against an electric railroad for death of a cow, an instruction that defendant's liability under its franchise requiring its cars to be properly lighted, and under the law of negligence, was not materially different; that defendant was obliged to have such a light as would give plaintiff fair notice of its approach; that it was for the jury to say whether the lights were reasonable on the night of the accident, and whether failure to carry a headlight was negligence under the circumstances—fairly presented the law.

Error to Circuit Court, Oakland County; George W. Smith, Judge.

Action by Philo Ensley and another against the Detroit United Railway. There was judgment for plaintiffs, and defendant brings error. Affirmed.

Brennan, Donelly & Van De Mark and Frank E. Jenkins, for appellant.

Kinsman & Arnold, for appellees.

MONTGOMERY, J. The plaintiffs were joint owners of a cow which was of the value of $45, and which has furnished the subject-matter of this litigation. There is no question that the cow was killed by coming in collision with a motor car on the line of defendant's road. As the contention is made that there was no case for the jury, we quote at some length from the testimony of plaintiff Cole: "Last summer, August 22d, I resided on Philo Ensley's farm, about one-half

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*See note appended to Louisville & N. R. Co. v. Landers (Ala.), 6 R. R. R. 96, 29 Am. & Eng. R. Cas., N. S., 96.

uth of the village of Oxford. I resided upon his farm
ant. I had one-half interest in the stock and crops
farm. I kept twelve head of cows. I can recollect
l day of August last. I got the cattle up for the pur-
milking them at 3 o'clock in the afternoon, because I
furnish milk for the milkmen. The weather was
and threatened to rain, and, after milking the cows, I
n their corn in the stable on account of rain. About
k in the evening I turned the cows out. The barn is
l on the east side of the highway, and the electric rail-
situated in the center of the highway, and the house
e west side of the highway. The pasture in which I
he cows is on the east side of the highway. That
about 8 o'clock I had gone across to the house to
hogs, and, after I got the hogs fed, I thought I would
cows out, and I came across and looked up and down,
aw no car coming from any direction, and I went and
the gate that goes to the lane, so that, when I got
ey would go right in, providing I had to crowd them
t them out, and kept constantly looking up the track
, and I see no car coming then from either direction.
ore it has been the custom of the company to carry a
t. I never noticed the car come down at night with-
adlight neither way. I could see north towards the
lear about eight-tenths of a mile. I saw no signs of
I saw no signs of any light or any car at all. Q.
king carefully, you looked down the road at the same
A. Yes, sir. Q. Now, after looking both ways, what
lo? A. I turned the cows out. Q. What did you
hem? A. I turned them out, and drove them right
pasture—that is, into the lane—and just before I got
e gate I looked around to see if any car was coming,
was one right onto me within three or four rods,
hed right across the track (I was on the west side of
when I saw the car coming, and I rushed right across
), and there was one of the cows started on a run
track, and I got in around those, rushed them
the gate, and shut the gate. As soon as I got them
r was by me. The car was within three or four rods
en I saw it first. I drove the cows in and shut the
could hardly keep the cows from the gate while I
It would have been impossible for me to have got
hat cow. This car that came down had no head-
evening. It had no light in front of it at all. It
dark, rather dark and cloudy, and it was about 8
It was about 325 feet south of there that the cow
That is the distance where they rolled the cow off
"

sisted that this testimony shows plaintiff to have
ty of contributory negligence. In support of this

contention it is said: "Neither on direct or cross-examination did Mr. Cole testify that he at any time looked for the car after leaving the barnyard gate until the cows were within twenty feet of the lane gate, and part of them way over on the west side of the track." Counsel must have overlooked the following, appearing in the direct examination of the witness: "I let them out, and kept constantly looking up the track for a car, and I saw no car coming from either direction." As he was driving the cattle down the track, where he had a plain view, it would seem that, if he constantly kept looking up the track (from which direction the car in question came), he did about all that could be expected.

Objection is made to the admission of the testimony of a passenger as to a statement made by the motorman at the time of the collision. He testified under objection that, when the car struck the cow, witness, the conductor, and the motorman got out of the car, and that while the motorman was getting out of the car, before he got out, he said, "There, that is running without a headlight." This was admitted as a part of the res gestæ, and we think properly.

An effort is made to liken the case to Dompier v. Lewis (Mich.) 91 N. W. 152, but the case is clearly distinguishable. In this case the exclamation was made at the very time of the injury, and related to the very fact; in the former case it was in the nature of a narrative of a past event, and did not relate to the very fact of the injury. The question put to the witness in the present case was somewhat broader than the answer itself, and in this holding we confine our decision to the case as disclosed by the answer of the witness.

The principal complaint in the case relates to the charge of the court on the subject of lights. The defendant's franchise contract contained the following: "That the cars of said railway shall be of modern type, propelled by electricity or any other motive power, except steam, which is or may become suitable for railway purposes, and must be properly lighted in the nighttime, whether standing or running." The circuit judge charged the jury upon this subject as follows: "The franchise for the township of Oxford, where the accident occurred, contains the provision that cars must be properly lighted in the nighttime, whether standing or running. Now, what do the words 'properly lighted' mean? They do not mean necessarily that the car be equipped with a headlight, or, if with a headlight, that it should be an electric headlight rather than one provided or furnished by the use of oil. The question of whether it was light or dark must be carefully considered in determining whether the car was properly and sufficiently lighted or not. If, in fact, it was light enough so that the plaintiff Cole, in exercising due diligence to protect his own interests, could have seen the approach of the car a considerable distance, then the question of lighting the

'ould be of no importance. Any light or no light would
ficient in that event. Now, regardless of the franchise,
nder the general liability of the defendant's company
gligence, it would be liable for any failure to use rea-
le care in the lighting of its car in front, so as to give a
ıd reasonable notice to persons desiring to use the high-
ıext to the track. That would not necessarily mean
: should use a headlight, any more than the language
n the franchise; but it would mean that, if the darkness
ıch that the plaintiff Cole could not otherwise see its
ach, then the car should be so lighted as to give the
iff fair and reasonable notice of its approach if he looked.
gentlemen, I leave that whole question to you, and say
that under the peculiar wording of that franchise the
:y for violation of the franchise does not differ greatly
vhat the ordinary liability of the defendant would be
the law of negligence. My construction of that lan-
would be that there should be such a light in front as
give the plaintiff reasonable and fair notice of its ap-
ı had he looked. Now, gentlemen, it is for you to say
ɜr the lights that evening, as described, are reasonably
perly within that definition or not. It is the claim of
ıintiffs that in order to constitute a reasonable and
tice, or to comply with the franchise, it is necessary to
headlight. Now, gentlemen, if it be true that the
om the window that has been described—from the bull's-
ht and from the windows—would give the plaintiff
.ir and reasonable notice of its approach, then I say to
ıt it would not be negligence not to have a headlight;
under all the circumstances, you determine that those
were not and did not give the plaintiff Cole, or would
'e him, fair and reasonable notice of its approach, then
ght find that the headlight was necessary to comply
ıe ordinances to relieve them from liability for negli-
That would depend, gentlemen, on what you deter-
:om the evidence. What I mean to say is, gentlemen,
e failure to carry a headlight is not of itself, standing
full proof of negligence. It might be negligence, and
ıt not, depending on what other lights were in front of
,,

hink this instruction fairly presented the question to
y. See Rascher v. Street Railway Company, 90 Mich.
N. W. 463, 30 Am. St. Rep. 447; McGee v. Street
y Company, 102 Mich. 107, 60 N. W. 293, 26 L. R. A.
Am. St. Rep. 507.
record presents no other questions meriting dis-

judgment is affirmed. The other Justices concurred.

LABARGE *v.* PERE MARQUETTE R. CO.

(*Supreme Court of Michigan, July 14, 1903.*)

[95 N. W. Rep. 1073.]

Gross Negligence and Contributory Negligence—Subsequent or Concurrent.

The gross negligence of the defendant will not warrant a recovery, notwithstanding the contributory negligence of the plaintiff, where plaintiff's negligence is, in the order of causation, either subsequent to, or concurrent with, that of the defendant.

Frightening Horses—Negligence—Question for Jury.

Whether a railroad company was guilty of negligence, where the horse of one driving along a public street became frightened at cars which were being shunted down the company's tracks which lay in the street, and backed the buggy onto the track in front of the cars, *held*, under the evidence, to be a question for the jury.

Instructions.

The fact that the trial judge, in charging the jury, presented the facts on one of the issues with considerable emphasis, and probably did not entirely conceal his opinion with relation thereto, was not ground for reversal, it being clear from the charge that the jury were to pass on the issue.

Error to Circuit Court, Bay County; Theodore F. Shepard, Judge.

Action by Sophia Labarge against the Pere Marquette Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

D. B. Richardson (Loranger & Flynn, of counsel), for appellant.

T. A. E. & J. C. Weadock (F. W. Stevens, of counsel), for appellee.

HOOKER, C. J. The plaintiff, when driving, was struck and injured by a car belonging to the defendant, which had been shunted down the street upon which she was driving, in Bay City. This action was brought to recover damages for the injury sustained by her, and, upon the trial, a jury rendered a verdict for the defendant. She has taken a writ of error upon the judgment rendered.

The negligence complained of is, first, that the defendant's servants "kicked" two sleeping coaches down its track, and across a street (Third), at a rate of five to six miles an hour, with no one upon them to control them, and this is said to have amounted to "gross negligence." This was afterwards amended so as to allege that she was struck upon Jefferson street, which accorded with the fact. The railroad occupies a portion of Jefferson street—which crosses Third—the main track being near the center, and a side track just west of it. Other side tracks occupy lands adjacent to Jefferson street. The plaintiff's home was upon Jefferson street, a short distance from Third street, and she was familiar with defendant's practice of shunting its cars, which it did daily at this place. Her version of the affair is, in brief, that, while driv-

:h a companion, she saw the cars pulled north across
street, and that her companion stopped her horse until
.in had crossed, when, on being signaled to cross the
y the flagman, she did so, and immediately turned up
on street towards plaintiff's residence. As she turned
n Jefferson the cars were coming toward her from the
and when she had gone 15 or 20 feet, on Jefferson
the horse became frightened at the approach of the
d reared and pranced, and finally became unmanage-
d backed the buggy upon the track in front of the ap-
ng car, which struck it, to her injury. We are asked
:hat the act of shunting these cars along the street, with
at the brake, was such a want of care as to make de-
liable, regardless of the question of contributory neg-

.y be conceded that, where one willfully injures an-
he doctrine of contributory negligence is not involved,
: the injury is not negligent, but intentional. Again,
ne is seen in danger, though placed there through his
gligence, one who, thus seeing him, omits ordinary
avert an injury to him, is not alone negligent, but is
, and, as wantonness of this kind is akin to willfulness,
an opportunity for applying the same rule, and de-
s have been held liable under such circumstances.
.in, we can conceive of a degree of recklessness which,
n of its coincidence with probable disaster, is closely
the foregoing, and should perhaps be governed by
e rule, but it does not follow that all acts that counsel
s might, in the light of subsequent events, be inclined
eckless, should be treated as something more than
ce, and classed with intentional, rather than with
t, acts, when it cannot be said that it was not coinci-
h a probable disaster. It has been held in this state
ross negligence" to run a car across a highway at a
e of speed, without having a lookout to stop the train,
persons upon the crossing by signal or otherwise to
om the track, and that in such cases, where the danger
have been discovered and averted by the use of or-
are, the antecedent negligence which caused plain-
pardy, which should have been discovered and
should not constitute a defense, though it does not
at subsequent negligence of a plaintiff would be ex-
d it should not be.
in Battishill v. Humphreys, 64 Mich. 494, 31 N. W.
hild 2½ years old was run over in daylight upon a
ssing, unseen by the engineer, who, it was said,
ve seen her in time to stop his train had he been at-
nd it was held that the court would not discuss the
of the negligence of the guardian, who should have
d her going into a place of danger. Here was the
t negligence of the guardian, and the subsequent

failure to discover the dangerous situation for want of ordinary care, upon which the liability rested.

The next case was Cooper v. L. S. Ry., 66 Mich. 261, 33 N. W. 306, 11 Am. St. Rep. 482. A girl of 11 years stepped upon a track at a city street crossing and looked after a receding train, when she was struck by a caboose of another train and killed. Again it was held that the defendant was liable, because it backed the train over a highway crossing, without a brakeman at the rear end as a lookout, and in readiness to apply the brakes in case of danger, and thus prevent collision or accident, there being no flagman. The question of contributory negligence was left to the jury, and the defendant claimed it was injured thereby. This court held not.

In the case of Schindler v. Ry., 87 Mich. 405, 49 N. W. 670, some freight cars were shunted across a highway, no one being upon them. A boy of 11 years was riding in a sleigh, which was struck, and he was injured. The case shows that the defendant's crew knew that the sleigh had started for the crossing "at the very time when they kicked these cars across this highway." The defendant was held liable. It was contended that the boy was chargeable with contributory negligence. In discussing this, the court said: "The charge in the declaration is for gross negligence. The jury have found the defendant guilty of gross negligence. There is no room, therefore, for the claim that the defendant company should be excused for its negligence, though Schupp may have been negligent, and his negligence might have been imputed to the child. Whether, under the circumstances stated here, Schupp's negligence could be imputed to the child, we do not determine, as under the finding of the jury there is no room for contending that Schupp's or the plaintiff's contributory negligence could be made applicable in determining the rights of the parties in this case. The term 'gross negligence' has been used in cases decided by this court, and has a definite meaning, when referred to as authorizing a recovery for a negligent injury, notwithstanding the contributory negligence of the plaintiff. It means the intentional failure to perform a manifest duty, in reckless disregard of the consequences, as affecting the life or property of another. It also implies a thoughtless disregard of consequences, without the exertion of any effort to avoid them."

In each of these cases there was a possible antecedent negligence, which should have been discovered, and danger averted, by the exercise of ordinary care by the defendant, viz., by having a lookout upon its cars. There was nothing to indicate that the plaintiff was chargeable with subsequent negligence, or, if there was, the point was not raised. In one of the cases the question of contributory negligence was not before this court in a way to be passed upon, so far as this question was concerned. In the other cases the question of imputable negligence on the part of the plaintiff was

:d by saying that "gross negligence upon defendant's eliminated the question of contributory negligence upon the plaintiff's antecedent negligence."

also, Denman v. Johnston, 85 Mich. 396, 48 N. W. Thomas v. Ry., 86 Mich. 496, 49 N. W. 547. In both of cases contributory negligence was considered a question : jury.

:ichter v. Harper, 95 Mich. 225, 54 N. W. 768, Mr. : Montgomery, speaking for all of his associates, was sing a case where gross negligence was charged. He "It is urged by plaintiff's counsel that the negligence of ants was so gross and willful as to excuse concurring ence on the part of the plaintiff, it being claimed that, the negligence of the defendant is gross or willful, the outory negligence of the plaintiff is not a defense. This another way of stating the doctrine of comparative neg- e, which has never obtained in this state. It is true ie contributory negligence of the plaintiff does not pre- ecovery in a case where the defendant, who knows, or by the exercise of the most ordinary care, to know, of ecedent negligence of the plaintiff, by his subsequent ence does plaintiff an injury." The Case of Battishill, of the three mentioned, was cited, but it shows our :etation of that case. He continued: "As well stated ge Cooley: 'In such cases it may be said that the neg- : of the plaintiff only put him in position of danger, is therefore only the remote cause of the injury, while osequently intervening negligence of the defendant was 'oximate cause.' This rule does not permit recovery, hstanding plaintiff's contributory negligence, but it izes that such discovered negligence of plaintiff, or his ence which should have been discovered, is not a con- ng cause to the injury in a legal sense. This, we think, logical statement of the rule as deduced from the au- es. 4 Am. & Eng. Enc. of Law, p. 80, and notes. But ule which has no application to the case at bar." Cit lley v. Courter, 93 Mich. 473, 53 N. W. 621.

aethem v. Ry. Co., 100 Mich. 297, 58 N. W. 996, Mr. Long appears to have recognized the rule that plain- ibsequent negligence is a defense. There a street car saw a milkman's sleigh in place of danger. He might :opped and avoided an accident, but he did not. The an saw the car and attempted to get out of the way, led. It was held that his conduct after seeing the car :d the question of contributory negligence.

ie case of Montgomery v. R. R., 103 Mich. 46, 61 N. , 29 L. R. A. 287, the intestate was a member of a which was marching upon a city street, playing at the Defendant's car came up behind them, and ran into :estate. The motorman saw the man walking in a ous place, and made no effort to avoid the accident.

There was testimony indicating that the intestate was unaware of the approach of the car. No subsequent negligence on his part appeared. See, also, Borschall v. Ry., 115 Mich. 473, 73 N. W. 551; Buckley v. F. & P. M. R. Co., 119 Mich. 587, 78 N. W. 655; Merritt v. Foote, 128 Mich. 373, 87 N. W. 262.

In all of these cases the negligence of the defendants occurred when there was a condition of danger, and it may be said that it was unimportant how such antecedent condition arose, or whether it was due to the negligent act of the plaintiff or not. The defendant's wrong being a want of ordinary care, which care would have prevented the accident, notwithstanding plaintiff's antecedent negligence, it was responsible for it, and plaintiff's antecedent negligence being at most a remote cause, and there being no other negligence on the part of the plaintiff, he might recover. It has in some cases been said that his negligence might be said to be a remote, and not the proximate, cause.

We have held that a defendant who backs its cars at high speed across a highway in a city or village, without having a brakeman upon or in charge of the same, is chargeable with gross, i. e., great, negligence, and cannot maintain the defense of contributory negligence, where the presence of such brakeman, and the use of ordinary care, would have shown plaintiff's danger and made it possible to avert the accident. This rule is subject to the exception of such negligence on the part of the plaintiff as occurs after his discovery of the danger. In our opinion the term "gross," as applied to negligence, has no such broad legal effect, as is contended for in this case; but whenever the defendant sees a plaintiff in danger, or by exercising only ordinary care in the discharge of his duty should discover such danger in time to avert an injury, and either fails, after discovering it, to take steps to avert it, or fails to discover the danger, the fact that the plaintiff's danger arose, in the first place, through his own negligence, does not prevent his recovery for an injury sustained.

Counsel in this and many other cases have apparently assumed that where negligence is extraordinary, to a comparative or superlative degree, it is proper to call it "gross," and that, when it can be so denominated, certain legal consequences result. Accordingly in this case it is said that it was extremely negligent to shunt these cars down the street without a lookout on duty, with his hand on the brake, and justified the charge of "gross" negligence, and hence nothing that the plaintiff had done or might do after the discovery of the approaching train could be effective as a defense to the action. We think this is not the rule. The doctrine of responsibility, notwithstanding discovered negligence of the plaintiff, does not apply where the plaintiff's negligence is, in the order of causation, either subsequent to, or concurrent with, that of the defendant. Smith v. Norfolk R. R., 114 N. C. 728, 19 S. E. 863, 923, 25 L. R. A. 287; Holmes v. South. Pac.

Ry. Co., 97 Cal. 161, 31 Pac. 834. Thus it is said that one discovered by an engineer, negligently walking on 'oad, may be entitled to recover, if the engineer, appre- ıg the danger, makes no effort to avert it, he cannot re- if, after becoming aware of the danger, he makes no r effort to escape. I. R. Co. v. Garcia, 75 Tex. 583, 13 223; Louisville R. R. Co. v. Webb, 90 Ala. 185, 8 . 518, 11 L. R. A. 674; Smith v. Norfolk R. Co., supra. ı Ochsenbein v. Shapley, 85 N. Y. 214, this was held one who, after notice that a boiler is to be tested, in a ss manner persists in standing by until it explodes. it has been said, "Defendant's negligence must be sub- ıt to plaintiff's. Recovery cannot be had for the killing respasser by reason of the fact that the train was not 'ly equipped with appliances for stopping it quickly." v. Norfolk R. Co., 114 N. C. 728, 19 S. E. 863, 923, 25 A. 287; Sullivan v. Mo. Pac. Ry., 117 Mo. 214, 23 S. W. "The obligation is mutual to use care to avoid the con- ıces of each other's negligence." N. C. R. Co. v. 29 Md. 420, 96 Am. Dec. 545. This rule, as first laid in Davies v. Mann, 10 M. & W. 546, has been much zed, and it is perhaps not too much to say that the doc- ntended to be announced there has been misinterpreted isapplied. Certain it is that, of a large number of cases n support of that case, in all but two or three the de- ts were fully aware of plaintiff's danger. See Shear- Red. on Neg. § 99, notes 2, 4. This understanding of e seems to be in accord with Mr. Justice Montgomery ıter v. Harper, supra.

contended by defendant's counsel that it had the right its track in the ordinary way, and that it might run its thereon, notwithstanding the fact that horses were o be frightened thereby, and that it cannot be said to een negligent in not anticipating that the horse would ıtened and back upon the track. We are not satisfied railroad company owes no duty toward those who drive street in which its trains also run. Undoubtedly it ight to run its trains there, but so have persons a right e there, and each has the right to expect reasonable the part of the other. We are not able to say, as a of law, that it was not possible for this train to have opped after the horse began to back up, had the ng been prudently done, nor can we say that there was ligence in a failure to do so. This would depend e distance that the cars were from the horse, the rate l, the provisions made by defendant for controlling the d the apparent conduct of the horse and its driver; question was for the jury, as the court held. Under ses it was a proper question for the jury to determine as a proper discharge of duty, and whether the em- of the defendant in charge of the cars, by the use of

ordinary care in running the cars, and in discharge of their plain duty, could and should have seen and averted the accident. If they could, the negligence of plaintiff and her companion in driving up the street, if it was negligent, was not a proper defense, unless it occurred after their discovery of the danger.

The trial judge indulged in a somewhat extended discussion of the testimony, and this is perhaps subject to the criticism that he did not entirely conceal his opinion in relation to some features of the case. That is sometimes a difficult thing to do, and at the same time direct the attention of the jury to the crucial points of the testimony upon which a case may turn. We have held that a charge must be based upon the evidence. Doyle v. Stevens, 4 Mich. 87; Amer. Co. v. Moore, 5 Mich. 368; Dodge v. Brown, 22 Mich. 446; Druse v. Wheeler, 26 Mich. 199; Chadwick v. Butler, 28 Mich. 352; Leslie v. Smith, 32 Mich. 64. We have also recognized the propriety of a discussion of the evidence within proper limits, and have refused to reverse a case on the ground that the trial judge had even expressed an opinion upon the facts, when it appeared that the jury were informed that it was no more than an opinion, and was not intended nor calculated to prevent their free consideration of the evidence and determination of the facts. See Sheahan v. Barry, 27 Mich. 227. In Elliott v. Van Buren, 33 Mich. 57, 20 Am. Rep. 668, it was said: "We do not find that anything was said which could in any way mislead the jury as to their powers or duties. This being so, we cannot be justified in acting as censors of the style or spirit of the charge, even if we should not approve them ourselves. Judges are not expected to be so purely mechanical in their action as never to express in words more or less of their ideas upon many questions of legal policy and theory, as well as human conduct. The reports are full of judicial remarks which are not supposed to be meant as legal rulings, and which an appellate court would never think of reviewing. In Sheahan v. Barry, 27 Mich. 217, the remarks complained of bore more severely against the defendant than anything which appears in this record. But on a review of the authorities we were there satisfied no ground of error existed, and so we think of the case before us." These cases have been cited frequently since, and the court has indicated an unwillingness to extend the rule. See People v. Lyons, 49 Mich. 82, 13 N. W. 365; People v. Murray, 52 Mich. 302, 17 N. W. 843; Letts v. Letts, 91 Mich. 599, 52 N. W. 54; Raymond v. Woolfenden's Estate, 99 Mich. 165, 58 N. W. 41; Blumeno v. R. R. Co., 101 Mich. 325, 59 N. W. 594; Preston Bank v. Ins. Co., 115 Mich. 511, 73 N. W. 815; Valin v. McKerreghan, 104 Mich. 213, 62 N. W. 340. A majority of the court are of the opinion that the judgment should not be reversed for this reason, for, although we agree that the court's language pre-

the facts bearing upon the question of contributory ence with considerable emphasis, it cannot be said that y were given to understand that they were not to pass he question, it being clear that it was expected that ould pass upon it. See Blumeno v. Railroad, 101 330, 59 N. W. 594.

unnecessary to discuss other questions, further than that they have received attention.

judgment is affirmed. The other Justices concurred.

CENTRAL OF GEORGIA RY. CO. *v.* DOZIER.

(*Supreme Court of Georgia, June 26, 1903.*)

[45 S. E. Rep. 67.]

ds—Killing Stock—Evidence.*

uit for damages for killing stock, the plaintiff offered no eye- to the transaction. While weak and unsatisfactory, the testi- s to the tracks of the animal and other physical facts was t, when aided by the presumption of negligence, to warrant a in favor of the plaintiff, notwithstanding the evidence of the r and fireman tending to show the exercise of ordinary care gence. See Central of Ga. Ry. Co. *v.* Harden, 38 S. E. 949, 113 ; Same *v.* Hardin, 40 S. E. 738, 114 Ga. 548.

bus by the Court.)

r from Superior Court, Talbot County; W. B. Butt,

on by Allen Dozier against the Central of Georgia y Company. Judgment for plaintiff, and defendant error. Affirmed.

e & Battle and A. J. Persons, for plaintiff in error. Bull, for defendant in error.

AR, J. Judgment affirmed. All the Justices

NASHVILLE, C. & ST. L. RY. CO. *v.* PRIEST.

(*Supreme Court of Georgia, June 26, 1903.*)

[45 S. E. Rep. 35.]

s—Injuries to Trespassers—Children on Depot Grounds— ding.†

laintiff being a trespasser upon the premises of the defendant company, it owed her no duty of protection until her presence ally discovered by its servants, notwithstanding she was a tender years; and it not affirmatively appearing from the allega- her petition that, after she was seen by one of the defendant's

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whether a presumption of negligence arises from mere proof r to stock on track, see foot-note appended to Southern Ry. Co. (Ga.), 6 R. R. R. 588, 29 Am. & Eng. R. Cas., N. S., 588.

oot-note appended to Ashworth *v.* Southern Ry. Co. (Ga.), 5 R. , 28 Am. & Eng. R. Cas., N. S., 679.

employees, the conduct of any of them was so grossly negligent as to indicate a willful and wanton disregard for her safety, the company's general demurrer should have been sustained.
(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Action by Mary Priest, by her next friend, against the Nashville, Chattanooga & St. Louis Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Payne & Tye, W. J. Neel, and Paul H. Doyal, for plaintiff in error.

McHenry & Maddox, Fouche & Fouche, and Moses Wright, for defendant in error.

SIMMONS, C. J. The question presented for decision in this case is whether or not the trial court erred in overruling a demurrer to the plaintiff's petition. The suit was instituted in her name by W. D. Priest, as her next friend, and was predicated upon the following allegations of fact: The defendant railway company has a passenger and freight depot in the city of Rome, Ga., which "is surrounded by platforms, yards, and railroad tracks, upon which tracks cars and engines are run and operated, and in, upon, and across which passengers and the public generally are accustomed and allowed to pass." On the 25th of February, 1902, the plaintiff, who was then 12 years of age, went with her brother, who was a year older, to the company's depot. On one of the adjacent tracks were standing two or three freight cars. "Being young and indiscreet children, and being unconscious of any danger, by reason of their tender years, and no engine or cars being then in sight or hearing, they climbed upon said cars and there remained, in full view of all passers-by, and in sight of the operatives, servants, and agents of the defendant, had they been in the exercise of any care or diligence. After petitioner and her brother had been upon said cars for some time, petitioner's attention was suddenly arrested by an engine which had approached near to said cars from the south; and as said engine continued to approach the car upon which petitioner was standing one of the servants or agents of defendant called loudly to petitioner, 'Get down off of that car, or you will be killed.' Petitioner became very much alarmed and excited by reason of the approaching engine and the harsh, loud order to get off said car as aforesaid; and believing that she was in very great danger and peril, to save herself from the danger apprehended by a collision between the car upon which she was standing and the approaching engine, she jumped from said car to the ground," a distance of about 12 feet, and broke one of the bones in her left leg, near the ankle. The plaintiff's position on the car was in full view of "those in charge of said engine and those on the ground, and she could have been readily seen or observed in the exercise of

:e whatever on their part, but * * * no signal was
ıf the approach of said engine to said car, and no effort
part of those in charge of said engine was made to
e same, and no notice or care was taken of her, save
ıgh and hasty command" above mentioned. The
ıy's demurrer was based on the general ground that no
of action was set forth in the plaintiff's petition, and
ıe further ground that the allegations thereof did not
: the names of the company's servants who were
l with negligence, or in any way identify them by stat-
ıt connection they had with the defendant's business,
: particular positions they occupied, etc. The plaintiff
ıok to meet the special objections just indicated by
; an amendment to her petition, in which she stated
: names of these employees of the company were un-
to her, and that she was, for lack of information, un-
allege what positions they occupied, or what particular
hey owed the defendant.
ıtless the plaintiff's petition was sufficiently full and
, as thus amended, respecting the identity of the em-
of whose conduct she complained. See Woodson v.
ın, 109 Ga. 454, 34 S. E. 587. The general ground of
ıurrer should, however, have been sustained. On the
nt before this court, counsel for the defendant in
:ry properly conceded that she was a trespasser upon
nises of the defendant company. Though a child
years of age may oftentimes occupy a much better
ı than would an adult under similar circumstances, in
ıea of tender years can be made to a charge of con-
y negligence on the part of a child, yet it remains true
:respasser, be he man or infant, is not legally entitled
ılain of lack of diligence on the part of a third person
ıls short of gross negligence. See, in this connec-
: full and able discussion of this subject, and the au-
ı cited, in the opinion delivered by Mr. Justice Fish in
W. R. Co. v. Beavers, 113 Ga. 398, 39 S. E. 82, 54 L.
4. Under the facts disclosed by the plaintiff's peti-
: company was certainly not liable on the idea that
nts did not sooner discover her presence on top of the
withstanding she was in full view, and might have
ın by them had they been in the exercise of ordinary
Inderwood v. W. & A. R. Co., 105 Ga. 48, 50, 31 S. E.
ıdy v. Georgia R. Co., 112 Ga. 668, 37 S. E. 861, and
ed. This is so for the reason that the company owed
to her until her presence actually became know to
nts. A. & C. Air-Line R. Co. v. Gravitt, 93 Ga. 370,
550, 26 L. R. A. 553, 44 Am. St. Rep. 145; S. F. &
o. v. Waller, 97 Ga. 166, 167, 25 S. E. 823, 34 L. R.
So far as appears, the plaintiff was not placed in a
of real peril by the approach of the engine to the

car on which she was standing. Indeed, the pleader does not attempt to do more than allege that the plaintiff "became very much alarmed and excited by reason of the approaching engine and the harsh, loud order to get off said car, * * * and, believing that she was in very great danger and peril," jumped to the ground in order "to save herself from the danger apprehended by a collision between the car upon which she was standing and the approaching engine." In other words, there is no pretense that a collision was, in point of fact, imminent, or even probable, at the time she was told by a servant of the company to get down from the car. It is not even alleged that the approaching engine was upon the same track as that upon which stood the car. Evidently the plaintiff's case was not planted on the ground that she was compelled to jump in order to avoid injury which she otherwise would have suffered, nor upon the theory that those of the company's servants who were upon the engine had knowledge of her presence in a situation of peril, but nevertheless wantonly neglected to take any steps to stop the engine before it reached the car on the top of which she was standing. On the contrary, she seeks a recovery on the idea that the defendant is chargeable with negligence (1) because its servants did not exercise ordinary care in the matter of looking out for trespassers, and (2) because, after her presence became known to the employee who told her to get off the car, the company's servants did not observe the proper precautions to prevent frightening her and causing her to do the rash act of jumping a distance of some 12 feet to the ground. As has been already remarked, the company owed no duty to her until her presence on its premises actually became known to its servants. The question upon which the case should be made to turn, therefore, is: Were they thereafter guilty of conduct evidencing a willful or wanton disregard for her safety? She does not profess to know or undertake to assert that any one on the engine had notice that she had climbed on top of the car, so it does not appear that those in charge of the engine were called upon to take any steps to avoid frightening her. The mere fact that at the time she jumped the engine was approaching the car on which she stood cannot, of itself alone, be relied on as showing reckless and wanton conduct. Knowledge of her situation is shown to have been had by one employee only, the one who told her to get down from the car. Where he was at that time, whether on the ground near by or upon the engine, is not disclosed, the plaintiff in the amendment to her petition stating her want of information in this regard. There is no allegation to the effect that he was guilty of negligence in not communicating his knowledge to those on the engine, or in not taking other steps to have it stopped in order that the plaintiff might not be frightened by its further approach. The only claim of negligence made in

nnection is that "no signal was given of the approach engine, and no effort on the part of those in charge of gine was made to stop the same." The company cer- wed no duty to trespassers generally to warn them by very time its engine was put in motion, and, unless charge of it had knowledge of the plaintiff's presence, ilure to make any effort to stop it before it came close to the car to cause her to apprehend danger cannot be d as a negligent omission of duty on the part of the y. As has been seen, there is nothing alleged upon base even a conclusion that the employee just re- was one of those on the engine, or that any of them wledge concerning the plaintiff's whereabouts. This e "called loudly to petitioner, 'Get down off of that ou will be killed.' " He did not tell her to jump, nor assumed he expected her to do so, or anticipated would become alarmed and act rashly. No circum- are set forth in the plaintiff's petition which indicate re was any necessity for haste, or that a child 12 years ight think there was. How close, if close at all, the hing engine was at the time, does not appear. For at the petition discloses, the engine might have been distance that even a very prudent man would have reason to suppose she would become alarmed, and, of alighting from the car by the means she had used ing on top of it, jump to the ground and suffer injury. as it may, however, no facts are alleged which go to t, under the surrounding circumstances at the time tiff was ordered to get down from the car, the con- he employee who told her to do so amounted to a willful, or wanton disregard of her safety. He may ed thoughtlessly and heedlessly in not anticipating e told her she would be killed unless she got down, ht construe what he said as meaning she was in im- peril because of the approaching engine, become d, and lose her presence of mind; but, if so, his in- te action could hardly be called gross negligence, or more than a failure to observe the prudence and reasonably to be expected of one exercising ordinary diligence in the premises. We are accordingly of on that the plaintiff did not in her pleadings state a itling her to a recovery against the defendant

ent reversed. All the Justices concur.

CHICAGO, B. & Q. R. CO. *v.* BEAL.

(*Supreme Court of Nebraska, May 6, 1903.*)

[94 N. W. Rep. 956.]

Case at Bar.

Evidence examined, and *held* sufficient to sustain the judgment of the trial court.

Fires Set by Locomotives—Appliances—Burden of Proof.*

"Where damage is caused by the escape of fire from a railroad engine, the burden is upon the company to show that the engine was properly constructed, equipped, and operated." Rogers *v.* Railroad Co., 52 Neb. 86, 71 N. W. 977.

Evidence.

Action of the trial court in admitting evidence examined, and *held* not prejudicial.

Commissioners' Opinion. Department No. 2. Error to District Court, Kearney County; Adams, Judge.

"Not to be officially reported."

Action by John T. Beal against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

J. W. Deweese and Frank E. Bishop, for plaintiff in error. Dailey & Paulsen, for defendant in error.

OLDHAM, C. This is a suit for damages for the loss of four stacks of wheat, alleged to have been consumed by fire negligently set out from one of defendant's engines. Defendant's answer was a general denial. There was a trial to a jury, verdict for plaintiff, judgment on the verdict, and defendant brings error to this court.

Defendant's chief contention is that the evidence is not sufficient to support the judgment, and that the court erred in not directing a verdict for defendant at the close of the testimony. A review of the evidence contained in the bill of exceptions discloses that the wheat stacks owned by plaintiff were from 10 to 18 rods south of the right of way of defendant's track; that the wheat stubble extended north from the stacks to the defendant's right of way; that on July 3, 1901, at some time from 5 to 6:30 p. m., these wheat stacks were discovered to be on fire; that one of defendant's trains (a freight) had passed along this right of way about 3:30, and also that a passenger train had passed through the premises about 4 o'clock, or a little later, on the afternoon of the fire. The evidence showed that, when the wheat stacks were discovered to be on fire, the two north stacks were burning, and the stubble north of the stacks and between them and the right of way was also burned. There is a dispute as to the direction the wind was blowing from at the time of the fire. It is conceded by all the witnesses that testify on this question

*See foot-note appended to Illinois Cent. R. Co. *v.* Barret (Ky.), 2 R. R. R. 566, 25 Am. & Eng. R. Cas., N. S., 566.

e wind had been blowing from the south during most
lay, but that during some time in the afternoon it
l its direction from southwest to the northwest.
f's witnesses contend that the wind was blowing from
thwest at the time the fire occurred, while some of
nt's witnesses testify that it did not change to the
est until after the fire had been discovered. There is
vidence in the record that there was alfalfa growing
the right of way, but as to the width of the strip, or
the fire burned through the alfalfa, there is no testi-
The evidence shows, however, that the fire extended
n from the wheat stacks until it was checked by a pub-
. The railroad company introduced no testimony
to show that the engines propelling its trains were
l with spark arresters and other modern improve-
o prevent the spread of fire, but appears to have relied
neory that plaintiff's evidence was not sufficient to
at the fire was communicated from one of its engines.
ot think we should be justified in saying, as a matter
hat, in view of this testimony, there was no evidence
to show that the fire originated from one of defend-
gines. We think the case falls within the rule an-
by Norval, J., in Rogers v. Railroad Co., 52 Neb.
W. 978, when he says: "It is true, no witness tes-
having seen the engine emitting sparks or coals of fire,
was not absolutely essential to a recovery. The
the fire, like any other disputed question of fact, may
ished by circumstantial evidence. While the testi-
duced in this case was not of the most convincing
, we cannot say that no inference could be properly
erefrom that the fire resulted from sparks or coals
by the engine. On the contrary, we are persuaded
proofs should have been submitted to the jury for
sideration, under proper instructions. The rule in
is that, when fire is set out by sparks from a passing
negligence may be inferred, and that the burden of
upon the company to establish that the engine was
in construction, and was properly equipped and
Railroad Co. v. Westover, 4 Neb. 268." Kelsey v.
. D.) 45 N. W. 204; Ry. Co. v. Richardson, 91 U. S.
. Ed. 356; Butcher v. Ry. Co., 67 Cal. 518, 8 Pac.
m. & Eng. R. Cas. 356.
ly other objection to the action of the trial court
our attention in the brief of plaintiff in error is as
rruling an objection to the testimony of plaintiff's
e effect that the section foreman of the company
ner house after the fire, and asked her about the
was burned—as to the number of acres—and said
wanted to send in an application or report
npany as to whose grain it was, and as to the
of damage. Able counsel for plaintiff in error say

that ordinarily evidence of this kind would not be objectionable, but that, in view of the fact that there was not sufficient evidence to show that the fire was started from defendant's engine, this testimony might have been taken by the jury as an admission of the company that it did start the fire. We have examined the record of the admission of this evidence, and are satisfied that it was admitted for no such purpose. Plaintiff had alleged in his petition that he had presented his claim for damages to the company, and that it failed and refused to pay the same. This allegation was denied by defendant's answer, and the evidence was probably admitted for the purpose of showing that plaintiff had made a claim of damage before the action was instituted. For this purpose it was unobjectionable, and if defendant desired to control it to this end, and this alone, it should have done so by requesting a proper instruction. This it did not do.

Finding no reversible error in the record, we therefore recommend that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

PER CURIAM. The conclusions reached by the Commissioners are approved, and, it appearing that the adoption of the recommendations made will result in a right decision of the cause, it is ordered that the judgment of the district court be affirmed.

ZOLPHER v. CAMDEN & S. RY. CO.

(*Court of Errors and Appeals of New Jersey, June 18, 1903.*)

[55 Atl. Rep. 249.]

Collision between Street Car and Another Vehicle—Negligence.

Whether there is negligence in the operation of an electric street car which collides with another vehicle ahead of it upon the track depends upon the speed of the car, and the distance which the car had to go at the time the motorman saw, or ought to have seen, the vehicle upon the track.

Same—Same.

If the distance between the car and the vehicle is in dispute, the existence of negligence is a question for the jury, unless the distance is, in any view of the evidence, so small that the motorman could not stop a car running at a reasonable rate of speed.

Contributory Negligence—Bicyclist Stopping upon Track—Failure to Signal.

It is not necessarily negligent for a traveler upon a bicycle to stop upon the track in front of an approaching car, without looking behind him, when the usual audible warning of its approach, by bell or gong, is not given by the motorman.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Anton Zolpher against the Camden & Suburban Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Joseph H. Gaskill, for plaintiff in error.
Howard Carrow, for defendant in error.

ıYZE, J. The plaintiff, while riding a bicycle upon
ck of the defendant in advance of an approaching car,
uck by the car and injured. He had been riding on
ht-hand side of the street until he came to a pile of
which obstructed his passage. He then turned on the
There was a high wind and considerable dust. While
on the track the wind came against him so strong, as
ified, that he had to get off. He did not then look
As he put his foot on the ground, the car struck
d dragged him, he says, for about 40 feet. There was
ny that no warning was given of the approach of the
e was a few feet in advance of the car when he went
rack. The estimates vary from 12 to 20 feet. There
imony to the effect that the car was going quite fast.
n to nonsuit was refused.
r, a witness for the defendant, testified that he was on
t platform; that he shouted to the motorman, "Look
re is a man," and the motorman immediately gave
rp sounds of the gong; that the plaintiff was not over
rom the car when he went on the track; and that the
n it struck him, was going at the rate of 5 miles an
He was asked on cross-examination why it was nec-
r him to call the motorman's attention to the fact
aintiff's being on the track, and he answered: "Why,
uld I do—stand there and let him run over him?"
lative rights of the plaintiff and defendant in the use
ghway are settled. Camden, Gloucester & Wood-
lway Co. v. Preston, 59 N. J. Law, 264, 35 Atl. 1119,
Eng. R. Cas. 616; Consolidated Traction Co. v.
59 N. J. Law, 577, 37 Atl. 135; Hughes v. Camden
ban Railway Co., 65 N. J. Law, 203, 47 Atl. 441.
uestion is whether the motorman, if he had been run-
car at a reasonable rate of speed, could, by the exercise
ry care, have stopped it in time to avoid the collision.
ver must depend upon the distance which the car
at the time the motorman saw, or ought to have
bicycle upon the track in front of him. If that
is so small that the motorman could not, by the exer-
dinary care, have stopped the car, if he was running
nable rate of speed, the defendant is not liable. If
nce was sufficient to allow the motorman, by the
of ordinary care, to stop a car running at a reason-
of speed, the failure of the motorman to stop subjects
dant to liability. In the present case the jury had
to believe the testimony of the plaintiff that he had
eet along the track before he was struck. If so, the
n had at least that distance in which to check, and,
ry, stop, his car. We think it was a question for
whether a failure to stop in that distance established
e. Even if the motorman did all that he could to
car when he saw the bicycle on the track, there
ll be evidence of negligence, if his failure to stop

was due to the fact that he had been running at an unreasonable rate of speed. That he was running at an unreasonable rate of speed could properly be inferred from the testimony of the plaintiff that he was dragged 40 feet. Whether the estimate of the distance traversed by the car after the collision was 40 feet, as the plaintiff said, 20 feet, as Welsh said, or 6 or 8 feet, as the motorman said, or 3 feet, as Taylor said, was a question depending on the credibility of the witnesses, and to be determined by the jury. . The greater the distance, the stronger the inference that the car was running at an unreasonable rate of speed prior to the effort made by the motorman to stop it.

The greatest difficultv in the case arises from the fact that the plaintiff stopped in the car track, and it is forcibly argued that the motorman could not anticipate this action of the plaintiff. If this case had rested on the plaintiff's case alone, I should have difficulty on this score; but, in my judgment, the testimony of Taylor justified the inference that the motorman was inattentive, and that if he had given proper attention the accident might have been avoided. Greater care and attention is necessarily required of the motorman when a vehicle is on the track in front of him than when he has a clear road.

The question whether the plaintiff himself was not negligent in failing to look around before stopping his wheel is also one of difficulty, but we think it was a question for the jury whether the motorman gave warning by the usual audible signal of gong or bell; and if no warning was given, such as would naturally be given by a car overtaking a vehicle, and approaching so close, then it was also a question for the jury whether the plaintiff was negligent in stopping. The case differs from cases where the traveler undertakes to cross directly in front of an approaching car. In this case it is proved that the plaintiff got safely on the track at least 12 feet in advance of the car. He was not bound to look behind him after he was fairly on the track. It then became the duty of the motorman to give warning, and to exercise reasonable care to avoid a collision.

The only errors assigned are the failure to nonsuit and the failure to direct a verdict. The duty of the trial judge, as this court has said in Newark Passenger Railway Co. v. Block, 55 N. J. Law, 605, 27 Atl. 1067, 22 L. R. A. 374, 56 Am. & Eng. R. Cas. 590, is to say whether any facts have been established from which negligence may be inferred. "If none, there is no case to go to the jury; but if, from facts established, negligence may reasonably and legitimately be inferred, it is for the jury to say whether from those facts negligence ought to be inferred." Applying this rule to the present case, we think the facts fairly presented a question for the jury, and we find no error in the refusal to nonsuit and to direct a verdict.

The judgment should be affirmed, with costs.

ATCHISON, T. & S. F. RY. CO. *v.* SCHWINDT.

(*Supreme Court of Kansas, May 9, 1903.*)

[72 Sup. Ct. Rep. 573.]

—Injury to Person on Track—Contributory Negligence.
ailroad tracks are laid in a public street, and there is room
ıo wishes to travel along the street to walk in safety outside
:ks, and there is no reason resting in either necessity or con-
'or his going upon them, his walking along a track between
; such negligence on his part as to prevent recovery for being
ı train, notwithstanding the negligence of the railroad com-
:ss the injury is intentionally and wantonly caused.
ıs by the Court.)

c. Error from District Court, Lyon County; Dennis
Judge.

by Charles Schwindt, administrator, against the
, Topeka & Santa Fe Railway Company.
ent for plaintiff, and defendant brings error. Re-

lurd and O. J. Wood, for plaintiff in error.
& Hamer and Kellogg & Madden, for defendant in

N, J. On December 29, 1900, J. P. Starr was struck
l by a freight car on the track of the Atchison,
t Santa Fe Railway Company on Third avenue, in
His administrator sued the company and recov-
lgment for $2,500, which the defendant now seeks to
:rsed. The only claim of error which it will be nec-
consider is that the trial court erred in overruling a
to the evidence of plaintiff for the reason that it
ıch contributory negligence as to preclude a recov-
: facts shown by the evidence, so far as they affect
er, are substantially as follows: Third avenue runs
west, and at the place where plaintiff's decedent was
d for a distance of several blocks each way, is
ıd leveled to the top of the railroad ties for its full
30 feet. Four tracks are laid in the street, also run-
and west. The one farthest north is called the
ack," and that next to it (distant about five feet) the
ck." A spur track connects these two, its connec-
the main track being west of its connection with the
:k, thus permitting east moving cars to be transferred
m the main to the house track. The entire street
e for walking, so far as the surface of the ground
ıed—between the tracks, upon the tracks, and both
south of all the tracks. The main thoroughfare,
ple do most of their traveling, is on the south part
nue and south of the main track, if not of all the
ıt there are various paths worn, and there is con-
space north of the house track. About 10 o'clock

at night Starr was walking west on the main track. At some distance west of him defendant's employees made a "flying switch" for the purpose of transferring a freight car from the main to the house track. An engine, with this one car attached, started from a point west of the switch where the spur track connects with the main track, came east with sufficient rapidity to give the car momentum, dropped the car west of the switch, and, running on ahead of the car, passed over the switch along the main line, the switch being then thrown so as to cause the car, under the impetus thus given it, to pass over the spur to the house track. After passing the switch, the engine slowed down, and the car, running parallel with it on the house track, was gaining upon it, and had almost overtaken it, while Starr was still walking up the main track towards the engine. There was a bright headlight on the engine. Starr did not leave the main track until the engine was very close to him. Of plaintiff's three witnesses of the affair one stated the distance as 6 or 8 feet, another as 15 feet, and the third as 15 or 16 feet, although his testimony showed some confusion between feet and paces. The petition says (but it is not in evidence) that employees on the engine hailed Starr, and he looked up, and saw his danger. To avoid the engine, he stepped from the main track to the north, and was struck and instantly killed by the car on the house track.

Preliminary to the discussion of the question of contributory negligence proper, it may be advisable to consider a claim of plaintiff in error that, while Starr was not technically a trespasser, yet the railroad company had a right to the exclusive use of its tracks, even where laid in the street, and therefore owed to him no duty except not willfully to injure him after discovering him in a place of danger. In view of this claim the defendant in error calls attention to the fact that the ordinance granting permission for the laying of these tracks provided that, after putting them down, the railroad company should restore the street to such a condition that their construction should not interfere with its free use as a highway. This, however, we regard as only a substantial equivalent for the statutory obligation on the part of a railroad company using a street to restore it "to its former state or to such state as to have not necessarily impaired its usefulness" (subdivision 4, § 1316, Gen. St. 1901), an obligation that exists even in the absence of statute (Elliott on Roads and Streets [2d Ed.] § 809). The expressions of courts regarding the relative rights of the railroad company and the public where a track is laid in a highway are conflicting, but the conflict is probably less as to the real nature of such rights than as to the proper language to use in defining them. Elliott on Roads and Streets (2d Ed.) § 810; Tunison v. Weadock (Mich.) 89 N. W. 703; Adams v. Wilmington & N. Elec. Ry. Co. (Del. Super.) 52 Atl. 264; Toledo, Wabash & Western Ry. Co. v. Harmon,

98, 95 Am. Dec. 489; Louisville, N. A. & C. Ry. Co.
ps (Ind.) 13 N. E. 132, 31 Am. & Eng. R. Cas. 432,
t. Rep. 155; Louisville & Nashville R. R. Co. v.
., 21 Fla. 700. We deem it unnecessary to go further
; feature of the matter than to say that we do not
he doctrine of an exclusive or paramount right in the
company. In Kansas Pac. Ry. Co. v. Pointer, 9
), 628, this court has said that the rights of the rail-
ıpany and of the public are "about equal."
iff in error makes the broad claim that one who is
while walking upon a railroad track longitudinally,
ı it is located in a public street, is by that act guilty
ıbutory negligence, and thereby barred from a recov-
ıe strongest case in support of this contention is I. C.
). v. Hall, 72 Ill. 222, wherein it is said: "It is neg-
for a person to walk upon the track of a railroad,
laid in the street or upon the open field, and he who
tely does so will be presumed to assume the risk of
s he may encounter. The crossing of a track of a
is a different thing. The one is unavoidable, but in
r case he voluntarily assumes to walk amid dangers
ly imminent. It is sought, in this case, to justify the
of appellee in traveling upon the track of the rail-
the fact that there were no good walks elsewhere on
et for persons on foot, nor had the street, outside the
been graded to accommodate the travel. This was
of the company. It was not its duty to grade the
The street is eighty feet wide, and, if graded, might
with safety, as ordinary streets, notwithstanding the
is laid in it. But there was a path between the
ıd one at the side, which appellee could have used
the least danger. The side path was not so easy to
ɔn as that between the rails, but that fact did not
ıppellee in taking the dangerous path. He was
with the dangers to which he was exposed, and we
ıclude he voluntarily assumed the hazard. He could
oided all danger by a little inconvenience, but he did
ıse to do it. The injury received must, therefore, be
d to his want of ordinary care." In McAllister v.
on & N. W. Ry. Co. (Iowa) 20 N. W. 488, 19 Am. &
Cas. 108, and in Kenna v. Central Pac. R. Co. (Cal.)
332, parts of the above excerpt, including the first
, are quoted approvingly, but neither case is founded
injury occurring in a public street. In I. C. R. R.
aches, 55 Ill. 379, the defendant asked the court to
nstruction ending as follows: "If the jury believe
: evidence that in this case the deceased, Jacob
was upon the track of the defendant's railroad, not for
ose of crossing over the same, but for the purpose of
ıg the same as a footpath from his place of labor to his
e, it was negligence on his part to employ such rail-

road track for such a purpose, even though the jury should believe from the evidence that at the time he was so injured by defendant's cars he had actually proceeded to and arrived at a point within the boundaries of a public highway." Of this instruction it is said in the opinion: "No objection is perceived to this instruction. It is evident that a place where a railway crosses a common highway is of more than ordinary danger when cars are frequently crossing at that point, and it is evident that all persons of ordinary intelligence should use greater precautions to avoid danger than at a place of less hazard. While all persons have a right to cross the railroad track at the intersection of the two ways, it is the duty of such persons to do so with all reasonable dispatch, and it would be negligence in an intelligent person to be on the track of a railroad constantly used, unless for the purpose of crossing the same. These principles are fairly and clearly announced by this instruction, and it should have been given." A contrary view is expressed in Kroeger v. Texas & P. Ry. Co. (Tex. Civ. App.) 69 S. W. 809, 811, where it is said: "The jury should not have been told that it was appellant's duty to have walked on the outside of the rails if the roadbed was wide enough to leave sufficient room, in good condition for walking, outside the ties, for this was in effect telling them that he would, as a matter of law, be guilty of contributory negligence in walking down the center of the track between the rails." In Lake Erie & W. R. Co. v. Brafford (Ind. App.) 43 N. E. 882, 885, it is said, citing various Indiana cases: "Appellee's decedent was not a trespasser, nor necessarily guilty of negligence, in walking along a railroad track laid in a public street." Pittsburgh, C., C. & St. L. Ry. Co. v. Bennett (Ind. App.) 35 N. E. 1033, and Fulmer v. Illinois Cent. R. Co. (Miss.) 8 South. 517, are to the same effect. In Fehnrich v. Mich. Cent. R. Co. (Mich.) 49 N. W. 890, the second paragraph of the syllabus reads: "One who is using a street for the purpose of travel has a right, when he comes to a railroad track, not merely to cross it squarely, but to walk upon it in getting off the street to a more direct route; and he is not a trespasser so long as the track continues along the street." The trial court held to the contrary, and two of the five judges of the Supreme Court dissented from the majority decision, and voted to affirm; citing Kelly v. Mich. Cent. R. Co. (Mich.) 31 N. W. 904, 28 Am. & Eng. R. Cas. 633, 8 Am. St. Rep. 876.

These citations show some conflict of authority upon the question whether the mere fact of walking along a railroad track laid in a public street constitutes negligence.. There is here present, however (as in several of the cases cited), an important element that limits the scope of the inquiry, in this: that the evidence discloses that the decedent, for the purpose of passing along Third avenue, could as well have kept off the tracks as upon them. The usual course of travel was

outh of them, while between them, or, at all events, to h of them, there was also sufficient room for walking y, without subjecting the pedestrian to any inconven- hatever. There is nothing in the record that suggests ntest reason for walking upon the tracks, rather than re. The question for our determination is, under rcumstances, does the voluntary choice of the tracks tpath constitute a want of ordinary care? In Tucker O. R. Co., 8 C. C. A. 416, 59 Fed. 968—a case of in- a licensee, not, however in a highway—it is said: ack of a railroad, over which frequent trains are pass- place of danger. A person who goes upon it un- ily or without valid cause, voluntarily incurs a risk consequences of which he cannot hold other persons ible." The second paragraph of the syllabus reads: egligence which will justify the withdrawal of a case e jury for a licensee to walk on or near a track in a yard, when, in the exercise of due care, it is admitted could have walked safely by the side of such track." s v. Galveston, H. & S. A. Ry. Co. (Tex. Supp.) 11 S. 39 Am. & Eng. R. Cas. 372, the following language is cognizing a distinction between the necessary and vol- ise of a railroad track: "Prudence may demand that nger should not go upon the track if it could be conven- voided; but, if the use of the track as a footway be necessary to the use of the street, one so using it ot be declared a trespasser." And an allegation in tion that the railroad track was "necessarily used" by lic was held to mean that the street was so narrow or se obstructed that there was not room to walk in the thout going upon the track. In the opinion in L. & N. o. v. Yniestra, 21 Fla. 700, where contributory negli- as held to bar recovery, it is said: "But it is insisted fact that the track of the railway company being laid lic street, where the deceased had a right to walk, his act of being on the track at the time of the acci- the presumption of want of due care and precaution ould arise if he were a trespasser on the track. We le to perceive the force of this argument. * * * ase there was no necessity for the deceased to walk ong the track of the railroad. The walking was as either side. In the case of crossings there is, in addi- he right to cross the track, a necessity for doing so e person crossing has any occasion to go to the oppo- of the track from the one on which he may be." In se of the decision in Gulf, C. & S. F. Ry. Co. v. Wilkins v. App.) 32 S. W. 351, in which contributory negli- as held to prevent a recovery, it is said: "The evi- arrants the conclusion that appellant, when struck, ey street, but he was at a point in it which was not a crossing. * * * Appellee was not attempting to

cross the railroad, but was walking parallel with it, and near enough to it to be struck by the car. * * * It may be conceded, also, that appellant was guilty of negligence in switching the car across or along the street as it did. The question, then, remains, was appellee free from negligence in walking so close to the track as to be struck, without looking behind him? In the first place, his act in walking so close to the track exposed him to constant danger. This is so obvious as to need no illustration. * * * Nor is he relieved by the fact that when struck he was in a street. That fact has not, so far as we can see, any influence upon the question of his negligence. * * * He was not attempting to cross the street. The risk which he would have incurred had that been his predicament would have been very small compared with that to which he was exposed in walking along the track. * * * One walking as was appellee is constantly exposed, and at the same time is situated so that he cannot constantly see the dangers that approach; and this shows the fact that one who voluntarily places himself in such a situation cannot be truly said to be acting prudently." In McIlhaney v. Southern Ry. Co. (N. C.) 26 S. E. 815, 6 Am. & Eng. R. Cas., N. S., 693, the plaintiff had been injured while walking along a railroad track in a street nearly taken up with the tracks. The spaces between the tracks were paved with coal dust, and afforded a good walking way. In the decision it is said: "Although the public were accustomed to use the street and the tracks for walking ways, yet the plaintiff must have known that such use was at all times attended with some risk. And this risk was necessarily increased with the darkness of the night. The use to which this street was put was a standing warning to pedestrians to be most careful when they undertook to walk through it. * * * This is not the case of one attempting to pass at a railroad crossing in a city. * * * When, under these circumstances, the plaintiff left the safe walking way where he was—a place prepared by the defendant, and where no harm could have come to him had he continued in it—the night being dark, and it raining, with no lights on the street, and put himself on the defendant's track, he was negligent, and contributed to his own injury. * * * But it must be borne in mind that the place where the plaintiff was injured was not a crossing, but upon a street filled up with four railroad tracks, and constantly used for railroad purposes. The facts concerning plaintiff's conduct were undisputed, and we think but a single inference could be drawn from them by fair-minded men, and that is that a prudent man would not have acted as the plaintiff did on the occasion of his injury." The syllabus concludes: "Held that, if plaintiff would have been safe in the space between the tracks, it was negligence for him to step on defendant's track." In Beck v. Portland & V. Ry. Co. (Or.) 34 Pac. 753, an action for injuries from being struck by a train while

ł was walking along a railroad track in a street, the paragraph of the syllabus reads as follows: "Nor is it ı such case, after evidence that there was another road ›laintiff could have chosen, to charge that a man can- deliberately, and with his eyes open, into danger, and ımplain of another that he is injured; that it is his use all ordinary means for self-preservation, and, if he lo that—if there is a choice of ways for him to pass, one l the other dangerous, and, with knowledge of the sit- he takes the latter—he must abide the consequences." ıghrey v. Pa. R. Co. (Pa.) 50 Atl. 972, 2 R. R. 25 Am. & Eng. R. Cas., N. S., 576, the Supreme Court ɜ the opinion of the lower court, reading as follows: onsuit was entered in this case because plaintiff's own ıny showed contributory negligence in the part of the of the accident. He was walking along a street occu- a double-track railway, on one of the main tracks, or : to it as to be struck by the passing engine. It ap- hat there are no sidewalks on this street, but that : at each side of these main tracks room for a wagon to ›ng. Under these circumstances, without explanation ıecessity, we must conclude that it was negligence for rty to walk along the track, just as it would be negli- ›r foot passengers without necessity to leave a side- ıd walk in the roadway. But it is said that at the f the accident there was a siding which made a third ı the street. This might justify or excuse a walking iding, but not on the main track. There would seem, re, to have been abundant room on the side of the way from the siding for this person to walk, and he ıve here walked in safety from engines on either the ack or siding. In any event, nothing has been shown bsolves him from the charge of negligence in walking ıe main track."

rmony with the spirit of these expressions, we hold ıere railroad tracks are laid in a public street, and room for a pedestrian who wishes to travel along the › walk in safety outside of the tracks, and there is no 'esting in either necessity or convenience for his going em, it is negligence for him to walk along a track be- he rails. Since the negligence of the deceased in upon the track obviously contributed to the occur- ıat caused his death, it follows that the demurrer to ence should have been sustained.

rgued by defendant in error that the conduct of the y was of such a character as to cut off the defense of ıtory negligence. To sustain this contention would a finding that the injury was intentionally and wan- used by the defendant. U. P. Ry. Co. v. Adams, 33 7, 6 Pac. 529. We do not think that the evidence

would justify such a finding, nor was this theory presented by the trial court to the jury.

Even if the evidence had shown a substantial reason for walking upon the tracks, rather than outside of them, there is another feature of the case that might prevent a recovery. Plaintiff's evidence tends to show that there was nothing to prevent decedent from seeing the car in time to avoid it, unless it was the fact that the glare of the headlight practically blinded him. The petition alleges that it confused his vision. While the occurrence took place at night, and the testimony does not disclose the character of the artificial light, the eyewitnesses already referred to were able to see the car for a time, and perhaps until the engine cut off their view. One of them said there was nothing to obstruct decedent's view of the car, unless the headlight blinded him. This language obviously has reference to anything that might in any way have prevented decedent's seeing the car, and not merely to an intervening obstacle. In the brief of plaintiff in error it is said that Starr stepped out from the glare and blinding light caused by the headlight of the engine into the darkness north of the main track. If the only thing that prevented him seeing the car in time to avoid it was the fact that he had voluntarily remained directly facing the headlight until it temporarily blinded him, or if he stepped upon the house track when he was in such condition that he could not see whether it was clear or not, his situation was very similar to that of one who goes upon a railroad track while his view is temporarily obscured by smoke, or by some obstruction due to his own act, and he would not be entitled to recover. As a decision of this question is not necessary to a determination of the case, we shall not pass upon it.

The judgment is reversed and the case remanded, with directions to grant a new trial for the error in overruling the demurrer to the evidence. All the Justices concurring.

KANSAS CITY, M. & B. R. CO. v. HAWKINS.

(Supreme Court of Mississippi, April 20, 1903.)

[34 So. Rep. 323.]

Railroads—Killing Animals on Track—Failure to Warn—Findings—Evidence.

Plaintiff with his bloodhound and others were walking along defendant's railroad track in search of criminals, when a freight train approached at a high rate of speed and without warning. Plaintiff and his companions escaped injury, but were unable to get plaintiff's dog from the track, which was struck and killed. The engineer testified that he was keeping a strict lookout, but saw neither the men nor the dog, and did not know that the dog was killed, but that no signals were given: *held*, that the evidence warranted a finding that the engineer did see or should have seen the dog, and that his failure to give warning constituted such carelessness as amounted to design, and rendered the company liable.

l from Circuit Court, Marshall County; P. H. Judge.

by C. S. D. Hawkins against the Kansas City, Mem- irmingham Railroad Company. From a judgment in plaintiff, defendant appeals. Affirmed.

; a suit by appellee, Hawkins, against appellant, to he value of a bloodhound, killed on its road in June, here was a verdict and judgment for plaintiff for $450, ıdant appealed. The evidence was, in substance, s: Plaintiff was employed by the sheriff of Marshall Miss., from whom some prisoners had escaped, to n up with his dog. At the time the dog was killed, :e two other men and two other dogs along with and his dog. They had trailed the prisoners down ɔad track, going west 800 or 900 yards, and were in a there was also a curve in the railroad before it the curve extending through the cut. Just before passed that killed the dog, which was a freight train, ;er train passed them, and it blew its whistle, and all got off the track, and took the dogs off; but this ain ran upon them very fast and gave no warning of no whistle was blown, and the bell was not rung. were all walking along the track together, and one ɔn the track 8 or 10 feet ahead of them, and Mr. dog was 20 or 30 feet ahead. The first thing that warning of the approaching train was the flash of ight, when one of the men said, "Look out, here rain," and all of the men at once got off the track, earest dog was reached and gotten off the track, but not time enough to get to the dog that was killed. ıeer and fireman both testified that they did not dog was killed, and that no bell was rung, and that e was not blown. The engineer said he was keep- :t lookout, and did not see the men nor the dogs. an did not recollect what he was doing.

uchannan, for appellant.
ler & Alexander, for appellee.

)ON, J. If the engineer was on the lookout, as he as, in coming around a curve debouching into a cut, ave seen the men and dogs. The jury manifestly ther that he did see them, or should have seen them lookout, in entering so dangerous a piece of road. ıo pretense that he was engaged about his engine. ɔf his whistle would, in all probability, have pre- : damage. From the evidence the jury must have e did see, and, in that case, the carelessness was "so o be tantamount to design." R. R. v. Holliday, 79 30 South. 820, does not apply to the facts here.
l.

HOLCOMBE *v.* SOUTHERN RY. CO.

(*Supreme Court of South Carolina, April 7, 1903.*)

[44 S. E. Rep. 68.]

Injury to Person on Platform—Unloading Baggage—Question for Jury.

In an action for injuries received by a trunk thrown against plaintiff while defendant's employees were unloading baggage at the depot, it is a question for the jury whether the railroad company was negligent.

Same—Care Due Licensees and Passengers.*

It is immaterial whether a person injured by an employee of a railroad company in unloading baggage at a depot was a licensee or a passenger.

Prospective Passengers.

In an action for injuries received by the negligence of employees of defendant railroad company in unloading baggage at a station, an instruction that, if plaintiff was not in the station within a reasonable time before the departure of the train, then defendant did not owe to her so high a duty if such person is not then in law a prospective passenger, and if she forsakes the station house, and goes to a part of the depot grounds, where she has no legal right to be, then the railroad company was bound only to do no willful injury to such person, was proper.

Appeal from Common Pleas Circuit Court of Anderson County; Gage, Judge.

Action by Ina Holcombe against the Southern Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

T. P. Cothran, for appellant.

Breazeale & Rucker, for respondent.

JONES, J. The plaintiff brought this action for damages for personal injury resulting from alleged negligence of defendant in throwing a trunk against her while its servants were unloading baggage at the Anderson Depot October 19, 1900. This appeal comes from the judgment on verdict in favor of plaintiff for $600, upon exceptions to the refusal of the motion for nonsuit and the charge to the jury.

The nonsuit was properly refused. There was evidence that plaintiff, with her several small children, went to the station at Anderson to take defendant's 9:45 a. m. train to Pelzer, S. C., as passenger, and on arrival at the station found that such train had gone, whereupon she concluded to remain at the station waiting room for ladies for the purpose of becoming a passenger on defendant's 2:45 p. m. train for Pelzer. After the arrival of defendant's 11:15 a. m. train from Belton, plaintiff, according to her testimony, was just outside the waiting-room door, having gone out to get one of her children, who ran out of the waiting room on the approach of the train. The defendant's baggage car was

*As to the liability for injuries to persons who are neither passengers nor railway employees, resulting from unsafe station and depot premises, see monograph appended to Cincinnati, H. & D. R. Co. *v.* Aller (Ohio), 21 Am. & Eng. R. Cas., N. S., 304.

in front of the waiting-room door, about 16 or 17 feet
nd its servants, while unloading several trunks there-
cording to plaintiff's statement, threw one of the
gainst her leg, and injured her. If the baggage had
ıdled with the care due under the circumstances, it is
able that plaintiff could have been injured by collision
unk, when she was standing some 16 feet from the
car. It was properly left to the jury to say whether
y was the result of defendant's negligence. Under
it was immaterial whether plaintiff was a passenger in
lation of law, or whether she was there as a licensee
ission of the defendant company.
lant's counsel requested the court to charge the jury
s: "A person coming to a railroad station with the
ı of taking defendant's next train becomes, in con-
on of law, a passenger on defendant's road, provided
ı coming is within a reasonable time before the time
leparture of said train." To which the court re-
as follows: "The Court: That is correct, and I leave
jury to say whether or not the plaintiff in this case
the station in a reasonable time before her car left,
ıe did, then, in contemplation of law, she was a pas-
.nd ought to have the rights of a passenger; but, if
ıot come there in a reasonable length of time before
rture of the next train, she is, in contemplation of
not a passenger." The court refused to charge de-
s second request, as follows: "If the plaintiff arrived
pot too late to take the 9:45 a. m. train, and con-
wait there in order to take the 2:45 p. m. train, she
ıg for her own convenience, and cannot be considered
enger, with the obligations due to her as such." The
arged defendant's third request, after inserting the
brackets, as follows: "If the defendant allowed
o wait in its waiting room for the next train, due
in four or five hours [and if, in the opinion of the
ıt was an unreasonable time], plaintiff became
ı licensee, not a passenger, and was entitled to only
as is due a licensee." Upon the foregoing appel-
pts as follows: "Error in holding that it was a ques-
act for the jury whether the plaintiff went to the
easonable time before the departure of the train, the
having testified that she went to the depot about
., found the train she expected to take gone, and
d to wait until the next train was due to depart, at
ı. As matter of law, the court should have held that
tiff was not at the depot within a reasonable time
e departure of her train, and was not, therefore,
o the extraordinary care due to a passenger." The
as to whether plaintiff was a passenger at the time
ury, and as to the degree of care which a railroad
should exercise towards her as such, was a matter

of appellant's own choosing. The complaint merely alleged that plaintiff, at the time of her injury, was at defendant's station "for the purpose of becoming a passenger," which implies that she was not then a passenger. The real issue, then, was as to the care which a railroad company owed to one at its station waiting to become a passenger. On this issue the jury, at appellant's request, was very plainly instructed: "If defendant exercised ordinary care in handling baggage, and plaintiff was where she had no right to be, the defendant is not liable for injury received by plaintiff." Under this instruction the verdict shows that the defendant did not exercise ordinary care in handling the baggage, and that plaintiff was where she had a right to be. It was, therefore, wholly immaterial whether plaintiff was at the time of the injury a passenger or a licensee, as the defendant failed to observe ordinary care to prevent injuring her. But, assuming that it was in issue whether plaintiff was a passenger, we think there was no error in the court leaving it to the jury to determine from all the circumstances whether the relation of passenger and carrier existed. In the case of Johns v. R. R. Co., 39 S. C. 162, 17 S. E. 698, 20 L. R. A. 520, 39 Am. St. Rep. 709, the court held that a railroad company owed the duty of exercising extraordinary care in providing safe approaches to one coming to the depot to become a passenger, whether he had a ticket or not. In that case the court quotes from 2 Am. & Eng. Enc. of Law, 744, as follows: "If a person has the bona fide intention of taking passage by a train, and if he goes to a station at a reasonable time, he is entitled to protection as a passenger, not only from the moment he enters upon the carrier's premises, but also while en route to the station in an omnibus run by the railway to take the passengers to their trains." In the case of Phillips v. Southern Ry. Co., 124 N. C. 123, 32 S. E. 388, 45 L. R. A. 163, the court held: "A party coming to a railroad station with the intention of taking defendant's train is, in contemplation of law, a passenger on defendant's road, provided that his coming is within a reasonable time before the time for departure of said train." In the case of Harris v. Stevens, 31 Vt. 79, 73 Am. Dec. 337, the court holds that the right to enter and remain at a railroad station house "extends only so far as is reasonably necessary to secure to the traveler the full and perfect exercise and enjoyment of his right to be carried upon the cars; and what is a reasonable time must depend upon the circumstances of each particular case." In the case at bar there was nothing to show that plaintiff remaining in the waiting room for passengers for several hours in the daytime was contrary to any rule or regulation of the company. The proper inference, under the circumstances, probably would be that, if there was no regulation fixing proper hours for the use of the waiting room, and plaintiff was permitted to use it

ɔurpose of taking the next train, her use of it for such was for a reasonable time; but it was not prejudicial lant, under its requests to charge, to have the matter ɜd to the jury.

lant's fifth exception assigns "error in refusing the ıt's fourth request to charge, which was as follows: efendant provided a reasonably safe waiting room ıtiff's accommodation during her wait, the defendant ɔt be liable to plaintiff for injuries received, if she ed such accommodation, and went upon the station necessarily, to gratify her curiosity, when a train ıe did not expect to take entered the station in the ıe.' Such request contained a legal proposition ap- to the case." In response to this request to charge, t instructed the jury as follows: "The Court: I re- harge you that in this language, but charge the fol- 'If any person be not in the station house within a ıle time before the train's departure, then the rail- s not owe to such person so high a duty, for the per- ıt then, in law, a prospective passenger. If, at the person forsake the station house, and goes to a place : or she has no legal right to be, then the railroad was ıly to do no willful injury to such person.' " We see in the instructions of which appellant has any right ain. The jury, under appellant's sixth request, were ' instructed: "If the plaintiff was guilty of the least ɔf negligence which contributed as a proximate cause ury, she is not entitled to any damage."

ceptions are overruled, and the judgment of the cir- t is affirmed.

ACKERMAN v. UNION TRACTION CO.

(*Supreme Court of Pennsylvania, May 4, 1903.*)

[55 Atl. Rep. 16.]

Boy on Freight Car—Negligence of Motorman—Evidence.
: in action against a street car company, causing death of boy he side steps of a freight car on a track parallel to the street ered, and *held* to show the motorman not guilty of negligence.

ɜ of Motorman—Sudden Emergency.*
motorman is confronted with a sudden danger, he is not ailure to follow what might appear on reflection to be the ɜe.

from Court of Common Pleas, Philadelphia County.
by Charles W. Ackerman against the Union Traction

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e care required of those in charge of street cars to avoid col- ı persons, animals, or vehicles, see monograph appended to v. Louisville Ry. Co. (C. C. A.), 1 R. R. R. 838, 24 Am. & .s., N. S., 838.

Company. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Bernard Harris, for appellant.
Thomas Leaming and Russell Duane, for appellee.

FELL, J. This action is by a father to recover damages for the loss of his son 13 years of age, who was killed under the following circumstances: The boy was riding on the side steps of a freight car of the Philadelphia & Reading Railroad Company, which was running north on Second street. The defendant's electric car was running south, and the tracks of the two roads were parallel, and so close that there was a space of only a few inches between the sides of the cars as they passed. The freight train approached Second street on a curve, and turned on to the street a short distance from the place of the accident. The freight car could be seen by the motorman when it was 300 feet distant, but the boy could not be seen until the freight car reached a position where the tracks were parallel. This was about 150 feet from the spot where the accident occurred. The boy was on the sixth car of the freight train, and according to the testimony the train and the electric car were running as fast as cars usually run between crossings, or, as stated by some of the witnesses, much faster than a horse could trot. As soon as the motorman saw the boy, he called to him and made gestures to indicate that he should jump off the step, or climb on the bumper at the end of the car, which was one foot from the step. This warning was disregarded. The boy attempted to avoid injury by straightening his body and keeping close to the side of the car. He was struck on the shoulder, thrown to the narrow space between the tracks, and injured by the wheels of both cars. We find nothing in this situation from which negligence on the part of the motorman can fairly be inferred. He first saw the boy when the distance between them was 150 feet, and they were approaching each other at the rate of at least 15 or 20 miles an hour. With a clear understanding that the boy would be injured unless he got out of the way of the electric car, the motorman called and motioned to him to jump off or climb on the bumper. Possibly, under the circumstances, it would have been better to stop the car, and thus lessen the injury, than attempt to avert it altogether; but, since he was confronted by a sudden and unexpected danger, and had but a moment in which to act, the motorman cannot be held liable for failure to see and follow what might appear on reflection to have been the wiser course. Hestonville, etc., R. Co. v. Kelley, 102 Pa. 115, 11 Am. & Eng. R. Cas. 123; Phillips v. People's Pass. Ry. Co., 190 Pa. 222, 42 Atl. 686.

The judgment is affirmed.

COGDELL *v.* WILMINGTON & W. R. CO.

(*Supreme Court of North Carolina, June 10, 1903.*)

[44 S. E. Rep. 618.]

stimony.

:tion for negligent death, whether the plank on which deceased ld, if sound, have been sufficient to have supported a man of t with safety, was not a subject of expert testimony.

Wrongful Act—Presumption of Due Care on Part of sed.*

presumes that a person found dead and killed by the alleged e of another has exercised due care himself.

me—Instruction.

tion for negligent death of a servant, it was error to refuse d charge that the law "presumes" that a person found dead by alleged negligence of another has exercised due care him- o substitute therefor a charge that an "inference arises from :t of self-preservation" that the person killed has exercised imself; the words "presumption" and "inference" not, hav- me significance.

ory Negligence—Pleading.

ment that plaintiff's intestate's death was not caused by s negligence, but by his own negligence, is not sufficient to efense of contributory negligence.

n for rehearing. Petition allowed.

·mer opinion, see 41 S. E. 541.

ER, J. This case is before us the third time, upon ı to rehear and revise the former judgment of this ıdered at February term, 1902, affirming the judg- he court below, which was adverse to the plaintiff. is reported in 124 N. C. 302, 32 S. E. 706, and 130 , 41 S. E. 541.

ık it is necessary to refer to only three of the excep- en by the plaintiff at the trial:

ıintiff proposed to ask a witness the following ques- this plank on the apron had been sound, and not rted or rotten, could a man of Cogdell's weight have stood on it with safety and thrown off the lump ıllen on it from the top of the car, without its break- him?" Defendant objected to this question, the was sustained, and plaintiff excepted. We do not : this matter is the subject of expert or opinion evi- 'he witness could well have described the plank and ion, and the jury would then have been just as com- form an opinion as to its strength and safety as the The conclusion reached by the court at the last ı this question was correct, for the reasons stated nion of the court.

intiff in apt time requested the court to charge the "the law presumes that a person found dead and ılleged negligence of another has exercised due care

note appended to Western Maryland R. Co. *v.* State, to use d.), 6 R. R. R. 904, 28 Am. & Eng. R. Cas., N. S., 904.

himself." The court refused to give this instruction, and charged the jury, in its stead, that "an inference arises from the instinct of self-preservation that the person killed has exercised due care himself." We are of the opinion that the court erred in refusing to give the instruction as prayed for by the plaintiff, and in substituting therefor the instruction which it did give with reference to this matter. It is well settled that the court is not required to charge the jury in the very words of a prayer for instruction, but if the prayer contains a correct statement of the law, as applicable to the facts of the case, the court must give it, at least substantially, and cannot substitute an instruction of its own for it, if thereby the instruction as requested to be given is weakened or diminished in its force. While the court is not required to use the words of the prayer, it must not change the substance of it in a way calculated to impair its force. The law does not regard the form, but even the form should not be so modified as to impart to the instruction less weight than it would have with the jury if given as it was submitted to the court, provided always that the instruction, as asked, is in itself correct with reference to the case presented by the proof. In the case now under consideration the court was requested to charge that there was a presumption that the deceased had exercised care, which the court refused to give, but charged the jury that there was an inference that due care was exercised. It is undoubtedly true that the law raises a presumption of care, and the party against whom it is raised must overcome it by proof of facts inconsistent with the fact presumed. The presumption has a technical force or weight, and the jury, in the absence of sufficient proof to overcome it, should find according to the presumption; but, in the case of a mere inference, there is no technical force attached to it. The jury, in the case of an inference, are at liberty to find the ultimate fact one way or the other as they may be impressed by the testimony. In the one case the law draws a conclusion from the state of the pleadings and evidence, and in the other case the jury draw it. An inference is nothing more than a permissible deduction from the evidence, while a presumption is compulsory and cannot be disregarded by the jury. In Johnson v. Chambers, 32 N. C. 292, Pearson, J., distinguishes between a presumption and inference. "Malice," says he, "may in some cases be inferred from the want of probable cause, but the law makes no such presumption. It is a mere inference of fact, which the jury may or may not make, and it should have been left to them." We do not think the charge given by the court in response to this prayer of the plaintiff was the full equivalent, even in substance, of the latter; and, as we have seen, it must be so, to justify the court in changing the form of the instruction. When the court refused to give the instruction as plaintiff requested it to be given, and substituted that which was given,

y might well have inferred that the court was of the ı that the prayer for instruction was too strongly , and that the inference was to be drawn by them, and was not obligatory upon them to infer the fact of care part of the intestate. In the case of Bragaw v. ıe Lodge, 124 N. C. 154, 32 S. E. 544, the court recog- ıe legal difference between a presumption and an infer- The court had charged the jury that, if a notice was ly addressed and deposited in the post office, the law es that it was received, and therefore had been duly but afterwards the court left it to the jury to decide, pen question of fact, or as an inference to be drawn e evidence, whether the notice had been served or not. urt held that it was error to have thus weakened the the presumption.

plaintiff objected to the submission of the issue as to utory negligence, and we think the objection should en sustained. It is alleged in the answer that the in- s death was not caused by any negligence of the de- , but by his own negligence. This is not a sufficient nt of the defense of contributory negligence. Indeed, a statement of contributory negligence at all, for the supposes the negligence of the defendant, which is n the answer in this case. The answer in this respect state any matter which could not have been consid- der the first issue. What is said in the answer is more than an averment that there was no negligence part of the plaintiff, and that the intestate's death was olely by his own negligence. If a pleading is defect- tatement, the defect will be waived, unless the op- party demurs to the pleading for that reason. Where any uncertainty or indefiniteness in the statement, t will order the pleading to be made certain and defi- motion, if made in apt time. This is not a case of e or indefinite statement, but an entire failure to plead nsive matter. The court may, and no doubt will, n amendment of the answer in this respect if the de- desires it.

must be a new trial, because of the errors pointed tition allowed.

GRISWOLD v. BOSTON & M. R. R.

e Judicial Court of Massachusetts, Middlesex, May 23, 1903.)

[67 N. E. Rep. 354.]

n Track—Licensees—Degree of Care.*

plaintiff was injured while walking across certain railroad path running along the same on land belonging to the rail-

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ıe care due licensees on track, see foot-note appended to Bul- ıthern Ry. Co. (Ga.), 6 R. R. R. 606, 29 Am. & Eng. R. Cas.,

road company, and it was proved that persons living in the part of the town toward which plaintiff was going were in the habit of using the track as a route to their homes, plaintiff was a mere licensee, as to whom the railroad company owed no duty except not to willfully or wantonly injure her.

Same—Negligence after Accident.

Where plaintiff was struck and injured while crossing a railroad track without fault of the railroad company, evidence that she was not released from the truck of the tender of the engine for from three to ten minutes, as testified by various witnesses, was insufficient to render the railroad company liable where there was no evidence tending to discriminate between the injury received by her being struck and that caused by the delay.

Same—Same—Assistance.

Where plaintiff was injured by being struck by an engine without fault on the part of the railroad company, the latter was not liable by reason of the fact that its servants did not use their best judgment in affording plaintiff necessary assistance after the accident.

Exceptions from Superior Court, Middlesex County; Jabez Fox, Judge.

Action by one Griswold against the Boston & Maine Railroad. From a judgment in favor of defendant, plaintiff brings exceptions. Exceptions overruled.

Thos. J. Boynton, for plaintiff.
Richardson, Trull & Wier, for defendant.

LATHROP, J. 1. The plaintiff in this case was a girl 19 years old. On October 15, 1900, she was a passenger on a train of the defendant company from Concord to Reformatory Station, and arrived there about half past 5 in the afternoon. It was then growing dark. Instead of going to her home by the highway, she attempted to take a short cut by going over land of the defendant, on which were two tracks, with a path between the two. One of these tracks was a spur track used for cars, and the other was a track running to the roundhouse, where the locomotive engines were kept. While the plaintiff was walking near the fence on the side of the track leading to the roundhouse, the cars had been kicked off onto the side track, and the locomotive engine backed slowly down on the track towards the roundhouse, going at the rate of four miles an hour. The plaintiff, according to her testimony, started to cross the track to the beaten path. As she started to cross, she looked back, and saw the engine, and thought it was upon the same track that the cars were on. While she was between the rails some one shouted to her, and she looked up and saw the engine backing down on the track which she was crossing. She did not hear either whistle or bell; and in her effort to go over the track she fell, striking on her back upon and across one of the rails of the track which she was attempting to cross, so that her head and body lay outside the rail toward the path she had started for, and her feet and legs were within the rails. She testified that there was time for her to go over the track, but after she fell

and she was struck by the rear truck
ed the injuries complained of.
l, against the objection of the defend-
in the part of the town towards
ing were in the habit of using the
e to reach their homes. Assuming
nissible, it only changes the status
of a trespasser to that of a bare
ndant owed no duty but that of re-
vantonly running her down. We
e to show that the servants of the
ng as the plaintiff was alongside
ne had no reason to suppose that
he track, and when she did make
got safely over but for her fall.
ne Railroad, 181 Mass. 322, 63 N.
m. & Eng. R. Cas., N. S., 600,

hat, if the defendant was not in
it owed her a moral and a legal
s it reasonably could, and that
action will lie. It appeared
s injured she screamed, and
judgment it was from eight to
heard the scream until the
vitnesses put the time from
was expert evidence that, if
l for eight or ten minutes, she
the injury would be greater.
, but neither undertook to
received by the truck of the
sed by the delay, and we
could be made which would
Vhen the accident occurred,
notify the station master,
engineer got down from
but did not start up his
ve been a prudent thing
the ground to assist the
Vhen an emergency of this
at the question whether
reasonably done is to be
liberality, and that "we
nay prove to have been
tion in cool blood, but
hurry and excitement of
act." Hawks v. Locke,
52 Am. Rep. 702, per
Vynn v. Central Park,
721, and Stabenau v.

Atlantic Ave. R. R., 155 N. Y. 511, 50 N. E. 277, 63 Am. St. Rep. 698. Viewed in the light of an emergency caused by the negligence of the plaintiff, it would be difficult to hold that there was sufficient evidence to warrant a jury in finding that the defendants' servants acted unreasonably in the slight delay that took place.

But there is another view of this case, which strikes at the foundation of the plaintiff's claim. Her counsel has referred us to no case which supports the proposition that, if a person is injured through no fault of a railroad company, the latter owes a legal duty to the person injured to assist him. There is, of course, a moral duty, but in performing that duty the company is not liable if one of its servants does not use his best judgment in affording the necessary assistance. Many of the cases relied on by the plaintiff are those where a passenger is rightly ejected from a car, but the ejection is effected in a wrong manner. Hudson v. L. & B. R. R., 178 Mass. 64, 59 N. E. 647; Conolly v. Crescent City Ry., 41 La. Ann. 57, 5 South. 259, 6 South. 526, 3 L. R. A. 133, 17 Am. St. Rep. 389; Weightman v. Louisville, etc., Ry., 70 Miss. 563, 12 South. 586, 19 L. R. A. 671, 35 Am. St. Rep. 660. In Northern Central Ry. v. State, 29 Md. 420, 96 Am. Dec. 545, much relied on by the plaintiff, there was evidence of negligence on the part of the railroad company in striking a man at a highway crossing. This being so, the duty of taking proper care of him afterwards resulted from the legal wrong done, and the case differs from the one before us, where no legal wrong was done by the defendant. See Baltimore & Ohio Railroad v. State, 41 Md. 268. The case of Dyche v. Vicksburg, Shreveport & Pacific R. R., 79 Miss. 361, 30 South. 711, 23 Am. & Eng. R. Cas., N. S., 526, proceeds upon the singular ground that if a railroad company, though not in fault in injuring a trespasser, assumes charge of him, there is imposed on it the duty of common humanity, and whether it has performed this duty is a question for the jury. We cannot accede to the doctrine of this case. If it is law, no humane or gratuitous act could be done without subjecting the doer of it to an action on the ground that the defendant ought to have acted more quickly, or with more judgment. It is a doctrine which would allow an action against a Good Samaritan and let a priest and a Levite go free. There have been many cases in our own Reports where railroads have been exonerated when an injury has been inflicted upon a trespasser, but in no case before has it been suggested that a slight delay in assisting a trespasser gave a right of action, or, to go further, that there was any legal duty to give such assistance, although we have no doubt that such assistance has always been rendered.

Exceptions overruled.

UNION PAC. R. CO. *v.* ROESER.

(*Supreme Court of Nebraska, May 20, 1903.*)

[95 N. W. Rep. 68.]

Wrongful Death—Damages.

In an action by an administrator for damages for causing the death of his intestate, it is proper to allege such facts as will show a pecuniary loss to the next of kin.

Same—Sufficiency of Petition.

In such action the petition is not demurrable because it alleges a contract to support the next of kin, made by the deceased in his lifetime, without alleging that the estate of the deceased is insufficient for that purpose.

Injury to Passenger—Contributory Negligence—Extending Person from Car Window.*

If a passenger on a steam railroad extends his person through the window of the car of a rapidly moving train in which he is riding, he is chargeable with such gross negligence as will prevent a recovery of damages for an injury to which such act on his part contributes.

Sullivan, C. J., dissenting.

(Syllabus by the Court.)

Error to District Court, Hall County; Thompson, Judge.

Action by Oscar Roeser, administrator of Niels Rasmussen, against the Union Pacific Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

John N. Baldwin, Edson Rich, W. R. Kelly, and W. H. Platt, for plaintiff in error.

R. R. Horth, for defendant in error.

SEDGWICK, J. The plaintiff, as administrator of the estate of Niels Rasmussen, deceased, brought this action against the railroad company to recover damages for the death of Niels Rasmussen, suffered by injuries received while a passenger from Grand Island to Omaha on one of the defendant's trains. It was at Chapman that the accident occurred. The train did not stop at this station, but maintained its speed of about 40 or 45 miles an hour. In passing this station, deceased raised a window and saluted an acquaintance on the station platform. He extended his head and right shoulder outside of the window, and was waving his hand toward his acquaintance until the train passed the station about 200 feet, when he was struck just above the left ear by an iron ring, about 15 inches in diameter, which was suspended from a crane and holding a mail sack. His skull was broken by the blow, from which he died the following day. The plaintiff recovered a judgment in the court below, which the company has brought to this court for review.

1. The first contention is that the petition does not state a cause of action because it does not contain the necessary allegation under our statute allowing pecuniary damages to the next of kin. The ground of this contention appears to be

*See foot-note appended to Flynn *v.* Consolidated Traction Co. (N. J.), 4 R. R. R. 688, 27 Am. & Eng. R. Cas., N. S., 688.

that the petition alleges that prior to his death the deceased had entered into a contract with his parents by which he was bound to support them, and since this contract could be enforceable against his estate, and there is nothing in the petition to show that the estate is not ample for that purpose, the plaintiff cannot recover in this action. The petition contains an allegation that the deceased promised his parents to support them, and that this promise induced them to come to America to live, and that the parents were depending upon the deceased for the support so promised. It may be that some of the allegations of the petition in this connection were irrelevant, and might have been stricken out upon motion. It is proper in such a case to allege such facts in the petition as will show a pecuniary loss to the next of kin, and some of the allegations complained of were necessary and proper for that purpose. The petition shows that the father is the next of kin of the deceased, and contains the necessary allegation to enable the administrator to maintain this action in his behalf.

2. It is complained that the court erred in admitting evidence that the parents came to this country at the request of the deceased, and relying upon his promise to assist them. It is urged that if the action is based upon our statute such evidence was immaterial, and might have a prejudicial influence upon the jury in estimating the amount of damages; and that, if the action is based upon the contract of the deceased with his parents, then no recovery is allowable. No recovery can be had under our statute except for pecuniary damage. The value in money of the life of one person to another person cannot be determined by mathematical calculations from fixed rules. It is a matter to be estimated from all the conditions existing, and surrounding circumstances, and is peculiarly within the province of the jury. The evidence in question tended to show what the parents were likely to have received in the way of substantial assistance from the deceased had he lived, and were proper for the jury to consider in arriving at a reasonable estimate of the pecuniary loss. The father was the next of kin under the law, and the duty of supporting the mother devolved upon the father. Contributions to support the mother would be a pecuniary benefit to the father which the jury might also consider in determining the father's damage by the death of his son.

3. The principal question in the case is whether the act of the deceased was, under the circumstances, such negligence on his part as will prevent recovery. It appears to be conceded that the company was guilty of negligence which directly contributed to the accident. The injury was caused by a heavy iron ring suspended from a crane which was used to enable trains when passing at full speed to receive or deposit sacks of mail. The post from which it was suspended was set at a distance of about 3 feet from the side of a passing car, and when not in use the iron ring was about 8 feet from

the car, but when placed in position so that the mail sack could be taken from the passing train this ring was about 8½ inches from the car. The train in which the deceased was riding was not a mail train, but the company's agent in charge of the apparatus, from some mistake not explained, turned the crane, and prepared the mail sack so that it might be taken by this train. But for this mistake of the company's agent the accident could not have occurred, so that, the negligence of the company being established, the question, as above suggested, is whether the act of the deceased was of such a nature as to prevent the recovery.

4. It is generally held to be negligence per se, and to be so declared as a matter of law, for a passenger on a steam railway to voluntarily protrude his person through the window of a car while in motion and beyond the line outside of the car. The law requires railway carriers of passengers to exercise extraordinary diligence to accomplish the safe carriage of passengers, so far as human skill and foresight can secure that result. But railways must construct and arrange their tracks, stations, grounds, and equipment, and operate their trains, to attain practical purposes in the transaction of their business. They have not been restrained from constructing tracks with switches in close proximity with each other when necessary. These and other conditions of a similar character justify the general conviction that the only place of reasonable safety for passengers is within the cars.

In Georgia Pac. Ry. Co. v. Underwood, 8 South. 116, 24 Am. St. Rep. 756, the Supreme Court of Alabama, by Judge McClellan, after citing a large number of cases which adhere to the above principle, says: "Against this array of adjudged cases, and to the converse of the proposition stated, there is believed to be in reality but one authority. That is the case of Spencer v. Railroad Co., 17 Wis. 487 [84 Am. Dec. 758], which takes the position, and supports it with vigor, that it is not negligence per se for a passenger to project his arm out of the window of the car in which he is riding. Another case frequently cited and relied on to support this view is that of Railroad Co. v. Pondrom, 51 Ill. 333 [2 Am. Rep. 306]. The conclusion in that case, however, was rested on the doctrine of comparative negligence, a doctrine which, if not peculiar to Illinois, certainly is not recognized in our jurisprudence; and, while the protrusion of the passenger's arm from the window of a moving car was admitted to be negligence, the judgment was allowed to stand because plaintiff's negligence was held to be less than that of the defendant." He then reviews the authorities, and says: "We are, however, satisfied with the rule as formulated, and supported by the great number of adjudged cases, and the texts to which we have referred. The reasons upon which they base the doctrine appear to be eminently sound. Windows are not provided in cars that passengers may project themselves through or out

of them, but for the admission of light and air. They are not intended for occupation. No possible necessity of the passenger can be subserved by the protrusion of his person through them. Neither his convenience nor comfort require that he should do so. It may be, doubtless is, true that men of ordinary prudence and care habitually lean upon or rest their arms upon the sills of windows by which they ride. But this is a very different thing from protrusion beyond the outer edge of the sills and beyond the surface of the car. We cannot concur in the assumption of the Wisconsin court that prudent men are habitually given to thus projecting themselves from the windows of moving trains."

The plaintiff does not contend that this is not a correct statement of the law. In his brief he says: "We have not to deal with the question, was Rasmussen guilty of want of ordinary care? but rather, does the petition disclose such conduct on his part as amounted to a reckless disregard of his own safety and the willful indifference to the consequences liable to follow?" This presents the real question with which we have to deal. Admitting that the act of the deceased was negligent, and that his negligence contributed to the accident, so that it could not have occurred without his contributory negligence, was this negligence on his part of such a character as would prevent a recovery in this case? Our statute provides: "Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." Comp. St. 1901, c. 72, art. 1, § 3. The purpose and meaning of this statute has long been settled in this state. In Omaha & R. V. R. Co. v. Eliza Chollette, 33 Neb. 143, 49 N. W. 1114, decided in 1891, the court, speaking by Judge Maxwell, approved an instruction in the following language: "The term 'criminal negligence,' as it is used in the statute above quoted, is defined to be gross negligence. It is such negligence as would amount to a flagrant and reckless disregard of her own safety, and amount to a willful indifference to the injury liable to follow." This instruction was approved and followed in Missouri P. R. Co. v. Baier, 37 Neb. 235, 55 N. W. 913, where it was said: "The purpose of the statute was not to fasten upon a common carrier of passengers a liability as insurer against any and all injuries while being transported upon the trains of such carriers, but it was rather intended to establish a presumption from the passenger receiving injury under the circumstances contemplated."

And in Clark v. Zarniko, 106 Fed. 607, 45 C. C. A. 494, the United States Circuit Court of Appeals for the Eighth Circuit adopted and applied this as the proper construction of

the statute. The court said: "The Supreme Court of Nebraska has defined the term 'criminal negligence' in this statute to be gross negligence; such negligence as would amount to a flagrant and reckless disregard of one's safety, or to a willful indifference to the injury liable to follow. It has also declared that the purpose of the statute was not to fasten upon a common carrier of passengers a liability as insurer, but that it was rather intended to establish a presumption from an injury to a passenger that the damages inflicted by such injury were entirely attributable to the negligence of the railroad company, and that to avoid liability it devolves upon the company to show that the injury was imputable to the criminal negligence of the party injured, or to his violation of some express rule or regulation of the road actually brought to his notice."

Other decisions of this court have recognized this as the true meaning of the statute. It is difficult to see what other force can be given to the word "criminal." It has no well-defined legal meaning in such connection. It occurs, so far as the writer is aware, in no other similar statute in this state or elsewhere.

Such recklessness as is incompatible with a proper regard for human life is negligence which will render unintentional homicide criminal. 1 McClain on Criminal Law, § 350. Gross negligence is criminal negligence, as the word is used in the statute. Reckless (that is, without thought or care) disregard of one's own safety, or a willful indifference or intentional disregard of the consequences liable to follow, is criminal negligence when accompanying the intentional doing of an act incompatible with a proper regard for one's own life. The act of the deceased was in no way related to the duty of the carrier to its passengers. It "was not necessary to his convenience or comfort as a passenger." He was provided with a place to ride in safety within the car. It is known to every passenger of ordinary intelligence that, on account of passing trains on adjacent tracks, and other causes continually existing in the operation of the road, a slight extension of the human body beyond the side of a moving car is done with danger to life and limb. These conditions have always existed. They are customary and to a large extent indispensable. The customary methods of constructing tracks, building bridges, and other appliances, and running trains in railroad yards, render any exposure of a person beyond the car line imminently hazardous. Benedict v. Minneapolis & St. L. R. Co. (Minn.) 90 N. W. 360, 57 L. R. A. 639. The deceased, being an ordinarily intelligent young man, knew this, and, without any necessity whatever for so doing, he elected to take the risk. The act, conceded to be negligent, it is clear was done knowingly and intentionally, without heeding the

consequences, and constitutes such gross negligence as will defeat a recovery.

The judgment of the district court is reversed, and the cause remanded.

SULLIVAN, C. J. (dissenting). I am not prepared to agree to the proposition that Rasmussen's act in protruding his head from the car window was so clearly an act of criminal negligence that reasonable men might not differ with respect to it. What he did was, I think, nothing more than people generally do under like circumstances. His conduct was the product of a sudden impulse—the spontaneous expression of an emotional nature. It was not, of course, prudent conduct; calculation and provident foresight were wanting; but it did not amount to a flagrant or reckless disregard of the consequences which were certain or likely to ensue. Risk was incurred; but, from the standpoint of a person who knew nothing about the appliance that caused the accident, it was a slight and not a serious risk. It was hardly sufficient, taking human nature as it is, to impose restraint upon the social instinct which prompts one to give greeting to a friend. In dealing with cases of negligence, judges are, I am disposed to think, too much inclined to take themselves as standards by which to measure the conduct of all classes and conditions of men. Commensurate care in a given case is apt to be what they would have done. They are accustomed to travel, and understand the dangers of the road; they are unaffected by novel situations; their native enthusiasm has been chilled by contact with the world; they hold themselves in leash, and wave no improvident salutations to acquaintances or friends. They are well-poised, circumspect, and deliberate; they are exemplars of correct conduct; but, however much it is to be regretted, their ways are not the ways of exultant youth, nor of "the man with the hoe." In my opinion, C., B. & Q. v. Martelle (Neb.) 91 N. W. 364, went too far, but this case goes still farther. Carriers of passengers, as was observed in C., R. I. & P. R. Co. v. Zernecke, 59 Neb. 689, 82 N. W. 26, 55 L. R. A. 610, are insurers; they charge for the risk they assume, and there is consequently no reason why the law imposing liability upon them should be enforced with reluctance. In actions brought to recover indemnity, courts have, it seems to me, no call to put a harsh construction upon the plaintiff's conduct in order to temper the statute with natural justice. Criminal negligence, as the term is used in section 3, c. 72 art. 1, Comp. St. 1901, means such negligence as amounts to "a flagrant and reckless disregard of one's own safety, and willful indifference to the injury liable to follow." C., B. & Q. R. R. Co. v. Hague, 48 Neb. 97, 66 N. W. 1000. It is true that in the case cited it was held that the act of a passenger who, after he had been expressly warned that the freight caboose in which he was riding was standing on a high bridge

and that he must not attempt to leave the car, stepped off at the rear and fell, receiving injuries from which death resulted, was "criminal negligence." In the next case, C., B. & Q. R. R. Co. v. Hyatt, 48 Neb. 161, 67 N. W. 8, criminal negligence is defined as "gross negligence, such as amounts to a reckless disregard of one's own safety and a willful indifference to the consequence liable to follow," and in that case the action of the plaintiff in jumping from a moving train was held not to be such negligence, and the case was distinguished from C., B. & Q. R. R. Co. v. Landauer, 36 Neb. 643, 54 N. W. 976, because in the latter case the train was moving rapidly, and the act of jumping off was obviously and necessarily perilous, and showed a willful disregard of the injury which was liable to follow. In the Chollette Case, 33 Neb. 143, 49 N. W. 1114, it was held that the question of negligence in stepping off a moving train was properly left to the jury, and the judgment against the company was affirmed. A great many cases, including the foregoing ones, are cited by plaintiff in error in its elaborate brief, but it is conceded that the definition of "criminal negligence" in O. & R. V. Co. v. Chollette, 33 Neb. 147, 49 N. W. 1114, has been followed ever since. Some of the cases cited from other jurisdictions hold that the placing of the passenger's person outside the window of a moving train is evidence of negligence; some that it is conclusive evidence of negligence; and some that, under the particular circumstances indicated, it is gross negligence; but none of them have any relation to the interpretation of that Nebraska statute which makes the carrier an insurer of its passenger against injuries inflicted upon him while he is such, unless such injury arises from his own "criminal negligence, or from violation of some express rule or regulation of the road" brought expressly to his attention.

It is not thought that any of these cases furnish any precedent for the determination of this one. None of the circumstances under which the courts have held that the mere fact of placing a part of the person out of the window of a moving train is gross negligence appear here. The injury was caused by a heavy iron ring suspended on a crane for the delivery of a mail sack to and the reception of one from another corresponding crane on a moving train. The appliance, which seems to be no longer in use, was called the "Fleming Mail Catcher and Deliverer Crane." It is not necessary to describe it, further than to say that by means of a post set at a distance of about three feet from the side of a passing car, and a swinging arm attached to the post, an iron ring could be let down to come within eight inches of a passing car, to be there caught by a like arm extending from the mail car, and the ring and mail bag drawn on board the car without stopping the latter. The machine was not of a kind to attract the notice of a traveler, as, when not in use, the swinging arms were drawn up, and, when properly in use and the arms

drawn down, they could be caught and thrown up by the crane on the mail car before the passenger coaches came by. The train on which plaintiff's intestate was riding carried no mail, and, if his attention had been called to the matter, he would have naturally supposed that the crane was drawn up properly, and no ring in dangerous proximity to the train window; but there is nothing to indicate any knowledge on his part of the presence of the ring, or of anything to warn him that his conduct was more dangerous than it would be on the open prairie. It would seem, therefore, that his conduct was not the "criminal negligence" necessary to relieve defendant from its statutory liability for the safety of its passengers.

Plaintiff in error cites Anderson's definition for gross negligence: "The omission of that care which even inattentive and thoughtless men never fail to take of their own property or interest." It is defined by Black's Law Dictionary as "the want of that care which every man of common sense, how inattentive soever, takes of his own property. The omission of that care which even inattentive and thoughtless men never fail to take of their own property." The last sentence is Bouvier's definition, citing Jones on Bailments. Beyond doubt, the question here, as in the case of Railroad Company v. Hague, above, is not whether this act of Rasmussen's in putting his head out of the window seems to this court to be gross negligence, but whether it was so manifestly of that character that reasonable men cannot deem it anything else. I am entirely unable to say so, and am unable to say on this ground either that there is no cause of action in the petition, or that none is proved by the evidence.

SETTERSTROM v. BRAINERD & N. M. RY. CO.

(*Supreme Court of Minnesota, May 15, 1903.*)

[94 N. W. Rep. 882.]

Injury to Employee—Negligence of Co-employee—Employment c Substitute—Negligence of Substitute.

Three coaches and an engine were being moved and set upon a sic track for the purpose of reversing their order in making up a train. I was the duty of one of the employees (the head brakeman) to be at switch and set the same to aid in accomplishing this result. By reasc of his abandonment of his post of duty and the unauthorized selectic by him of another person to take his place, the switch was first proper set for a side track which was clear, then changed immediately, ar reset so as to cause a car being run or kicked backward from the engir to go upon another track, where cars were standing, in one of whi plaintiff was engaged in scrubbing the floor, occasioning a collisic therewith, whereby plaintiff was thrown down and injured: *held*, upc the facts:

Same—Proximate Cause—Negligence of Substitute Brakeman.

That the acts of the substitute for the head brakeman was a proxima cause of the injury plaintiff received.

Same—Substitute Brakeman—Liability for Acts of.
That the substitute was not an employee for whose acts defendant was directly responsible.

Same—Negligence of Co-employees—Evidence.
That there is nothing in the evidence reasonably tending to show that other employees than the head brakeman were wanting in ordinary care.

Same—Contributory Negligence—Question for Jury.
That the issue of plaintiff's contributory negligence was, under the evidence, for the jury.

Same—Negligence of Brakeman Employing Substitute—Question for Jury.
That whether the head brakeman was negligent in abandoning his post of duty and selecting a substitute to take his place was a question for the jury.
(Syllabus by the Court.)

Appeal from District Court, Crow Wing County; W. S. McClenahan, Judge.

Action by Peter Setterstrom against the Brainerd & Northern Minnesota Railway Company. Judgment for plaintiff. From an order denying a motion for judgment or a new trial, defendant appeals. Reversed.

Koon, Whelan & Bennett, for appellant.
Polk & Polk, for respondent.

LOVELY, J. Plaintiff recovered a verdict for personal injuries caused by the collision of cars while a passenger train was being made up for use on defendant's railway. There was a motion for judgment, or a new trial in the alternative. The motion was denied, conditioned upon the acceptance of a reduction of the verdict, to which plaintiff consented. Defendant appeals from the blended order.

It appears that plaintiff's injuries were sustained while he was cleaning a car in the course of his employment as a servant of defendant during the interval between the arrival and departure of its passenger train at Brainerd on March 23, 1901. Defendant operated the train referred to, which was composed of an engine, combination car, and two passenger coaches making regular trips from Bemidji to Brainerd each day except Sunday, leaving Bemidji every morning at 7:15, and reaching Brainerd, some 92 miles distant, at 11:30 a. m. On its arrival at Brainerd it came into the Northern Pacific passenger station over the tracks of the latter company, and there discharged its passengers. Then, according to a custom adopted for that purpose, by switching, the order of the engine and cars were reversed, and about 2½ hours afterwards the train started on its return trip to Bemidji.

On the day of the accident, the engineer, Auge, and the fireman, Poppenberg, had charge of the engine. The crew operating the train consisted of a conductor, Brush; the head brakeman, Hart; and a baggageman, Carlton, who, on occasions, acted as brakeman. The conductor, on the arrival of the train at Brainerd, made his report, and was then at liberty

to leave the train; the switching and reversal of the cars being attended to by the other employees by moving the engine on the main and north side tracks in the station yards west of the depot. This train, on the day referred to, arrived at Brainerd on time, and discharged its passengers. It then moved westerly upon the first north side track in the Northern Pacific yard, the engine was disconnected, it passed westerly to the main track, then backed easterly thereon until it reached a turntable, where it was reversed. It then backed over the main and side track, and was reattached to the train. The switch was then immediately set for the main track, and the entire train pulled east over it until it cleared the same, then backed westerly upon the main track. The engine, with the passenger car to which it was attached, was then cut off from the two remaining cars, and pulled forward on the main track some distance east of the switch. At this time it was the duty of Hart, the head brakeman, to be at this switch, and set it for the side track, in order that the remaining cars might be moved thereon to put them in the reverse order of arrival. In the last movement to set the cars upon the side track each coach would be pushed backward by the engine with sufficient force to enable the fireman, before the car reached the switch, which had been in the meantime set for the side track, to detach it from the engine, so that it could be run or kicked upon it by the momentum thus acquired a sufficient distance to enable the remaining cars of the train ample room thereon. While it was the duty of Hart to operate the switch over which the cars were to be moved, he on this occasion, left the train on its arrival at Brainerd to attend to his private business, having first made arrangement with a former employee of defendant, named Leath, to perform his duties while he was absent. This arrangement was unknown to defendant, and neither the engineer, fireman nor the other members of the train crew knew of it. While the engine and coach were on the main track east of the switch, as above described, before starting to back down to throw the coach upon the side track, Leath, being in Hart's place, set the switch properly for the north side track, as was indicated by the switch target, which could be seen by the engineer and fireman where they then were upon the engine. Leath also gave the proper signal to back, and kick the detached passenger coach upon the side track. This signal was received by the fireman on the left side of the engine and transmitted to the engineer on the right. The engineer immediately turned to his levers, and applied force sufficient to give the necessary momentum to throw the detached coach backward upon the side track and, as the engine was pushing the coach backward, Leath, under a mistaken impression that the switch was set wrong, instantly changed it, so that it was set for the main track. Poppenberg, supposing that the switch was set for the side track as usual, went to the

coach, and cut it off, so that it might run backward by the force it had acquired from the engine, but, owing to the mistake of Leath, instead of going upon the side track, it passed the switch upon the main track, where, unless stopped, it would run against the car from which it had previously been detached. As soon as the fireman discovered that the car was going upon the main track he commenced setting the brakes to prevent the collision which seemed to be imminent. Carlton, the baggageman, about the same time, discovered that the car was going upon the main track; then from the place where he was got on the moving car, and attempted to set the brakes; but the efforts of the baggageman and fireman were not effective to prevent a collision with the cars on the main track, which occurred, throwing the plaintiff upon the floor while he was in the performance of his duties scrubbing the floor of one of the stationary cars, and for the injuries thus received he recovered the verdict now under review.

It was substantially conceded at the trial that Hart had no authority from defendant to put Leath in his place, and that the negligence of the latter directly contributed to and was a proximate cause of the collision; but the court left it to the jury to say whether the negligence of the engineer, fireman, and Carlton might not also have contributed to the accident, and it seems from the memorandum of the trial court, as well as the brief of counsel, that much stress was laid upon the possibility that the engineer had applied too much force in kicking the colliding coach backward for the side track, when, through Leath's mistake, it went on the main track. We have examined the entire record with much care, but are unable to find that there is any evidence therein reasonably tending to show that either the engineer, fireman, or baggageman were wanting in ordinary care in the performance of their duties at this time. The defendant's yard at the place of the collision was level, the side track was clear for a distance of two blocks, and there is nothing to show that the car would not have run thereon safely under the force given to it by the acts of the engineer had it not been for the mistake of Leath in inadvertently resetting the switch at a time when none of the employees engaged in the movement of the car could discover that he had done so. There is no reliable evidence in this case that the car, when it passed over this switch and collided with the stationary cars on the main track, was moving at a rate greater than four miles an hour. Some witnesses say the speed was less. Nor does it appear that this rate of speed would have been attended with any danger if the switch had remained as it was set when Leath gave the proper signal for the engine and coach to be moved backwards, upon which the engineer was bound to act, according to the usual custom adopted in switching and making up this train. It is true that one witness, who was sweeping the floor of one of the stationary cars, stated that the force

of the collision shook down a stove pipe and broke the glass in the door and lamp, and undertook to estimate the rate of speed of the moving car he did not see when it struck. When asked how fast the car was going, he stated, "That is hard for me to say, but they went pretty fast, and I think everybody knows, who have seen trains switching, when they are looking at a car they know the car don't go very slow, and don't go very fast either; about, I should judge, twenty miles an hour." Stress was laid upon this statement by plaintiff's counsel, but, while it may be conceded that the moving car struck with sufficient force to jar the stove pipe so that it fell down, that a window light was broken, and the lamp disarranged, the opinion that it was moving at the rate of 20 miles an hour is absurd. If this had been so, the force of the collision must have broken some more substantial portions of the stationary car than a lamp and window glass, and the baggageman could not have got upon the car if it had been going at that speed. All estimates of distance must, under such circumstances, be regarded as of doubtful value at best, and, when given in such haphazard and conjectural way, amounted to nothing more than a mere guess, and ought not to be made the basis of judgment by court or jury. It may be conceded that, had the engineer known that the car was going upon the main track when it was his duty to apply the force he did to send it upon the side track, the question of negligence would be for the jury; but upon all the evidence he had the right to believe that it was going upon the side track, which was clear, when he applied force not too great to send it there without danger. Hence we cannot hold that he was obliged to divert his attention from his necessary and onerous duties at this time to speculate upon probable conditions he had no reason to believe existed from imaginary fears of hazards he could not foresee, and therefore was not required to guard against.

It is an elementary principle, based upon reason and humanity, that it is not negligent to act reasonably upon the presumption that others will exercise ordinary care in the performance of duties imposed upon them. Particularly should this rule be applied where an employee in the use of hazardous appliances, in attending to duties demanding his undivided attention, must, in so doing, obey the signals he receives from those by whom they are given; and there is nothing to show that the engineer, fireman, or baggageman had any reason to anticipate the sudden and negligent act of Leath in resetting the switch, and, if this action had been instituted against either of these employees of defendant for the injury to plaintiff upon the claim that they were negligent, we cannot believe that a jury could have determined the issue against them, and, if it had, we would unhesitatingly regard it as our duty to set it aside. The entire evidence demonstrates that these employees were exercising ordinary care in the performance of their duties, and we are compelled to adopt the

view that the learned trial court, by authorizing the jury to pass upon their negligence, was in error.

It was insisted on the part of defendant that the plaintiff was himself negligent, he having been generally warned by other servants of the company not to stand upon the floors of the car during the switching operations. Since we have reached the conclusion that there must be a new trial, in passing upon the question of plaintiff's negligence we need not further refer to this contention than to say that it was a question for the jury. While plaintiff had received warnings, we cannot, as a matter of law, hold that he was required, under the evidence, to anticipate the extraordinary conduct of Leath, or the unexpected movement of the detached coach upon the main track, or bound to anticipate the collision.

In its general charge the court instructed the jury that defendant was in no way responsible for Hart's act in selecting Leath to do his work, and whether Hart, the head brakeman, was negligent in making the selection of Leath or putting him in his place did not concern the jury; thus taking out of the case the question whether Hart's abandonment of his duties to his employer, which might have endangered the safety of all other employees, in its causal relation to the collision, contributed to plaintiff's injury. We think the learned trial court went too far in this respect. We may not, upon the record before us, lay down any precise rule of duty that should have governed the jury in passing upon the relations of Hart's acts to plaintiff's injury, for the trial court disposed of the case upon the theory that, no matter how negligent he was in putting another person in his place when he should have been there himself, without reference to the connection between such acts and the accident his conduct in that regard would not authorize a recovery. But we are very clear that the issue whether Hart was negligent was a question upon all the facts and circumstances attending his abandonment of his post of duty, and the putting of another person in his place without authority might have been a proximate cause of the injury, which should have been submitted under proper instructions, and the failure to do so makes it necessary that a new trial should be ordered.

For the reasons indicated, the order appealed from is reversed, and a new trial granted.

MEMPHIS ST. RY. CO. v. GRAVES.

(*Supreme Court of Tennessee, May 23, 1903.*)

[75 S. W. Rep. 729.]

Carriers of Passengers—Street Railways—Ejection of Passengers—Refusal of Transfer Tickets.

Where the conductor on a street railway car gave plaintiff a transfer, which was refused by the conductor of the car to which plaintiff prop-

erly changed, on the ground that the transfer was defective, and plaintiff, being without money, was forcibly expelled from the car, he could recover therefor against the railway. Negligence in the issuing of the transfer was that of the company, and plaintiff was not bound to examine it.

Appeal from Circuit Court, Shelby County; J. S. Galloway, Judge.

Action by R. L. Graves against the Memphis Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wright, Peters & Wright, for appellant.
J. W. Canda, for appellee.

WILKES, J. This is an action for the alleged unlawful ejection of the plaintiff from the car of the defendant company by one of its conductors. The action was commenced before a justice of the peace. On appeal it was tried before the court and a jury, and there was a verdict and judgment for $50, and the street railway company has appealed and assigned errors.

The facts necessary to be stated are that the plaintiff boarded a car of the defendant company on its suburban line at the corner of Latham and McLemore streets. When he paid his fare, he asked for a transfer ticket to go east on Vance street. At the proper transfer point he boarded a Vance Street car, and, when the conductor of that car came for his fare, handed him the transfer ticket received from the conductor of the initial car. The conductor of the Vance Street car refused to recognize the transfer ticket, and after some parley the plaintiff was ejected from the car. He had no money with him, and was compelled to walk to his place of business, where he arrived late, causing him anxiety lest he lose his position. The plaintiff testifies that the conductor ejected him by force, over his protest and explanation, and treated him roughly. He testifies that, when he presented his transfer ticket, the conductor insolently and insultingly handed it back to him, saying: "This ain't no good. You will have to pay your fare." He further states that he politely protested, and informed the conductor that the conductor on the suburban line had given it to him as a transfer east on Vance street. To which the conductor replied, "You will have to get off," and thereupon had the car stopped, and jerked him by the arm in the presence of the passengers, and rudely and roughly carried him out of the car, and put him on the ground, without any explanation why he would not honor the transfer; that there were many passengers on the car, some of whom were ladies, and he was greatly humiliated and embarrassed; and that it was a rainy, disagreeable morning.

It is said that the court erred in charging the jury that "it was the duty of the defendant company, upon being applied to for a transfer, to furnish the plaintiff a proper transfer,

and, if the conductor furnished the plaintiff a different transfer from the one called for, that would be the negligence of the conductor, and not the negligence of the plaintiff; that the plaintiff had the right to presume that the street car conductor would do his duty in the premises, and had a right to rely for passage upon the transfer given him." It is said, also, that it was error to charge it to be negligence on the part of the company if the conductor gave him a wrong transfer, and also that it was error to hold that the plaintiff could accept the transfer without question, and that his acceptance of a wrong transfer would not constitute negligence on his part. We think there is no error in the charge, and that the question has already, in principle and effect, been settled in the case of O'Rourke v. Street Railway Co., 103 Tenn. 126, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639. In that case the court said: "To require a passenger, who has made a valid contract for transportation and paid the requisite fare, to retire from the car and suspend his journey because of an original defect in the ticket furnished him by the company's agent, is to visit the wrong of the offender upon the offended. It is to make the rightful passenger suffer for the fault of the carrier, and that, too, in the latter's interest. This court will not yield its assent to a result so unjust and oppressive. The plaintiff had a right to believe the transfer ticket all that it should be. With it he diligently sought and promptly entered the first transfer car, and, upon being challenged by the conductor of that car as too late to use the ticket, he made a fair and reasonable statement, showing that he had just left the first car, and that the first conductor must have wrongfully indicated the hour of issuance on the face of the ticket. He owed the company no other duty, and his expulsion under such circumstances was a tortious breach of contract, for which he became entitled to recover all approximately resulting damages, including those for humiliation and mortification, if such were in fact sustained." O'Rourke v. Street Ry. Co., 103 Tenn. 135, 52 S. W. 874, 46 L. R. A. 614, 76 Am. St. Rep. 639. This court said again, in the O'Rourke Case: "The passenger is not required in law, nor allowed in fact, to print or write or stamp the ticket. The carrier alone has that right, and the passenger is authorized to believe and presume it will be properly exercised, and that the ticket, when delivered, is a faithful expression of the contract as made." O'Rourke v. Street Ry. Co., 103 Tenn. 133, 52 S. W. 874, 46 L. R. A. 614, 76 Am. St. Rep. 639. There was in the O'Rourke Case a printed statement on the back of the transfer ticket to the effect that the passenger would "examine date, time, and direction, and see that the same are correct." But the court held that it would not enforce such a condition, that it was unreasonable, and that it would not place upon the passenger the duty of verifying the act of the conductor in issuing a transfer ticket; and in that case the plaintiff

made no examination at all of the transfer check, as in this case. O'Rourke v. Street Ry. Co., 103 Tenn. 141, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639.

The argument of counsel for the street car company is that passengers should be required to examine transfer tickets when handed to them, and verify the action of the conductor, and, if there is any defect in the ticket or any deviation from the request, to have it at once corrected, and, if he does not do so, he is guilty of such negligence as must bar his recovery. We think this contention not sound. The ticket is a mere token, to be used for the convenience of the road. It is not the contract between the road and the passenger. It is a statement by the initial conductor to the subsequent conductor what the contract is, and what the passenger is entitled to, and, if it is not correct, the fault is that of the road. Nor can passengers be required to verify the acts of the conductor, but they may presume that he acts correctly. The tickets or tokens are prepared by the company. They contain more or less of printed and other directions. Some passengers cannot read. Others are children. None of them have the time or opportunity in the rush of travel to scrutinize the ticket, and in many instances, if they did, they could not understand the devices used by the company. The passenger has the right to presume the conductor has given him a proper ticket; and, if he make a mistake, it is the fault of the company, for which it is liable; and, if the passenger in good faith accept the ticket, he is not bound to stop and scrutinize it, to see that no mistake has been made.

We are of opinion that there is no error in the judgment of the court below, and it is affirmed with costs.

COPELAND v. WABASH R. CO.

(*Supreme Court of Missouri, Division No. 2, March 31, 1903.*)

[75 S. W. Rep. 106.]

Duty to Trainmen—Safe Bridges.

A railroad company owes the duty to its trainmen to construct and maintain reasonably safe bridges; and, having constructed a pile bridge where it was not reasonably safe, because of the high, swift water in case of rain, the floating logs, and the insufficiency of the earth under it to support piles, whereby it gave way under a train, injuring the conductor, it is liable for the injury.

Same—Unsafe Bridge—Sufficiency of Evidence.

Evidence, in an action for injury to a conductor by the giving away of a pile bridge under his train, *held* sufficient to support a finding that the earth under the bridge was insufficient to support the piles.

Instructions.

An instruction, in an action for injury to a railroad conductor by a bridge giving way, does not authorize a verdict for him on a finding that it was a pile bridge; it being that the jury should find for him if the accident was caused by reason of the defective condition of the bridge, and it was a pile bridge, and on account of the character of the

stream and the country drained by it said bridge was not reasonably safe at that place.

Same.

An instruction, in an action for injury to a railroad conductor by the giving way of a bridge under his train, that defendant was not bound to furnish a bridge of a particular kind or style, but only a reasonably safe one for carrying trains, does not conflict with one that if, on account of the stream and topography of the country drained by it, a pile bridge was not reasonably safe, defendant had not performed its duty, and, if the injury resulted therefrom, it was liable.

Same.

Defendant's requested instruction, directing the jury, in passing on the extent of plaintiff's injuries and his physicial condition, to consider that prior to the accident he had rheumatism, is properly amended to say that they may consider he had rheumatism prior to the accident, if they believe his subsequent ailments resulted in whole or in part therefrom.

Attorneys—Attempting to Prejudice Jury.

That an attorney of plaintiff gave interviews to reporters does not tend to prove, so as to be ground for new trial, that he procured his statements as to a former trial to be published and caused them to be distributed, that they might be read by the jurors to prejudice them against defendant.

Jurors Reading Newspaper Article.

That jurors, pending the trial, see a paper which simply states how the jurors stood on a former trial as to awarding damages, and that plaintiff was suing for injuries received in a wreck where eight men were killed, and that a coffin was bought for him, but he recovered, is not ground for new trial.

Appeal from Circuit Court, Audrain County; E. M. Hughes, Judge.

Action by G. C. Copeland against the Wabash Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Geo. S. Grover and Geo. Robertson, for appellant.

P. H. Cullen, E. S. Gantt, and W. M. Williams, for respondent.

BURGESS, J. This is an action for $35,000 damages alleged to have been sustained by plaintiff, a passenger conductor on defendant's railroad, by reason of the negligence of defendant company to provide and maintain a bridge which was reasonably safe. The specific allegations of the petition upon which the case was tried are as follows: (1) That said bridge was a pile bridge, and, on account of the character of the stream and the country drained by it, such a bridge at that place was not reasonably safe; (2) that the piling that supported said bridge had become rotten, unsound, or defective, and therefore not reasonably safe; (3) that there was not sufficient earth around some of said pilings, and for that reason the bridge was not reasonably safe. The answer was a general denial. The trial resulted in a verdict and judgment in favor of plaintiff for $15,000. Defendant appeals.

The accident occurred by reason of the train upon which plaintiff was discharging his duties being ditched at Rose

Branch, in Clay county, on June 26, 1897. Plaintiff left Union Depot at Kansas City at 5:30 that evening, in charge of his train; his objective point being St. Louis, Mo. The train had to cross Rose Branch, a small stream, about 1 mile west of Missouri City, and 20 miles east of Kansas City. As it was crossing Rose Branch, the bridge over that stream gave way, wrecking and ditching it, by reason of which plaintiff was greatly and permanently injured. Rose Branch is a stream about 3½ miles long, skirted upon either side by broken land and abrupt bluffs, heavily timbered. It drains about 1,300 acres of land. For many years persons in the locality have been cutting timber in the valley of this stream and on the hills on either side of it. The tops of the trees were scattered along the branch and in the valley on either side of it. Logs, full-grown trees, and other timber were cut and lying loose in and across the branch and in its valley. This state of affairs had existed for years, and was known to the defendant long prior to the time Mr. Copeland was injured. The precipitous bluffs on either side of the stream caused the water to rush into it with great rapidity. An ordinary rainfall would cause it to overflow, and when it overflowed it carried great quantities of timber and driftwood, and lodged it against the piling supporting the railroad bridge. On the evening of the accident, June 26, 1897, plaintiff left Kansas City at 6:20 p. m., as conductor in charge of a regular east-bound passenger train on defendant's railroad, bound for St. Louis. The train was composed of an engine, tender, and 7 cars, viz., a mail car, 3 passenger coaches, a chair car, baggage car, and a sleeping car. It was raining some, but not very hard, when the train left Kansas City. The regular west-bound passenger train on defendant's road arrived in Kansas City that evening just before the train in charge of plaintiff left there. This train passed over Rose Creek bridge at 5:43 p. m., and was on time at Missouri City, one mile east of there, at 5:38 p. m. This train safely crossed over Rose Creek bridge at the usual rate of speed, and at that time the water was not running in the branch underneath that structure. It was raining "just a very little bit" when this train crossed over Rose Creek bridge. This train had seven passenger cars, and was heavier than the train in charge of plaintiff. An extra freight train, east-bound from Kansas City to Missouri City, composed of an engine, tender, 10 or 12 loaded cars, and 3 empty cars, or 15 cars in all, passed over Rose Creek bridge in perfect safety at 6:20 that evening. It was not raining, and there was very little water in Rose Branch, when this train crossed it. Defendant's section foreman, with three men and a hand car, passed over Rose Creek bridge that evening at 5:45 p. m., going east to Missouri City. There was no water in Rose Branch then "to amount to anything." It was just beginning to rain. The foreman "noticed nothing unusual as to the condition of the bridge over Rose creek."

There is, as the record shows, very little water in the branch at ordinary times. The driftwood in time of heavy rains floated down Rose Branch and lodged against the piling supporting the railroad bridge, but was removed as soon as practicable by defendant's section men. These men saw no driftwood in Rose Branch on the evening of the accident when they passed over the bridge.

The bridge in question was constructed in 1890. On the east and west banks of the stream stone abutments were constructed, upon which the bridge rested. The bridge was what is known as a "pile bridge," with about 60 feet of water way between the abutments. The stringers, upon which rested the rails of the track, were white pine, 7 by 16, and 32 feet long; that is, they were 16 feet at the top, 7 inches wide, and 32 feet long. The joints in the stringers were broken; that is, every other one was crossed, starting with 16 feet, then the next one would come 32 feet and fastened over with caps, and the next one the same way. Underneath the bridge, supporting it, were three rows of piling, 16 feet apart, and 16 feet from the edge of each abutment. Each row or bent contained 6 piles, or 18 in all. These piles were of Missouri white oak, perfectly new in 1890, purchased along the line of defendant's railway, and were inspected at Moberly by an experienced bridge builder before being used, and were all sound. As unloaded at the bridge, these piles were each 35 feet long, but were cut off to 30 feet each, so as to fit in the space under the rails. They varied from 16 to 18 inches in diameter, and were driven from 15 to 17 feet in the earth to the solid rock, where they could not be driven any further. In driving these piles a steam hammer weighing 2,500 pounds was used. After the piles were driven, cross-braces were put on each row or bent of 6 piles. After the accident it was discovered that the west side of the pilings in the bridge was entirely gone, and the piling in the middle bent was broken square off, and the piling in the east bent broken and splintered.

Defendant's tracks cross Rose Branch at right angles, at which point its bottom is solid rock or soapstone, and level, or nearly so, but its covering was of made earth, not evenly spread over it. The bed of dirt upon it was standing on its surface. It was higher and much more solid on the east side, and gradually inclined down toward the west abutment. The main channel of the stream ran next to the west abutment, and against the west row of piling. The wagon road passing under the bridge was not a public road, or one much traveled, but was a place where some neighbors passed through, going to and from their work. This road, or passageway, was between the east abutment and the east row of piling, and practically on the bank of the stream. From this wagon road the dirt gradually declined down toward the west row of piling, and the west

abutment, until the earth around the west row of piling was perhaps not half so deep as the dirt beneath the wagon road; nor was it near so compact or solid, because it was sandy, and the water usually standing on it percolated through it. The west bent or row of pilings washed out entirely. It was the washing out of the west bent that caused the catastrophe. The middle bent, which was set in deeper and more solid earth, did not wash out, but broke square off. The earth in which the east row of piling was set was still deeper and more solid than the earth around the middle bent. The east bent did not wash out, and, while the piles broke, they did not break off square, like the ones in the middle bent, but in breaking splintered like fairly sound timber.

Plaintiff offered much testimony tending to show that by reason of the accumulation of drift against the bridge, and the water working its way out under it, the earth under the bridge had been washed away. As to whether the bridge was a proper or safe structure at this point, and the pilings sound or decayed and rotten, the evidence was in conflict. Defendant's evidence showed, however, that from the time of the completion of the bridge in July, 1890, it was inspected frequently, sometimes as often as two or three times a week, up to 22 days prior to the accident, and was found to be all right. About 100 feet west of defendant's bridge was a bridge erected by Clay county over Rose Creek Branch, 66 feet long, 16 feet wide, and rested on piles 8 feet long. It was about 6 or 7 feet above the water, when there was any in the branch. This bridge had been there for 15 years prior to 1897 without washing out.

The bridge was on a curve, and the engine rounded it at a speed of about 50 miles an hour. The track and bridge were both in line, and the bridge apparently all right. No driftwood was seen against the bridge. The water in the branch was about 4 feet below the cross-ties, which rested on the top of the bridge. The engine crossed the bridge, but the entire tender did not. The forward trucks of the tender crossed the bridge, but the rear trucks were derailed, and went down the embankment on the east side of the track. The mail car and the baggage car went down into the creek. The smoking car and one chair car followed the baggage car, but the rear chair car did not fall entirely into the stream. The sleeping car tipped partly into the creek, with the rear trucks on the west bank. Plaintiff was sitting in the smoking car at the time, went down with it, was badly crushed and bruised, and taken out more dead than alive.

The county bridge was swept off of its supports by the high water, and was afterwards found to be comparatively intact in the river bottom below defendant's bridge. While the evidence upon behalf of defendant tends to show that the accident was the direct result of a sudden, unprecedented, and extraordinary flood, there was evidence on behalf of

plaintiff tending to show that the rain was not an unprecedented one, and that the branch had been as high up on one, and perhaps two, occasions before.

At the time the plaintiff was injured he was a fine specimen of physical and mental manhood. He was a very active man for one of his size, strong and athletic. The injury made of him a total physical wreck, so that he has since then been unable to perform any labor, or to move, rest, or sleep. He is now an invalid for life. He was unconscious, and thought to be in a dying condition, for several days after the accident. He was in the hospital for seven weeks, and it was six months before he was able to go to his home in St. Louis. His spine was injured, and there was a good deal of soreness over it at the time of the trial. His abdomen and stomach were mashed, bruised, and injured, being swollen and black for months. His shoulders were wrenched, and the bones and ligaments broken and torn. His eyes were permanently injured. His heart was misplaced, the apex being turned upward and toward the left nearly 2½ inches. His sixth and seventh ribs were broken. His liver had been injured, and at the time of the trial was not in its normal condition. His nervous system lacked tone and vitality. All these conditions were present at the time of the trial, and the medical testimony established that they affected his general health, were permanent and incurable, painful, and incapacitated him from any labor at the present or any future time. He has never been able to lie down in bed since his injuries. He can only lie in bed by being propped up with pillows. He cannot lie on his left side.

A demurrer was interposed at the close of plaintiff's case, and overruled, and again at the close of all the evidence, and again overruled.

Over the objection and exception of defendant, the court, at the request of plaintiff, instructed the jury as follows:

"(1) The court instructs the jury that if they believe, from the evidence, that plaintiff was in defendant's employ as conductor of the east-bound passenger train on the 26th of June, 1897, and that said train was wrecked by the falling of defendant's bridge across Rose Branch, and plaintiff was thereby injured, and the said wreck was caused by reason of the defective condition of said bridge in any of the particulars hereinafter mentioned, and that said bridge was a pile bridge, and on account of the character of the stream and the country drained it (said bridge) was not reasonably safe at that place, or that the piling that supported said bridge had become rotten, unsound, or defective, or that there was not sufficient earth around some of said piling, and that from any or all of said causes said bridge, on said 26th of June, 1897, was not reasonably safe for the passage of defendant's said train over the same, and that defendant knew of the defective and unsafe condition of said bridge, or by the exercise

of reasonable care and diligence could have ascertained the same before the arrival of the train, upon which plaintiff was conductor, at said bridge, then the verdict must be for the plaintiff.

"(2) The jury are instructed that the risks assumed by the plaintiff in accepting employment from defendant as conductor of its passenger train were only such as were incident to said employment, and did not include any risks arising from negligence upon defendant's part (if there was such negligence) in failing to use reasonable care and diligence to see that its tracks and bridges were in a reasonably safe condition.

"(3) The jury are instructed that, while the defendant was not bound to provide against the effects of a storm which it could not reasonably anticipate, yet if they believe, from the evidence, that the bridge over Rose Branch was not reasonably safe on account of its being a pile bridge, or because some of the piling had become rotten and decayed, or because there was not sufficient earth or dirt around said piling, and that the fall of the bridge was caused by its defective condition in any of the particulars aforesaid, and not by reason of the extraordinary force of the storm, then the fact that the bridge fell during said storm will not prevent a recovery in this case.

"(4) The jury are instructed that the opinions of the parties who testified as experts are merely advisory, and not binding upon the jury, and the jury should accord to them such weight as they believe from all the facts and circumstances in evidence, the same are entitled to receive.

"(5) 'Ordinary care,' as used in these instructions, means such care as a reasonably prudent person would have exercised under the same circumstances.

"(6) If the jury find for the plaintiff, in estimating his damages they will take into consideration, not only his age, the physical injury inflicted, and the bodily pain and mental anguish endured, together with the loss of time occasioned, but also any and all such damages which it appears from the evidence will reasonably result to him from said injuries in the future."

The following instructions were given at the request of the defendant:

"(1) The court instructs the jury that if the said bridge in question was composed of such material as was used by men of ordinary care engaged in building pile bridges, and if said material was given a reasonable inspection at the time it was put in the bridge, and found to be suitable for the use to which it was put, and if the maintenance of the bridge thereafter was given such care and inspection as would be given by men of ordinary care and prudence, and if by such inspection nothing was found to indicate that the bridge was not reasonably safe for the purposes for which it was used,

then the defendant is not liable, and you will return a verdict for the defendant; and you are further instructed that what is meant by 'ordinary care,' as used in these instructions, means such care as an ordinarily prudent person would exercise under the circumstances given in evidence in the case.

"(3) The court instructs the jury that, before the plaintiff can recover in this action, he must prove to the reasonable satisfaction of the jury, by the greater weight of the evidence in the cause, that his injuries are due to the negligent conduct of the defendant, its agents, or servants, and that, had it not been for such negligence in constructing or maintaining the bridge in question, he would not have been injured; and, if he has failed to so prove, your verdict will be for the defendant. And you are further instructed that the defendant was not bound to furnish its employees any particular kind or style of bridge over Rose Branch, or other streams its railroad crosses; that defendant has discharged its full duty to plaintiff when it has constructed and maintained a bridge over Rose Branch such as is in ordinary use by itself and other railroads, and reasonably safe to carry trains over it under ordinary conditions and circumstances; that defendant was not bound to anticipate unprecedented, extraordinary, or unusual rainfalls, or to build such a bridge as would resist or stand against such; and if the jury believe that the bridge over Rose Branch, as constructed and maintained, was reasonably safe for the purpose for which it was built in times of usual and ordinary rainfall, then plaintiff cannot recover.

"(4) The court instructs the jury that if you believe the bridge in question, as built and maintained, was reasonably safe for the passage of defendant's trains over it under ordinary conditions, and that it was destroyed or weakened so that it was made unsafe by an unusual rainfall, and that the wreck was thereby caused, then the accident is due to causes over which the defendant had no control and for which it is not blamable, and you will return a verdict for the defendant.

"(5) The court instructs the jury that the defendant is not bound to furnish any particular kind or style of bridge over Rose Branch to the plaintiff, and it is in no sense an insurer of his safety; that all the law requires of the defendant toward its employees is that it shall furnish a bridge over its streams that is reasonably safe for carrying trains over them under ordinary conditions.

"(6) The court instructs the jury that if you believe, from the evidence, that in the construction and maintenance of the said bridge the officers, agents, and servants of the defendant, in and about such work, exercised ordinary care—that is, such as is usually exercised by men of ordinary prudence under the same or similar circumstances—then defendant is not guilty of the negligence charged; and what is meant by the word 'negligence' is the want of that degree of care that an ordi-

narily prudent person would have exercised under the same or similar circumstances.

"(7) The court instructs the jury that one of the defenses in this case is that the wreck was caused by the act of God—that is, an extraordinary or unusual rainfall—and you are instructed that the law is that the defendant is not liable for damages or injuries resulting from an inevitable accident or the act of God; and you are instructed that if you believe, from the evidence in the case, that the wreck in which plaintiff was injured was caused by an extraordinary or unusual rainfall, and that it would not have occurred from an ordinary rainfall, then the verdict should be for the defendant.

"(8) The court instructs the jury that, although you may believe from the evidence that the defendant was negligent in either or both the construction and maintenance of the said bridge over Rose Branch, yet if the wreck is not due to such negligence, and would not have occurred in an ordinary rainfall, and is due to such extraordinary or unusual rainfall alone, then the defendant is not liable, and you will return a verdict for the defendant.

"(9) Although the jury may believe that a bridge with a single span reaching clear across Rose Branch was better than a bridge with piling in the bed of the branch, and although some parts of the piling had decayed, and although some of the dirt was washed away from around the piling, and that the piling was driven in soft earth, and driftwood was allowed to accumulate against the bridge, yet if the bridge, under these conditions, was reasonably safe for the purposes for which it was designed, and would have been reasonably safe under ordinary conditions and in the time of ordinary rainfall, and under such condition said train would have passed safely over said bridge, but said wreck was the result of an extraordinary or unusual rainfall, then the defendant is not liable, and you will return a verdict for the defendant.

"(10) If the jury find, from the evidence in this case, that the fall of defendant's bridge and the wreck of its train thereby at Rose Branch on the 26th day of June, 1897, was occasioned by a sudden and unusual or extraordinary rainstorm then and there prevailing, which caused an unusual amount of water to accumulate in said branch, and thereby wash away a bridge previously constructed by the county of Clay over an adjacent highway, resulting in its being forced by said water against the supports under defendant's bridge, thereby causing said supports under defendant's bridge to give way and cause the wreck, resulting in the injuries to plaintiff here sued for, then you are instructed that the plaintiff is not entitled to recover in this action, and your verdict must be for the defendant.

"(11) The court instructs the jury that you cannot resort to guess, conjecture, random judgment, or supposition to determine the cause of the wreck; but, before plaintiff is entitled to recover, he must prove by the evidence in the case that his

injuries were caused by the negligence of defendant, its servants, agents, or officers, and negligence is a matter that must be proven, and cannot be presumed, nor can it be inferred from the happening of the accident; and if the evidence in this case fails to show that the wreck in which plaintiff was injured was caused by the negligence of defendant, or if the evidence satisfies you that the wreck was caused by unusual or extraordinary rainfall, or if from the evidence you are unable to determine the cause of the wreck, or if from the evidence the probabilities are equally strong that the wreck was occasioned either by defendant's negligence or by an extraordinary or unusual rainfall, then it is your duty to return a verdict for the defendant.

"(12) The court instructs the jury that you are sole judges of the weight of the evidence and of the credibility of the witnesses, and, if you believe any witness has intentionally sworn falsely to any material fact, you are at liberty to disregard the whole of the testimony of such witnesses; and in arriving at your verdict you will take into consideration, not only all the evidence in the case, but all the facts and circumstances given in evidence, and, in determining what weight and credibility shall be given to any witness testifying in the case, you will consider his conduct while upon the witness stand, the reasonableness or unreasonableness of his testimony, and, in cases where he is testifying as an expert, you will consider his opportunities for forming his opinions, his qualifications for giving opinions upon the subject of his testimony, his attitude toward the parties to the action, and all the other facts and circumstances given in evidence in the trial of the case.

"(15) The court instructs the jury that the plaintiff is not entitled to recover, for loss of time, his wages as a railroad conductor on a railroad train, and you can only consider the evidence of such wages in considering the value of time lost.

"(16) The court instructs the jury that, if you believe that any witness in this case has sworn to a state of facts therein in the face of and in opposition to obvious physical facts or contradictory to the common knowledge or experience of men, then it is your duty to wholly disregard any such testimony.

"(17) In this case the defendant has set up the act of God as a defense against any recovery by the plaintiff. By the expression 'act of God' the law means any phenomenon or action in the physical world around us (not occasioned by the intervention or interference of man) which is extraordinary or unprecedented, or outside of common experience, which is irresistible in its character, and which cannot be before seen or prevented, such as extraordinary or unprecedented storm of any kind, or an unprecedented overflow of water, or an earthquake, or a sudden death or the like. If, therefore, the jury find from the evidence that before the train in question

approached Rose Branch an extraordinary or unprecedented rainstorm or waterspout passed down and across the valley of Rose Branch (which defendant's servants in charge of the train did not and could not foresee), causing an extraordinary and sudden rise in the waters of said branch, which swept away the county bridge in evidence, and hurled it against the piling of defendant's bridge, where the county bridge became the cause of extraordinary scouring action in the waters of said branch, they being arrested in their flow by the impediment of the county bridge, by means of which the west bent of defendant's bridge was washed out, and the supports of its bridge weakened, whereby the train was wrecked and plaintiff injured, then the jury must find the issues for defendant."

The court gave the following instructions of its own motion:

"(13) The court instructs the jury that, in considering the extent of the plaintiff's injuries and his physical condition, you may consider the fact that plaintiff, prior to the accident, had had rheumatism. If you believe his subsequent ailments, in whole or in part, resulted therefrom, you are instructed that plaintiff was bound to use all means within his power to effect a cure of himself from the injuries received in the accident, and if he has not done so, and has neglected to properly treat himself, then he cannot recover for any condition due to such neglect; and, in considering the element of damages based on account of loss of time, you will consider the nature of his employment as a railroad conductor, and cannot allow for loss of time sued for since the commencement of the action, to wit, December 15, 1898, but may consider the fact, if proven, of impairment of earning capacity.

"(14) The court instructs the jury that, although you may believe that the plaintiff has a displaced heart, and that his liver is not in its natural position, yet, before you can consider these facts as an element of damages, it must be proven to your reasonable satisfaction that these conditions were caused by the wreck, either directly or indirectly, and that the wreck is due to the negligence of the defendant, as explained in the other instructions."

To the giving of all of said instructions, and each of them, defendant duly excepted.

The defendant then prayed the court to give the following instructions:

"(13) The court instructs the jury that, in considering the extent of the plaintiff's injuries and his physical condition, you will consider the fact that plaintiff, prior to the accident, had had rheumatism and other ailments. You are instructed that plaintiff was bound to use all means within his power to effect a cure of himself from the injuries received in the accident, and if he has not done so, and has neglected to properly

treat himself, then he cannot recover for any condition due to such neglect; and, in considering the element of damages based on account of loss of time, you will consider the nature of his employment as a railroad conductor, and cannot allow for loss of time sued for since the commencement of the action, to wit, December 15, 1898, but may consider the fact, if proven, of impairment of earning capacity.

"(14) The court instructs the jury that although you may believe that the plaintiff has a displaced heart, and that his liver is not in its natural position, yet, before you can consider these facts as an element of damages, it must be proven to your reasonable satisfaction that those conditions were caused by the wreck, and that the wreck is due to the negligence of the defendant, as explained in the other instructions.

"(18) The court instructs the jury that there is no evidence in this case that the bridge in question was not a suitable bridge to have been placed over Rose Branch, and that a pile bridge is not a suitable structure for that point, and that there is no evidence that said bridge was made of unsound or unsuitable material for a bridge, but the evidence shows that it was built of proper material for a bridge; and if you find, from the evidence, that said bridge was reasonably maintained and reasonably inspected after it was built, and nothing therein was found to indicate that it was unsafe for the purpose for which it was used, then your verdict should be for the defendant.

"(19) And you are further instructed that although you may find that sap rot had taken place on the piles, or some of them, and that they were reduced on account thereof in size, yet if you further find that the piling in that condition was reasonably safe for the purposes of a bridge, and was reasonably supported, so as to make the bridge a reasonably safe structure as a bridge, then the verdict should be for the defendant.

"(20) The court instructs the jury that under the pleadings and all the evidence in this case the plaintiff is not entitled to recover."

To the refusal of such instructions the defendant then and there duly excepted.

It was not the duty of defendant to furnish plaintiff any particular kind of bridge, so that the one furnished was reasonably safe for the purpose for which it was used; nor does the petition otherwise allege. It does, however, allege that the bridge over Rose Branch was a "pile bridge, when it should have been a span bridge," but then proceeds to set forth its infirmities, and the dangerous condition it was in at the time of and before the accident. The mere allegation that the bridge was a "pile bridge," without more, does not state a cause of action; but after this allegation follows averments which, if true, show why it was not the proper kind of bridge for that place, and not reasonably safe. That

it was defendant's duty to its employees in its train service to construct and maintain a reasonably safe bridge over Rose Branch, and if it failed to do so, and in consequence of such failure plaintiff, while in the discharge of his duty, was injured, that defendant is liable to him in damages for such injury, there can be no question. Cobb v. Railway, 149 Mo. 609, 50 S. W. 894.

Defendant asserts that there was no proof whatever in support of the allegation that the earth under this bridge was insufficient to support the piles; but we are unable to give our assent to this contention. The evidence upon this feature of the case was as follows:

E. P. Donovan, public administrator of Clay county, on direct examination, testifying on behalf of defendant, said: "I am familiar with the bed of Rose Creek. It is made of soapstone rock and limestone. In olden times I have seen Rose Branch cut out there when there wasn't any water left in it, and I have seen soapstone there." Again, on cross-examination, the same witness said: "I do not know whether there is any quicksand in the bed of Rose Branch or not. I saw sand there, but whether it was quicksand or not I will not say. I have seen dirt left by the stream that would mire until it dried up; that sediment and sort of gumbo above the sand would wash out. I have seen it when there would come down a freshet and wash it out. It was washed down deep enough so you could see the hard soapstone. I have seen soapstone there in the bottom of the branch after one of these freshets. I don't remember when it was or how many times."

H. B. Wood testified as follows: "I think it has been described as good as I can describe it. The river sediment forms in there and washes from the hills. It washes down the dirt, and it settles there, and the river backs up there over it. Sometimes it is a kind of sandy soil, and sometimes it is black and bluish mud, and very sticky, like soft soap. It will slip out when you catch it in your hand. Sometimes the river would back in there, and there would be more mud than others. It would wash out after another rain. Could not say how deep it is to solid rock. Have been bathing down there when I could stand on solid rock or bottom, but whether it was rock or soapstone I cannot say. It was perfectly solid, and I could stand on it."

A. C. Kidd testified as follows: "The soil into which these piles were driven was soft dirt, or made dirt. The river backs up under there every year. The river leaves a sediment there. The Missouri river some years settles as gumbo, and some years it settles as quicksand. I have seen it both. Some years it is soft, and some years it is pretty solid."

Mr. Crabtree testified: "I never examined the earth into which this piling was driven, only when the horses got mired in it just below the bridge; 30 or 40 feet below the bridge, probably. I think the character of the dirt under the bridge

was something similar to that. I think the Missouri river sediment makes sand sometimes, and it is dark blue, like with mud, like the same kind they took out when they put in this bridge; something about like that same kind of stuff. Under the bridge at the west bent it is not very solid. It is a kind of spongy soil. Could not walk very close to the edge of the water without getting into the mud six or eight inches deep."

Samuel Roby testified that "the earth into which these pilings were driven was soft mud; a kind of quicksand sediment or wash from the hill; soil washed from the uplands and backed up by the river. When the river is high, it backs in; and mud, it is very soft. When the river is high, and big rains come, it makes it very soft and miry. I should judge the sediment to be about eight feet, from what I know about it, from sounding it with a rod of iron. * * * I took a three-quarter rod of iron I had there to see how deep the mud was under the bridge, and it was nine feet under the railroad bridge, and seven feet and something at the county bridge, until we struck something we supposed to be soapstone or rock."

Frank McCoy, a witness, said: "I suppose it was made land. It was soil from the bluffs and the Missouri river. When the river backs in there, and stands awhile, it leaves a sand probably a foot, or a foot and a half; and if the creek gets high, and runs, it runs in mud on top of it from the bluffs. That is about the way it is formed. When it crossed the branch, there is a soapstone bottom. I have seen it. * * * I never dug down through this stream to find where solid rock was. Have seen the day when there was no dirt in the river at all; when the river ran along and washed it off clear, and I could see the soapstone."

Dr. Henshaw stated: "I think the soil in which the piles were sunk is soil that was washed in from the hills. It has washed in there, and some of the soil is sediment from the river that backed in there, and when it is muddy it leaves a sediment from the river water. I think the last time I noticed it there was a hole of water under the bridge; that is, before the wreck."

Wm. McCoy testified that "the soil beneath the bridge is soft and quicksand. It is made of earth. On the east side it is hard sometimes, but on the west side I never saw it hard at all. On the west side it would mire anything that went in there—any kind of stock. I have seen stock in there, horses and cattle, and I have helped to get them out. There has been water under that bridge pretty nigh all the time."

Seth White testified as follows: "All that land in the bottom is made by the Missouri river. In driving pumps you find a sort of sand or gumbo. That land is made by the deposits from the river. It is made soil, and we call it 'made land' that is left there by the river. At times, when there is

plenty of water and wet, it is very spongy and muddy, and this gumbo comes down with the water under this bridge. I do not know just the character of it, but it is made dirt."

D. D. Holt, a witness for plaintiff, testified that he was present when they built the bridge to supply the one that gave way. He testified as follows: "I saw them when they laid the first stone. From the bottom of the creek, down, I suppose it was about six feet from the bank up to where the abutment stood, and perhaps it was a good deal more. From the bottom of the creek down to solid rock it was not very far; six feet, perhaps, from the bed of the creek. With the exception of a little mud on that five or six feet, the balance was quicksand and gravel. I saw it when they were drawing it out and shoveling it out. I seen it again some days after the wreck, and I seen it sunk at the same place. I was down there after the wreck in 1897. They were sinking and digging out the old stone, and putting in a new stone abutment there. I didn't see any difference in soil I saw in 1897 and that which I saw 31 years ago. I saw them digging in 1897. They digged six feet from the bottom of the creek before they struck solid rock. They struck quicksand directly they started. When they stopped they struck rock. From the bottom of the creek down to where they stopped was nothing but quicksand. I saw it when they drew it out by the tubs full."

It is clear from these excerpts from the evidence that there was some evidence tending to show that the earth under the bridge was insufficient to support the piles. Its weight was, of course, for the consideration of the jury. The bridge was constructed out of first-class material; but there was evidence tending to show that at the time of the accident some of the piling was decayed, and not of sufficient strength to withstand the pressure of the water and driftwood which came in contact with it. And while the fact that the bridge went down under the train did not of itself make out a prima facie case in plaintiff's favor (Bowen v. Railway Co., 95 Mo. 274, 8 S. W. 230), and it was incumbent on him to show how and why the accident occurred, the falling of the bridge was one of the incidents which occasioned the injury, so that the case does not stand alone on the fact that the bridge fell and that the plaintiff was injured; but if, in connection therewith, the evidence showed that the bridge was a pile bridge, and on account of the character of the stream and the country drained by it such a bridge at that locality was not reasonably safe, or that the piling that supported it had become rotten, unsound, and defective, and therefore not reasonably safe, or that there was not sufficient earth around some of said pilings, and for that reason the bridge was not reasonably safe, or for any or all of these reasons it fell and injured plaintiff, and that defendant knew of the unsafe condition of said bridge, or by the exercise of reasonable care and diligence could have

ascertained the same before the arrival of the train upon which plaintiff was conductor at said bridge, he made out a prima facie case entitling him to go to the jury, and it then devolved upon defendant to overcome this prima facie case, and to show by the weight of the evidence to the satisfaction of the jury that the accident was attributable to some other cause; and this defendant undertook to do by showing that a sudden, unforeseen, unprecedented, and extraordinary storm, flood, and waterspout, purely local in its character, occurred in the immediate vicinity of Rose Branch, only a few brief minutes prior to the arrival of that train at that point, which swept the county bridge against this structure and wrecked it, and hence the accident was the result of vis major, or an act of God, for which the defendant is not liable. But the evidence upon this point was not all one way, and, while it tended to show that the rise in Rose Branch was occasioned by an unprecedented rainfall, there was evidence to the contrary, to such an extent that the court would not have been justified in taking the case from the jury upon that ground. Besides, defendant's assertion that the high water in the branch washed the county bridge from its location, and swept it against the railroad bridge, and wrecked it, is merely conjectural, as there was no evidence to that effect.

It is said, for defendant, that by the first and third instruction given at the plaintiff's request the jury were expressly authorized to find a verdict in plaintiff's favor if the bridge was a pile bridge. This we think a misinterpretation of these instructions, and that by no fair construction can they be construed as telling the jury that they were authorized to find a verdict in plaintiff's favor simply because the bridge in question was a pile bridge. They simply told the jury that defendant was bound to maintain a reasonably safe bridge, and submitted to them, for their determination from the evidence, whether such a bridge over Rose Branch, in view of the area of country drained by it and the character of the stream, was reasonably safe. It would have been difficult to have presented this feature of the case to the jury in more apt words than were employed in that respect, to wit: "And that said bridge was a pile bridge, and on account of the character of the stream and the country drained by it said bridge was not reasonably safe at that place." Now, if the instruction had presented the case to the jury upon the ground alone that the bridge was a pile bridge, without more, defendant's contention would clearly be correct; but it went further, and in connection with the fact that the bridge was a pile bridge submitted to the jury to say whether, on account of the character of the stream and the country drained by it, such a bridge was reasonably safe at that location.

So with respect to the third instruction. It left to the jury for their determination the question whether a pile bridge was reasonably safe over Rose Branch at the place of the accident,

under all the facts and circumstances in evidence. The entire instruction should be considered together, and not certain parts or words taken from it; and when this is done it is not in any way open to the objection urged against it.

Nor is there any conflict between plaintiff's instructions and the third and fifth given in behalf of defendant. They are framed, when taken together, to cover certain features of the case—plaintiff's, that defendant was bound to furnish him a reasonably safe bridge over Rose Branch, though of no particular kind or style; while by defendant's the jury were told that defendant was not an insurer of plaintiff's safety, and was only required to furnish a bridge that was reasonably safe for carrying trains under ordinary conditions. The conflict between these instructions and plaintiff's, to the effect that if, on account of the character of the stream and the topography of the country drained by it, a pile bridge was not reasonably safe, then defendant had not performed its duty to plaintiff, and if the injury resulted from such negligence he was entitled to recover, is not apparent; nor do we think there is any. They merely presented diverse views of the respective parties with respect to the duty of the defendant to the plaintiff, and are not at all inconsistent or inharmonious. Upon the part of defendant the jury were told that no particular kind or style of bridge was necessary, but that defendant's duty was performed when a reasonably safe bridge was constructed. For the plaintiff the jury were told that it was the duty of defendant to provide and maintain a reasonably safe bridge, and if, on account of the stream and the country drained by it, a pile bridge was not reasonably safe at that place, etc., the defendant was negligent. Clearly there is no inconsistency or conflict in these instructions.

Another contention is that the thirteenth and fourteenth instructions asked by defendant, modified by the court, should have been given as asked. There is no merit in this contention. The first-named instruction, as asked, directed the jury, in passing upon the extent of plaintiff's injuries and his physical condition, to consider the fact that prior to the accident he had rheumatism and other ailments, when, as amended, it told the jury that they might consider the fact that plaintiff had rheumatism prior to the accident, if they believed his subsequent ailments, in whole or in part, resulted therefrom. Clearly, unless plaintiff's rheumatic troubles have some connection with the injuries, there was no reason why they should be considered by the jury in making their verdict.

The fourteenth instruction was amended so as to authorize the jury to take into consideration any physical injuries to plaintiff resulting directly or indirectly from the accident. That the instruction, as amended, correctly presented the law on this phase of the case to the jury, is beyond any question.

No error was committed in refusing the eighteenth and nineteenth instructions asked by defendant, as those that were given covered fully every phase of the case.

Defendant asserts that illegitimate and improper means were resorted to by one of plaintiff's counsel to prejudice the jury against the defendant, outside of the court room, in that a false and misleading account of the first trial, there having been one before this, was furnished to the Mexico newspapers by him, and thereafter published during the progress of the trial here under review; that such newspapers, containing the articles above described, were read by the jury, or by certain members of it, during the trial. While this point is made in the motion for new trial, on the hearing of that motion there was no evidence adduced showing that the jury ever read these statements in the Ledger and Intelligencer, the papers in which they were published, and therefore they were not hurtful to defendant. Nor does the mere fact that P. H. Cullen, one of plaintiff's attorneys, gave out these interviews to the reporters of the papers named, prove or tend to prove that he procured such statements to be published, and thereafter caused them to be distributed in Mexico, to the end that they might be read by the jurors, for the purpose of prejudicing the jury against the defendant.

The trial began on Monday, February 19th, and continued until the afternoon of the 23d, when the jury were sent to their room to consider of their verdict. After their supper that evening they were sent back to their room, where they remained until about 10 o'clock that evening, when they reported to the court that they were unable to agree, and were discharged until morning. One of the jurors, by the name of Crum, in the meantime procured a copy of the Mexico Message, cut from it the article which had been published a few days before concerning the Copeland Case, read it over, and showed it that night to another member of the jury with whom he was rooming. This is also one of the errors assigned in this case. The article is as follows:

"The Copeland Case.

"Again on Trial in the Audrain Circuit Court.

"G. C. Copeland is suing the Wabash Railroad for $35,000 for injuries received in the wreck at Missouri City, June, 1897, where eight men were killed. A coffin was bought for Copeland, but he recovered. The trial last term of court resulted in a hung jury. One of the jurors was for nothing, and hung to the last, while one of the others was for $20,000, two for $15,000 and eight for $10,000. There is much interest in the case. Every point of ground will be contested. The trial may last a week."

There is nothing said or intimated in this article with respect to the right of plaintiff to recover. It does not undertake to espouse his cause, or to attribute his injury to the fault or

negligence of defendant, but simply gives an impartial statement of how the jury stood upon the former trial and a few facts connected with the accident; and does the fact that, pending the trial, some of the jurors read the article, furnish a sufficient reason for the interference by this court, and for a reversal of the judgment upon that ground? We think not. The matters stated in the article, even if they had been published in either of the papers and read by the jurors before they were selected to try the case, would not have disqualified them; and certainly the reading of the article thereafter, and while serving as jurors, would not of itself be sufficient cause for setting aside the verdict by the trial court, or for a reversal of the judgment by this court upon that ground.

The same question was before the Supreme Court of Michigan in the case of Sherwood v. Chicago W. M. Ry. Co., 88 Mich. 108, 50 N. W. 101, in which it is said: "After the trial had been in progress a day, some newspapers published and circulated in Grand Rapids, where the trial was in progress, an item in regard to the former trial, in which was stated the amount of the verdict. It was shown that some of these articles reached some of the jury. Defendant thereupon requested the court to permit an inquiry to be made to the jury, and ascertain whether they had read these articles, and, if they had, to arrest the progress of the trial of the case and grant a new trial. The application was overruled. Defendant's counsel insist that this was prejudicial, and especially in view of the fact that a verdict in the present case was larger than in the former. This rule, if established, would render incompetent every juror who knew the amount of the former verdict. Intelligent men, who are the most competent jurors, are usually readers of newspapers. Newspapers have the right to publish verdicts and judgments rendered in the courts. The result would be to render incompetent as jurors in many cases nearly all the intelligent residents of the county. It, of course, makes no difference when the jurors learn the amount of the former verdict. It is, indeed, desirable that such things, as far as possible, should be kept from the knowledge of the jury; but, however unwise it may be to publish them at the time of the trial, no violation of law is committed in so doing, nor will the reading of them by jurors render them incompetent."

In Harriman v. Wilkins, 20 Me. 93, it was decided that where a jury found among the papers, without any fraud on the part of the successful party, the verdict rendered upon a former trial, this constituted no ground for vacating their verdict.

In 2 Thompson on Trials, § 257, it is said: "The mere fact that the verdict in a former trial gets accidentally into the hands of the jury, with the papers, held no ground for a new trial," etc.

Fuller v. Fletcher (C. C.) 44 Fed. 34, was an ejectment

suit. It had been tried five times. Verdicts for the defendants at the first and the plaintiff at the second trials were set aside by the United States Circuit Court. A verdict returned for plaintiff at the third trial was set aside by the United States Supreme Court on writ of error. 120 U. S. 534, 7 Sup. Ct. 667, 30 L. Ed. 759. The fourth trial resulted in a hung jury. On the fifth, the defendants obtained a verdict, and plaintiff moved to have the same set aside, because the jury had read the opinion of the Supreme Court in 120 U. S. 534, 7 Sup. Ct. 667, 30 L. Ed. 759, which opinion, as read by them, was published by defendants in pamphlet form and by them generally distributed. The copy of the opinion which the jury read will be found in 120 U. S. 534, 7 Sup. Ct. 667, 30 L. Ed. 759, and said opinion contains a full statement of the evidence at the former trial, including a map of the disputed land in reduced size; also a statement of the finding of the jury for plaintiff, and the opinion of the Supreme Court, of about 12 pages, stating the evidence and discussing the weight of the evidence, and the conclusion of the court that a verdict for the plaintiff was not authorized. The verdict for defendants on the fifth trial was challenged by plaintiff for the reason that the jurors had read the opinion of the Supreme Court above referred to. In overruling the motion for a new trial on these grounds the court said: "The depositions, taken by a commissioner appointed by the court with the consent of the parties, prove this state of facts: One of the defendants before the last trial caused to be printed 100 pamphlet copies of the opinion of the Supreme Court as reported in Fletcher v. Fuller, 120 U. S. 537–555, 7 Sup. Ct. 667, 30 L. Ed. 759, and distributed them among friends and relatives interested in the case, and among other persons in the neighborhood, including some who had been jurors or witnesses at former trials. Pending this trial the foreman and another of the jury each read one of these copies, brought to his notice under the following circumstances: A copy was left, by whom it did not appear, at the place of business of the foreman in Providence. Goodling, the town clerk of Lincoln, and who held other lands under the same title as the defendants, testified that two days before the last trial he called at the residence, in Lincoln, of another juror drawn and attending at the term, and afterwards sworn as a juror in this case, and gave him a copy, for the purpose of enabling him to understand the case better, and with no intent to influence his judgment. Goodling's conduct, though meddlesome and foolish, does not appear to have been dictated by a corrupt intent to interfere with the administration of justice, and there is not the slightest evidence that either of the defendants had a hand in it. On the contrary, it is clearly proved by the uncontradicted testimony of the defendants that none of them had anything to do with transmitting or delivering such copies to either of those jurors, or to any

other juror who sat at this trial; and it is also proved by the testimony of both of those jurors that no such copy was taken into the jury room or laid before the jury. In order to set aside a verdict because a paper was unlawfully communicated to the jury, it must at least appear, either that the party in whose favor the verdict was afterwards returned took some part in the communication, or that the paper was such as could be supposed to have influenced the minds of the jury. The copies in question having been communicated to the two jurors out of court and without any participation of the defendants, the case stands just as if those jurors had happened, on the way to or from the court, during the trial, to read the opinion in a newspaper or in the official reports of the Supreme Court; and there is no such presumption that they could have been unduly influenced by their separate reading of that opinion as will justify the setting aside of the verdict subsequently returned by the jury after being fully instructed by the court upon the law applicable to the case. U. S. v. Reid, 12 How. 361, 366, 13 L. Ed. 1023."

The case of Kerr v. Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668, is also in point. In that case the court said: "The motion for a new trial was also based upon an affidavit that the Wheeling Intelligencer, a daily newspaper published in the city of Wheeling, had the following paragraph published therein during the trial: 'The Lunsford Will Case still drags its slow length along. It will probably occupy the entire remainder of the week. The general public opinion is that the jury will sustain the will or disagree. Among the witnesses examined yesterday were Rev. Dr. Cunningham, Attorney General Caldwell, Hon. Daniel Lamb, and John O. Pendleton.' And affiant further says that said daily newspaper has a large circulation in and through said city, and is very generally read by the people of said city, as he believes. Here is no evidence that any member of the jury read said paragraph; and, if they had, that would not be sufficient to set aside the verdict. If the fact was as therein stated as to the 'public opinion' on the case, the members of the jury, who are not required to be, and were not, kept together, could have heard the matter talked of without themselves being culpable. If verdicts could be set aside on such grounds, suits would be interminable. The court did not err in refusing to set aside the verdict on this ground."

To the same effect is U. S. v. Reid, 12 How. 361, 13 L. Ed. 1023.

It is said in 12 Ency. Pl. & Pr. p. 622: "And even when the jurors received newspapers containing accounts of or comments upon the case, a new trial will not be granted if there was nothing calculated to mislead or improperly affect their minds, or to prejudice their verdict." As we are unable to see how or in what way defendant could have been prejudiced, or the jury influenced, by reading of this article, we

are not inclined to think the judgment should be reversed upon that ground.

While the excessiveness of the verdict is assigned for ground for a new trial in the motion filed for that purpose, it is not urged in the briefs filed by counsel for defendants upon the attention of this court. But, in any event, no one can read the evidence in this case with respect to plaintiff's physical condition, before the accident and since, the extent of his injuries and their permanency, the suffering that he has undergone and will have to endure during his life, and his incapacity to work or labor, and entertain for a moment the idea that the sum awarded him was at all excessive.

Our conclusion is that there was ample evidence to take the case to the jury upon all the issues, and, as its weight was for their consideration, and not ours, we should not interfere upon that ground. Finding no reversible error in the record, we affirm the judgment. All of this division concur.

BROMMER v. PHILADELPHIA & R. RY. CO.

(*Supreme Court of Pennsylvania, May 4, 1903.*)

[54 Atl. Rep. 1092.]

Vice Principals—Train Dispatchers.*

A train dispatcher is a vice principal of the railroad company which employs him.

Injury to Brakeman—Collision—Nonsuit—Sufficiency of Evidence.

A brakeman sued for personal injuries received in a collision. The evidence showed that the train dispatcher directed an engineer to run on a certain track carefully, and stated that there were cars at a street named. The engineer collided with such cars some 1,200 feet nearer than the point named: *held* error to direct a nonsuit.

Same—Same—Defect in Sill of Tender—Sufficiency of Evidence.

Where a collision occurs, and plaintiff, a brakeman, is injured, an alleged defect in the sill of the tender cannot be treated as negligence contributing to the accident, as a requirement that such sill should be strong enough to resist the force of a collision would be impracticable.

Appeal from Court of Common Pleas, Philadelphia County; Wilson, Judge.

Action by William H. Brommer against the Philadelphia & Reading Railway Company. From an order refusing to take off a nonsuit, plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Richard P. White and Andrew C. Wylie, for appellant.
Gavin W. Hart, for appellee.

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*As to whether train dispatchers and telegraph operators are fellow servants of other railroad employees, see note appended to Northern Pac. Ry. Co. v. Mix (C. C. A.), 6 R. R. R. 739, 29 Am. & Eng. R. Cas., N. S., 739.

MITCHELL, J. It is conceded that under the decisions the train dispatcher, within the limits of his employment, was a vice principal. Lewis v. Seifert, 116 Pa. 628, 11 Atl. 514, 2 Am. St. Rep. 631. The negligence charged in the plaintiff's statement includes, among other things, erroneous information, and a misleading direction by the yardmaster, which were averred as at least in part the cause of the accident. The direction complained of was as stated by the engineer: "My orders were to run the south-bound track carefully. That there were fifteen cars on the south-bound at Front street, and that an engine was coming from Richmond to move them to Richmond. That I should follow those cars down carefully, and, after they were shifted, the engine would go in the house." The engine and tender were accordingly run carefully, as alleged, but met the standing cars at Second street, instead of Front, as expected, with the result of a collision, in which the plaintiff was injured. The character of these orders on the question of negligence was for the jury. It may be that in railroading, where distances are so entirely a matter of time and speed, a direction to run carefully, and be on the lookout for an obstruction at a point named, is sufficiently accurate and specific, though the obstruction be met in fact 1,200 or 1,300 feet nearer. If the order was not negligent under the customs and common understanding in the business, then the defendant is not responsible, for that is the only negligence averred on which the plaintiff can recover. But, as that is not the only, or even the prima facie, deduction from the order, it must go to the jury on the evidence.

It is not perceptible how the alleged defect in the sill of the tender can be treated as negligence contributing to the accident. The sill being the place where the coupling is attached for pulling the train, it is required to have strength to resist the tension of that operation, but there is nothing in its purpose or use to require that it shall be strong enough to resist the force of a collision. Such a requirement would be impracticable. The inference that, if the sill here had been stronger, the injury to the plaintiff would have been less, or would not have happened at all, is a mere guess, which the jury should not be permitted to make.

It is strongly urged by the appellee that the only proximate cause of the collision was the disregard of the rules of the company by the crew of the standing train, and it may be so, but it is not sufficiently established in the plaintiff's presentation of the case to justify the court in taking it away from the jury.

Judgment reversed, and procedendo awarded.

ROSEMAND *v.* SOUTHERN RY.

(*Supreme Court of South Carolina, April 30, 1903.*)

[44 S. E. Rep. 574.]

Foreign States—Common Law—Presumptions.

In an action for damages sustained by a railroad employee in another state, where there are no allegations as to the rule of law applicable to such facts in such state, it will be presumed that the common law prevails.

Fellow Servants—Common-Law Doctrine.

The fellow-servant doctrine is a common-law doctrine.

Same—Negligence—Assumption of Risk.

Where fellow servants are exercising the ordinary duties of their employment, each assumes the risks incident to the employment.

Appeal from Common Pleas Circuit Court of Greenville County; Gary, Judge.

Action by J. C. Rosemand against the Southern Railway. From order of nonsuit, plaintiff appeals. Affirmed.

H. K. Townes and Blythe & Blythe, for appellant.

T. P. Cothran, for respondent.

Plaintiff and engineer are fellow servants at common law. Railroad Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009; Railroad Co. v. Charles, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999; Stephani v. Railroad Co. (Utah), 57 Pac. 34; 3 Wood, R. R. 1775; Jenkins v. Railroad Co., 39 S. C. 507, 18 S. E. 182, 39 Am. St. Rep. 750; Wilson v. Railroad Co., 51 S. C. 96, 28 S. E. 91; Boatwright v. Railroad Co., 25 S. C. 135; Evans v. Chamberlain, 40 S. C. 106, 18 S. E. 213.

GARY, A. J. The appeal herein is from an order of nonsuit. The action is for damages alleged to have been sustained by the plaintiff, at a point on defendant's railroad near Toccoa, in the state of Georgia, while engaged in the occupation of flagging, through the negligence of the defendant. The complaint alleges substantially that on June 1, 1900, the plaintiff was, and for three weeks preceding had been, in the employ of defendant, and engaged in the repair of a trestle near Toccoa, Ga., under the orders and direction of B. O. Worley, bridge foreman; that it was the duty of Worley, and it had been his custom, to send out flagmen to warn approaching trains of the dangerous condition of the trestle, and it was the duty and custom of those in charge of the trains so warned to stop their trains, and this had been done for three weeks during all of the time repairs were being made on the trestle; that upon the occasion in question the plaintiff was ordered by Worley to proceed about a mile in the direction of Toccoa for the purpose of flagging approaching trains; that he had been previously ordered to do similar work on the south side of the trestle, and, when he came back to the trestle from such previous work, he was not allowed

time to rest before going out again, as he was directed, and, after placing the flag and torpedoes in proper position, he became so overpowered by the heat and exertion that he fell exhausted and unconscious upon the track; that while lying in this unconscious condition he was struck by a south-bound train and seriously injured; that his injuries were caused by the negligence of the servant of the defendant in not exercising due care in approaching a known dangerous place, and a place where he had been accustomed to have trains flagged, and in failing to keep a proper lookout along the stretch of track. The answer denied negligence, and pleaded plaintiff's contributory negligence.

At the close of plaintiff's testimony, the defendant moved for a nonsuit on two grounds: (1) That there is no testimony tending to show the negligence alleged in the complaint; (2) that the accident occurred in Georgia, and that, in the absence of proof, it will be presumed that the common law prevails there.

His honor the presiding judge granted the following order:

"The first ground is overruled. The second ground is sustained. It appears from the evidence that the accident occurred in the state of Georgia. The law of that state must govern. In the absence of proof as to that law, the presumption is that the common law prevails there. At common law a master is not responsible in damages to one servant injured by the negligence of a fellow servant. If there were any negligence at all in this case, it was that of the engineer of the train which struck the plaintiff. As it appears that the plaintiff and the engineer were engaged in the duties, respectively, of their employment, I hold that they were fellow servants. It is therefore ordered that the motion be granted, and that the complaint be dismissed, with costs."

The plaintiff appealed upon the following exceptions:

"(1) The circuit judge, having held that, in the absence of proof as to the law of the state of Georgia, the common law prevails there, erred in not holding further that the presumption existed that the common law of the state of Georgia is the common law as declared by the Supreme Court of the State of South Carolina.

"(2) The circuit judge erred in holding that at 'common law a master is not responsible in damages to one servant injured by the negligence of a fellow servant,' whereas he should have held that, under the common law as established by the courts of this state, the master is responsible in damages to one servant injured by the negligence of a servant of the same master engaged in a different department of labor, and for the further reason that the doctrine of fellow service is not a common-law doctrine.

"(3) Because the circuit judge erred in holding that the engineer of defendant's train, and the plaintiff, a laborer on one of defendant's bridge gangs, were fellow servants, whereas

he should have held that the said employees, being engaged in different departments of labor, and not being associated in the work which each was employed to do, were not fellow servants.

"(4) Because, inasmuch as the fellow-servant doctrine is based upon the doctrine of assumption of risk, the circuit judge erred in not submitting to the jury the question as to whether the plaintiff had assumed the risk of injury from the negligence of the servants of defendant.

"(5) Because the circuit judge erred in holding that, 'if there were any negligence at all in this case, it was that of the engineer of the train which struck plaintiff,' whereas he should have held that the complaint alleged and the testimony tended to show that the vice principal of the defendant, to wit, the bridge-gang foreman, was negligent in ordering plaintiff to perform an extrahazardous work without notifying him of the increased danger to which he was subjected, and that plaintiff's injuries resulted from such negligence on the part of the said bridge foreman, or from the concurrent negligence of the said bridge foreman and of the engineer of train which struck plaintiff.

"(6) Because the testimony showed that the plaintiff had been employed by the defendant as a laborer on a bridge gang on defendant's road, but that he had been ordered by the foreman of the bridge gang, on occasions, to flag trains in the absence of the regular flagman of the bridge gang, and, on the occasion alleged in the complaint, had been ordered to flag a train under particularly dangerous circumstances. The circuit judge, therefore, should have left it to the jury to say whether or not plaintiff had assumed the increased risk by flagging under the circumstances alleged, to which he was subjected by the orders of the said foreman.

"(7) Because the foreman in charge of the bridge gang had authority to order the plaintiff's actions, the said foreman representing his master in the said work. The circuit judge should have left it to the jury to say whether the plaintiff's injuries resulted from the risks that he had contracted to assume, or were such as resulted from an increased risk that he was compelled to assume by reason of the order of the servant having authority to make the same.

"(8) Because, the plaintiff having been ordered to perform work other than that he had contracted to perform when he entered defendant's employment, the circuit judge erred in not submitting the following questions to the jury: (a) Whether the plaintiff was acting within the scope of his employment at the time he was injured, or whether he was ordered to perform work outside the scope of his employment by one who had authority to direct his actions; (b) whether the work he was ordered to perform was more hazardous than the work he had contracted to perform; (c) whether the danger of the work plaintiff was ordered to perform was so

manifest that a person of ordinary prudence, situated as plaintiff was, would have realized the danger, and not have undertaken it."

The defendant gave notice that it would ask this court, in case it became necessary, to sustain the order of nonsuit upon the additional ground that the presiding judge erred in overruling the first ground of defendant's motion.

Before proceeding to consider the questions presented by the exceptions, it may be well to state some general principles affecting this case. The second ground of the motion for nonsuit was, in effect, a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, in that, under the common law, which, it must be presumed, prevails in Georgia, a master is not responsible to a servant injured through the negligence of a fellow servant. For it was not based upon the failure of the testimony to sustain the allegation of the complaint, but upon the fact that the allegation of the complaint did not show actionable negligence, or such as the law recognizes. The circuit court practically decided that, although there was testimony tending to support the allegations of the complaint, nevertheless it was not actionable, for the reasons stated in the order of nonsuit. The right of the plaintiff to maintain this action must be determined by the laws of Georgia. In Bridger v. R. Co., 27 S. C. 458, 3 S. E. 860, 13 Am. St. Rep. 653, the court says: "The cause of action arose in North Carolina. The injury was inflicted there, and if the parties had remained in that state, and brought action there, they would have been compelled to stand or fall by the law there. And we cannot see, upon principle, how stepping over the line could give the plaintiff a new and altogether enlarged cause of action—in fact, a cause of action which he did not have before, and therefore could not have enforced in the tribunals having jurisdiction of the matter at its origin." Sawyer v. Macauley, 18 S. C. 543; Thornton v. Dean, 19 S. C. 583, 45 Am. Rep. 796. The remedies, however, for determining the rights of the litigants, pertain to the lex fori. The rule is thus stated in Thornton v. Dean, supra: "As for all matters relating to remedies, each state insists upon enforcing its own laws—the lex fori—but in the interpretation of a contract it has been established by usage that the lex loci contractus must govern. The rule is clearly stated by Chancellor Kent, with its qualifications: 'Then it may be laid down as the settled doctrine of public law that personal contracts are to have the same validity, interpretation, and obligatory force in any other country which they have in the country where they are made. * * * It is, however, a necessary exception to the universality of the rule that no people are bound or ought to enforce or hold valid in their courts of justice any contract which is injurious to their pub-

lic rights, or offends their morals, or contravenes their policy, or violates a public law.' "

The complaint is silent as to the laws of Georgia. We will therefore proceed to consider what allegations must be alleged by the plaintiff, so as to show that he has a cause of action, when it arose in another state. In Pom. Code Rem. § 519, it is said: "Every action is based upon some primary right held by the plaintiff, and upon a duty resting upon the defendant corresponding to such right. By means of a wrongful act or omission of the defendant, this primary right and this duty are invaded and broken; and there immediately arises from the breach a new remedial right of the plaintiff, and a new remedial duty of the defendant. Finally, such remedial right and duty are consummated and satisfied by the remedy, which is obtained through means of the action, and which is its object." In section 520 the author uses this language: "The first of these branches must always, from the nature of the case, be a conclusion of law. The law, by its commands, creates a rule applicable to certain facts and circumstances, by the operation of which, when these facts and circumstances exist, a right arises, and is held by the plaintiff, and a corresponding duty arises and devolves upon the defendant. * * * This first factor of the cause of action is therefore always a conclusion or a proposition of law, *and results from the command of the supreme power in the state as its cause.*" Italics ours. In section 524 we find the following: "The reformed system, following in this respect the common-law method, dispenses with several of these elements which make up the plaintiff's entire ground of relief. It wholly rejects all the subdivisions which are mere legal rules or conclusions, and admits only those that consist of the facts to which the legal rules apply, and which are the occasion whence the conclusions arise. It assumes that the courts and the parties are familiar with all the doctrines and requirements of the law applicable to every conceivable condition of facts and circumstances, so that, when a certain condition of facts and circumstances is presented to them, they will at once perceive and know what are the primary and the remedial rights and duties of both the litigants; and, this knowledge being complete and perfect, it is useless incumbrance of the record to spread out upon it the legal propositions and inferences with which every one is assumed to be acquainted. A complaint or petition, therefore, drawn in accordance with this theory, must omit (1) the legal rule which is the direct cause of the primary right and duty; (2) the primary right and duty themselves, which are the results of this rule acting upon the given facts; and (3) the remedial right and duty which accrue to the plaintiff," etc.

When a cause of action arises in another state, it cannot be said that the courts and parties are familiar with the doctrines and requirements of the law applicable to the case, and

that "they will at once perceive and know what are the primary and remedial rights and duties of both the litigants." The complaint must therefore set forth the rule of law applicable to the facts from which the plaintiff's primary right and the defendant's primary duty arise, if they are founded upon statute; otherwise he will be forced to rely upon the common law as the foundation of these rights and duties. In the absence of allegations as to the laws of another state, the courts will presume that the common law prevails in that state. 6 Ency. of Law (2d Ed.) 284; Gooch v. Fancette (N. C.) 29 S. E. 362, 39 L. R. A. 835; Sibley v. Young, 26 S. C. 415, 2 S. E. 314; Watson on Pers. Inj. § 554.

We proceed to consider the exceptions in their regular order.

First Exception. Even if the appellant is correct in his contention in this exception, he was not thereby prejudiced, unless the common law, as declared by the courts of this state, entitled the plaintiff to recover damages for the alleged injury, and this question will be considered later.

Second and Third Exceptions. These exceptions will be considered together. The appellant's attorneys, in their argument, do not cite any authorities to sustain the proposition that the doctrine of fellow servant is not a common-law doctrine. If there was any doubt upon this question, it would only be necessary to refer to the authorities cited in the argument of respondent's attorneys to show that the doctrine of fellow servant does exist at common law. In the case of Wilson v. Ry. Co., 51 S. C. 96, 28 S. E. 91, the court says: "When persons are employed in a common undertaking, all sustain towards each other the relation of fellow servants when exercising only the ordinary duties of their employment, even when they cannot see each other, and are working apart, and not in conjunction. But if an employee sustains an injury through the negligence of a co-employee while such employee is performing the duties of the master, the master cannot defeat his recovery on the ground that they are fellow servants." The case of Jenkins v. R. Co., 39 S. C. 507, 18 S. E. 182, 39 Am. St. Rep. 750, fully sustains this doctrine. The syllabus of the case states correctly the principle decided, as follows: "The conductor of a preceding freight train and the assistant fireman of a following freight train are fellow servants, to the extent that the fireman on train No. 2 cannot recover from the master for damages received by him in jumping from his engine to avoid a collision with cars on the track detached from train No. 1, of whose presence proper signals, by torpedoes or otherwise, had not been given. Whether persons in the same employment are fellow servants does not depend upon the respective rank, grade, or authority of the servants." The respondent's attorney, in his argument, has cited numerous other cases sustaining the doctrine

announced in Jenkins v. R. Co., supra, which will be noted by the reporter. These exceptions are overruled.

Fourth Exception. It appears from the allegations of the complaint that the plaintiff and the engineer were exercising at the time of the injury the ordinary duties of their respective employments. One of the risks, therefore, which the plaintiff assumed, was the negligence of his fellow servant, the engineer. When the fellow servants are exercising the ordinary duties of their employment, the law says that each assumes the risks incident to the employment. Under such circumstances, no question of fact is presented for the consideration of the jury. Gallman v. U. H. Co., 65 S. C. 192, 43 S. E. 524.

Fifth, Sixth, Seventh, and Eighth Exceptions. These exceptions will be considered together. They must be overruled for the reason that the only acts of negligence alleged in the complaint are those relating to the conduct of the engineer. While the conduct of others is mentioned in the complaint, they are not alleged to have been negligent.

It is the judgment of this court that the judgment of the circuit court be affirmed.

GAY'S ADM'R v. SOUTHERN RY. CO. *et al.*

(*Supreme Court of Appeals of Virginia, June 11, 1903.*)

[44 S. E. Rep. 707.]

Master and Servant—Incidental Risks—Notice of Danger.*

When a servant enters upon an employment, it is the duty of the master to inform him of the nature of the risk and peril to be incurred in the course of his employment, but not as to a special danger which springs out of a particular fact, which in its details cannot be anticipated.

Error to Circuit Court of City of Alexandria.

Action by the administrator of Dona Gay against the Philadelphia, Wilmington & Baltimore Railroad Company and the Southern Railway Company. Judgment for defendants, and plaintiff brings error. Affirmed.

D. Harmon and C. W. Allen, for plaintiff in error.

F. L. Smith, Munford, Hunton, Williams & Anderson, and W. H. Payne, for defendants in error.

KEITH, P. The administrator of Dona Gay sued the Philadelphia, Wilmington & Baltimore Railroad Company and the Southern Railway Company for injuries resulting in the death of his intestate. The jury rendered a verdict subject to a demurrer to the evidence, and, the court having entered

*As to the master's duty to instruct and warn inexperienced and ignorant employees, see foot-note appended to Proffit v. Missouri, etc., Ry. Co. of Texas (C. C. A.), 5 R. R. R. 196, 28 Am. & Eng. R. Cas., N. S., 196.

judgment for the defendants, the case is now before us upon a writ of error awarded the administrator.

The evidence proves, or tends to prove, the following facts: Dona Gay was on the 16th day of July, 1899, in the employment of the Southern Railway Company as one of the crew of a shifting engine in the yards of the company at Alexandria, which at this point extend from the station in a southerly direction for about one-half a mile, to a place designated in the evidence as the "Hill." There were at the time three tracks of the Southern Company, the most eastern of which was known as the "Main Track," that next to it as the "Valley Track," and the westernmost of the three as the "Bridge Track." Still further to the west, at no great distance, were the tracks of the Philadelphia, Wilmington & Baltimore Railroad. On the morning of the accident, Dona Gay, who had been continuously on duty from the preceding evening until 7 o'clock of that morning, had stopped work, thinking that his tour of duty had been completed; but, there being urgent need for his services, he was again summoned, and resumed his duties upon the yard engine. Some hours before the accident occurred a car loaded with lumber was taken from the yards of the Southern Railway and transferred, as was the custom, by means of connecting rails, to one of the tracks of the Philadelphia, Wilmington & Baltimore Road. Soon thereafter, while engaged in the same duty of shifting cars from the one road to the other, the engine came in contact with a gondola, and drove it with violence upon a car laden with lumber. The gondola "mounted" the lumber car, and it took more than an hour to remove the gondola and free the track. The load of lumber was confined by wooden standards placed in iron sockets, and one of these standards was so bent or broken that it projected over the side of the car. After the track had been cleared of the wreck of the gondola, the car loaded with lumber was taken by the Philadelphia, Wilmington & Baltimore, returned to the Southern Railway, and placed upon the track known as the "Valley Track," which, as we have already stated, is the one nearest to the main line of that road. The shifting engine and crew went on the side track in order to permit a passenger train to pass, and the engineer in charge then said that he would go out and get the bad loads from the valley track and put them on the repair track. Before the shifting engine started, the conductor proposed to Gay to get a drink of water; Gay got up on the engine first, drank, and then took his position between the tender and the engine. He was looking around the corner of the cab, when he was struck on the left side of his head, just above his eye, and received an injury from which he died in a few days.

There is evidence which tends to show that the engine was moving at the time of the injury from 12 to 20 miles an hour; that the standard upon the lumber car projected to within 6

or 7 inches of the cab of the engine. There is evidence which also tends to prove that Gay at the time of the injury was watching the cars upon the valley track to ascertain which of them were out of repair, whether they had brakes on, and how many, and how many links and pins were needed in moving them to their proper position in the yard, all of which was in the line of his duty.

Do these facts, considered as upon a demurrer to the evidence, establish negligence of the defendants, or either of them?

The collision between the gondola and the lumber car, by which the latter was disabled, was the result of negligence; but that act was not the proximate cause of the injury to the deceased, and no such claim is asserted. The lumber car having been disabled and rendered unfit to be forwarded to its destination until it had been examined, its injuries repaired, and its load readjusted, it is not perceived that the Philadelphia, Wilmington & Baltimore Railroad was guilty of any wrong in returning it to the Southern Railway.

It is claimed that it might have been put in a safer place than that at which it was left on the valley track, because that track was next the main passenger track of the Southern Railway, and that it would have been safer to have placed it upon the bridge track. In the light of subsequent events, it is true that the accident complained of would not have happened if this had been done; but without going into a consideration of the evidence as to the reasons which it is alleged induced those who were charged with the duty of returning the lumber car to the Southern Railway track to select the valley track, instead of the bridge track, we cannot see that the act itself was, with respect to the shifting crew, negligent, or one from which it could reasonably have been expected that any injury would result. It is true that, with respect to passenger trains, an obstruction upon the valley track would be more dangerous than if it were upon the bridge track; but to the shifting crew the choice between the track would a priori seem to have been a matter of indifference.

It was the duty of the Southern Railway Company to exercise ordinary care to furnish a reasonably safe place in which, and reasonably safe instrumentalities with which, its employees should perform their duties. There is no suggestion that the engine and track were not in complete order, or that the engine was not manned by a competent and efficient crew. We have seen that the act of negligence by which the lumber car was disabled was not the proximate cause of the injury to Dona Gay, and that the Philadelphia, Wilmington & Baltimore Road, finding it disabled upon their track, was guilty of no negligence in restoring it to the Southern Railway, from which it had received it, and in placing it upon the valley track of that company.

It was necessary to take the lumber car to the shop where

it could be overhauled, its load readjusted, and any injury which it had suffered could be ascertained and repaired. It was the business of the yard crew to remove disabled cars, and this duty involves risks which are incident to that service, and which are assumed by those who undertake to discharge them. It was necessary to remove this car, and, while the decedent may not have known of the precise danger to which he was exposed upon this particular occasion, he did know the general duties required of him, and the perils attendant upon their discharge.

In N. & W. Rwy. Co. v. Donnelly's Adm'r, 88 Va. 856, 14 S. E. 693, 53 Am. & Eng. R. Cas. 571, it is said: "It is well settled that when a servant enters upon an employment he accepts the service subject to the risks that are incident to it. An employee who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge, from causes open and obvious, the dangerous character of which causes he had opportunity to ascertain. If a man chooses to accept employment, or continue in it, with a knowledge of the danger, he must abide the consequences, so far as any claim against his employer is concerned." Robinson's Adm'r v. Dininny, 96 Va. 41, 30 S. E. 442; Bertha Zinc Co. v. Martin's Adm'r, 93 Va. 791, 22 S. E. 869.

In Yeaton v. Boston & Lowell R. Corp., 135 Mass. 418, the plaintiff had some experience in railroading; knew how to "brake" and make up cars. He, with others, were in the habit of taking damaged cars and putting them upon what was known as the "Hospital Track." Whenever there had been damaged cars during his employment, his attention was called to it, generally by the yardmaster, who usually told the men that the cars had been damaged, and that he wanted them put upon such and such a track.

The court says: "The plaintiff was forty-five years old, and, with his admitted experience, was thus of sufficient age and intelligence to understand the nature of the risk to which he was exposed by his employment. He knew that broken cars were to be moved and handled in the yard, and he voluntarily undertook and continued in a service which he knew included the moving and handling of them. He was aware of the danger which attends handling broken cars, and sought to guard against it by looking to see if the cars which he was to assist in moving were out of order. Notice was expected to be received in such cases, but he was also in the habit of looking out for himself. It was incident to a service of this description that broken cars might sometimes be put in the wrong place in the yard, and that sufficient notice of defects in them, and of their being put in the wrong place, might be given. These are omissions of notice in respect to matters of detail, which cannot be given in advance, and which are not like an omission to give instructions to an inexperienced

hand as to the general dangers to which his service will expose him."

That case illustrates what we have already said—that it is the duty of the master to inform the employee of the nature of the risk and peril to be incurred in the course of his employment, but not as "to a special danger which springs out of a particular fact, which in its details cannot be anticipated."

"There was no negligence on the part of the defendant in sending broken cars for repairs to the yard where the plaintiff was at work. This was a proper place for them. There was no negligence in omitting to give notice to the plaintiff that broken cars were to be sent to this yard for repairs, and that his employment included the duty of handling and moving them. All this he knew already. What he did not know was that this particular car was broken, and that broken cars which were sent for repairs might be found in that part of the yard where this car was." Yeaton v. Boston & Lowell R. Corp., supra; Watson v. Railway Company, 58 Tex. 434.

We are of opinion that the judgment of the circuit court of Alexandria City should be affirmed.

LOUISVILLE & N. R. CO. v. HALL.

(*Court of Appeals of Kentucky, May 19, 1903.*)

[74 S. W. Rep. 280.]

Pleading—Amendments.

Ky. St. 1899, § 2524, provides that an action shall be deemed commenced when the first process is issued. Civ. Code, § 39, provides that an action is commenced by filing the petition and causing a summons to be issued. Section 132 permits a plaintiff at any time before answer to amend without leave, and section 134 provides that the court may at any time, in furtherance of justice, permit a plea to be amended by correcting a mistake. Plaintiff was injured August 15, 1899, and began action August 16, 1900. Defendant answered at the September term, and at the following March term, before reply, tendered an amended answer, pleading limitations. Plaintiff filed an affidavit of the clerk stating that he received the petition August 5, 1900, with a letter requesting that it be filed and summons issued, but that no tax accompanied it, for which reason he did not file it, but, when questioned by plaintiff's attorney several days prior to the 16th, informed him that it had been filed, and did not discover his error until the 16th, when he filed the petition and issued summons: *held*, that a refusal to permit defendant's amended answer to be filed was error.

Injury to Employee from Structures near Track*—Negligence—Instruction.

Plaintiff, who was employed by a railroad company to load engines with coal from bins by means of portable chutes, was injured by being struck by a chute while he was riding on the ladder on the side of a box car: *held*, that an instruction that it was negligence, as a matter of law, not to keep the coal chutes, when not in use, far enough from the tracks so as not to injure employees so situated, was error.

Same—Same—Assumption of Risk.

An instruction that, if plaintiff "knew" that the chute was too close

*See notes at end of case.

for reasonably safe passage, the jury should find for defendant, was error. as defendant was entitled to a verdict if plaintiff knew, or could by the exercise of ordinary care have known, that fact.

Personal Injuries—Elements of Damages.

In an action for personal injuries, an instruction that in estimating damages the jury should consider the age and situation of the plaintiff, his earning capacity and its probable duration, his bodily suffering and mental anguish, and the extent to which he is unable to make a support for himself, is erroneous, as not confining the damages to the expenses of cure, value of time lost, a fair compensation for physical and mental suffering, and any permanent reduction of earning power.

Same—Same.

Such instruction is also erroneous in permitting the jury to consider the situation of the plaintiff.

Punitive Damages.

An instruction in a personal injury case permitting an award of punitive damages without requiring, as a condition precedent, a finding of gross negligence, is erroneous.

Same.

Where a railroad employee, injured while on the side of a box car by being struck by a portable chute used to convey coal from bins to locomotives, admits that he knew the chutes were portable and frequently moved from one place to another, and that they were too close to the track for safe passage by employees situated as he was, and that his injury resulted solely from the fact that he believed the car on which he was had passed the chutes when he assumed his dangerous position, an instruction permitting an award of punitive damages is erroneous.

Appeal from Circuit Court, Bullitt County.

"Not to be officially reported."

Action by W. H. Hall against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Fairleigh, Straus & Eagles, B. D. Warfield, and E. W. Hines, for appellant.

W. S. Pryor and B. F. Cooper, for appellee.

BURNAM, C. J. The appellee, W. H. Hall, was one of a gang of laborers employed by the appellant, the Louisville & Nashville Railroad Company, to perform such services as might be necessary about the coal bins from which it supplied its engines with coal at Lebanon Junction. The bins are about 800 feet in length, and are built along a side track, on which appellant operated three large, portable coal chutes, from which the tenders of the engines were loaded. On the 15th of August, 1899, the appellee, Hall, came in contact with one of these coal chutes whilst descending the side ladder from the top of a box car attached to a moving freight train, and was knocked between two cars, and his legs run over and so crushed as to require amputation. On the 16th of August, 1900, he instituted this suit for damages, alleging as a cause of action that he had been directed by the foreman in charge of the coal bins to try to detect certain parties who were stealing coal from the bins, and for this purpose was allowed to board freight trains after they had been supplied with coal and ride along the bins; that on the 15th day of August, 1899,

he climbed to the top of a box car of a slowly passing train, and remained on the top of the car until it had passed, as he supposed, the three coal chutes on the side track; that he then descended the side ladder of the box car for the purpose of alighting near the far end of the coal bins, when he suddenly came in contact with one of these chutes, which had been moved from its customary place near the other two, and without his knowledge, and had been negligently left standing on the side track in such close proximity to the main track that his body could not pass between the chute and the moving train; and that as a result of this negligence he was knocked from the side of the car and run over by the train, sustaining injuries therefrom which resulted in the loss of both of his legs. He charges that these injuries were the result of the defendant's negligence in failing to construct and keep its portable coal chutes at a proper and safe distance from its passing cars.

At the following September term of the Bullitt circuit court, defendant answered, traversing specifically all the affirmative allegations of plaintiff's petition, and saying further, by way of defense, that the plaintiff had been employed about its coal bins for many months prior to receiving the injuries sued for; that he was familiar with its portable chutes and the construction thereof, and was thoroughly familiar with their proximity to the main track; that he received the injuries sued for whilst he was riding on the side ladder of one of their freight cars in violation of one of the rules of the company, and for his own pleasure and convenience, and not on any business of the company, or in obedience to any direction, express or implied, of the foreman of the coal bins; that he was at a place where he had no right to be, and where no duty of his employment called him, and received the injuries complained of as the result of his own contributory negligence. The pleadings were not made up at the September term. At the following March term of the court, before a reply had been filed, the defendant tendered and offered to file an amended answer, in which it alleged that more than one year had elapsed between the 15th day of August, 1899, when plaintiff's right of action accrued, and the 16th of August, 1900, when this suit was filed and summons issued thereon, and relied upon the lapse of time and the statute of limitations, and averred that this plea was omitted from the original answer by oversight and mistake on the part of the attorney. Plaintiff objected to the filing of this amended answer, and filed the affidavit of O. W. Pearl, clerk of the Bullitt circuit court, in which he stated that about the 5th of August, 1900, he received the petition in this case in a letter from plaintiff's attorney, requesting that same be filed, and summons issued thereon, but that no tax accompanied the petition, and that, as he did not know either the plaintiff or his attorney, he did not file the petition, but when asked

about the matter by plaintiff's attorney, several days prior to the 16th of August, 1900, informed him, in good faith, that it had been filed, and that he thought so at the time, and did not discover his mistake until the 16th of August, 1900, when he filed the petition and issued summons thereon. The trial court refused to permit the amended answer to be filed. The pleadings being made up by reply, a trial before a jury at the December term, 1901, resulted in a verdict and judgment in favor of the plaintiff for $10,000. Grounds and motion for a new trial having been overruled, the defendant appeals, relying for a reversal upon numerous alleged errors to its prejudice in the court below.

First in order was the refusal of the trial court to permit the plea of limitation set up in the amended answer to go in. By section 2524 of the Kentucky Statutes of 1899 it is provided that "an action shall be deemed to have been commenced at the date of the first summons or process issued in good faith from the court or tribunal having jurisdiction of the cause of action." Section 39 of the Civil Code of Practice is as follows: "An action is commenced by filing in the office of the clerk of the proper court, a petition stating the plaintiff's cause of action; or, in cases wherein written pleadings are not required, by filing in such court the account, or written contract, or a short written statement of the facts on which the action is founded; and, in either case, by causing a summons to be issued or a warning ordered to be made, thereon." In Kellar v. Stanley, 86 Ky. 240, 5 S. W. 477, it was held that an action was not commenced until a summons was issued or a warning order made. In L. & N. R. Co. v. Smith's Adm'r, 87 Ky. 501, 9 S. W. 493, which was a suit for damages for personal injuries, the petition was filed and summons issued thereon and served upon the appellant within a year from the accrual of the cause of action; but the summons cited the appellant to appear at the next term of the court, which commenced within 10 days from the date of the summons. At the following term of the court the summons, upon defendant's motion, was quashed, upon the ground that it was made returnable to a term of court commencing within 10 days from its date. Thereafter an alias summons was issued and served, and, more than a year having elapsed from the accrual of the cause of action to the issuing of the alias summons, plaintiff pleaded the statute of one year's limitation as a bar to appellee's right to maintain the action; and it was held that, where the plaintiff had filed his petition and caused summons to issue thereon in time to save his right of action, he had done all that the law required him to do, as it was the duty of the clerk to issue the summons to the proper term of court, and it was not incumbent upon the plaintiff to see that he did so. The ruling in this case was followed in the case of L. & N. R. Co. v. Bowen, 39 S. W. 31. In that case the petition was filed in time, but the summons was issued in the

name of D. C. Brown instead of D. C. Bowen; and it was held that, when plaintiff filed his suit and had summons issued, he had a right to believe that the clerk would issue it in his name, and that limitation did not run. These cases involved the construction of the Code provisions. In Clark v. Kellar, 66 Ky. 223, the court had before it a case arising under section 2524 of the statutes, and it was held that if five years was permitted to elapse after the suing out of process, which had been returned unexecuted, until another process was sued out and executed, the bar was effectual. In Hyatt v. Bank of Kentucky, 71 Ky. 193, it was held that an action was commenced when the first summons thereon was isued in good faith.

In all the cases bearing upon this question which we have been able to find, where the plantiff had filed his petition in the clerk's office, and caused summons to be issued thereon, within the statutory period of limitation, it was held that this was the limit of his duty; that he had a right to rely upon the clerk to issue the summons in proper form and to the proper court. It appears both from the reasoning and decision in each of these cases that the duty on the part of the plaintiff to file his petition and have summons issued thereon within the statutory period was mandatory, and that any negligence in this respect could not be charged to the clerk as an excuse for the plaintiff's failure to perform his duty. But in the case at bar, another very serious question arises; the clerk, in his affidavit, testifies that, whilst the petition was mailed to him within the period of limitation, it was not accompanied by the tax on the suit; that he was unacquainted with the plaintiff and his attorney, and for this reason declined to file the petition or issue the process; nor does it appear that this omission was ever supplied. As said in Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807: "Statutes of limitation are vital to the welfare of society, and are favored by the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidences of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and the antidote go together." Section 132 of the Civil Code provides that the plaintiff may at any time before answer amend his petition without leave. In this case no reply had been filed to defendant's original answer, and the amendment was tendered for the purpose of supplying a defense which had been omitted from the original answer by the oversight and mistake of counsel. Section 134 of the Civil Code provides that the court may at any time, in furtherance of justice, permit a pleading to be amended by

correcting a mistake in any respect; and, in our opinion, the trial court erred in refusing to permit the amended answer to be filed, and upon return of the case the amended answer should be filed, and plaintiff allowed to reply thereto.

We will next consider alleged errors in the instructions Nos. 1 and 2 given to the jury on plaintiff's motion.

No. 1 is as follows: "The court instructs the jury that it was the duty of the defendant to keep its portable chute, when not in use, at such distance from its moving trains as was reasonably necessary to enable its servants to ascend or descend the side ladders of its freight trains in the discharge of their duties, with reasonable safety, without the exercise of more than ordinary care. And if the jury believe from a preponderance of the evidence that the plaintiff was injured whilst discharging in good faith his duty to defendant, under the directions of defendant's employee superior in authority to plaintiff, and that his injuries in controversy were caused by the gross negligence of defendant, its agents or employees, in failing to keep, if it did so fail, its portable chute, when not in use, at a reasonably safe distance from the side ladders on its moving trains, the law is for the plaintiff and the jury should so find. If, however, the jury believe the plaintiff knew that the defendant's portable chute was too close for reasonably safe passage on the side ladder of defendant's train at the time and place in controversy, then, in that event, the law is for the defendant, and the jury should so find." By this instruction the jury are told, as a matter of law, that it was negligence in appellant not to keep its coal chute far enough from the track so as not to injure employees on the side ladders of passing cars. Whether or not it is possible to maintain a portable coal chute used for furnishing coal to passing engines so far away from moving trains that one on the side ladder of a box car may pass safely between the chute and the train was a question of fact for the jury. It may be that it is absolutely necessary to construct coal bins as in the case at bar, and, if it be not so, still it may not be negligence to do so. In the case of L. & N. R. Co. v. Mounce's Adm'r (decided Jan. 23, 1903) 71 S. W. 518, where damages were sought for the death of a switchman in appellant's yard at Livingston by reason of the alleged fact that the switch lights were unlighted, the court used this language: "Besides, instruction No. 1 given to the jury is erroneous and prejudicial to the defendant, as in it the court told the jury that it was defendant's duty to have the lights in reasonably good order and condition to show the location of the switch, and, if he failed to do so, plaintiff was entitled to recover. Under this instruction, if the jury found that the lights were out, it was bound to find for the plaintiff, however great may have been the care exercised by the defendant. As was said by this court in Needham v. L. & N. R. Co., 85 Ky. 425 [3 S. W. 797, 11 S. W. 306]: 'It is the duty of the master to use ordinary

care in providing for the use of the servant safe machinery, and premises in safe condition. He is not, however, an insurer.' In Shearman & Redfield on Negligence (4th Ed.) § 189, the principle is stated in these words: 'The master is bound to use ordinary care, diligence, and skill for the purpose of protecting his servants from encountering unnecessary risks in the service, but he is not bound to use any higher degree of care for that purpose.' These citations are in accord with the great weight of authority on this subject. In fact, we know of none to the contrary." This instruction is objectionable for another reason, as it only requires plaintiff "to know" that the chute was too close to the track for reasonably safe passage by it on the side ladder of the car. It should have contained the additional qualification that he knew, or could by the exercise of ordinary care have known.

The verbiage of the second instruction is also unusual, and calculated to mislead the jury. It tells the jury that: "If they find for the plaintiff, they should award such damages, if any, as the proof shows he has sustained." This general expression is followed by the words: "In estimating the amount of damage, the jury should take into consideration the age and situation of the plaintiff, his earning capacity and its probable duration, and his bodily suffering and mental anguish, and the extent to which he is disabled in making a support for himself by reason of the injuries received; and the jury, in addition to such compensatory damages, may award punitive damages, not exceeding, in all, $25,000." This court has frequently announced, in actions for personal injuries where death does not ensue, that compensatory damages were confined to the expense of cure, value of time lost, and fair compensation for physical and mental suffering caused by the injury, and for any permanent reduction of the power to earn money. See Parker v. Jenkins, 66 Ky. 587; L., C. & L. R. Co. v. Case's Adm'r, 72 Ky. 736; C. P. & R. v. Kuhn, 86 Ky. 578, 6 S. W. 441, 9 Am. St. Rep. 309; Carson v. Singleton, 65 S. W. 821. The instruction is erroneous in that it does not confine the jury to the consideration of these elements of damage. It is also erroneous in telling them that they should take into consideration the situation of the plaintiff, and in authorizing punitive damages—both for the reason that the jury are not required to find, as a condition precedent to awarding such damages, that the acts of the defendant which are complained of amounted to gross negligence, and for the reason that the proof discloses no ground for the recovery of punitive damages at all. The plaintiff admitted that he knew the coal chutes were portable and were frequently moved from one place to another, and that they were too close to the track for reasonably safe passage by them of a man riding upon the side ladder of a moving box car; that his injuries resulted solely from the fact that he believed the car on which he was riding had passed beyond

the chutes before he attempted to descend the side ladder for the purpose of alighting.

Appellant insists that the overwhelming weight of testimony in the case conduces to snow that appellee got upon the car for his own purposes, and not in the interest of business of the company; that he had full information as to the relative location of the coal chutes, and that his injuries resulted from his negligence in riding on the side ladder of the box car, without proper precautions on his part to avoid being struck by the coal chute; and that a peremptory instruction should have gone. Where there is any conflict in the testimony, questions of negligence should be left to the jury; but, in our opinion, there was such a decisive preponderance of the evidence in this case against the finding of the jury that it should have been set aside and a new trial awarded on this ground, as well as for errors of the court pointed out in the opinion.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

NOTES.

INJURIES TO EMPLOYEES FROM OBJECTS OVERHEAD, OR OBJECTS TOO NEAR TRACK.

I. General Rule.
   Illustrations.
1. Objects so Near as to Strike Employees Operating Trains.
   a. Coal Chutes.
   b. Buildings and Awnings.
   c. Cattle Guards.
   d. Cattle Chutes.
   e. Telegraph Poles, Signal Posts, etc.
   f. Station-Limit Boards.
   g. Water Tanks and Spouts.
   h. Switch Stands.
   i. Mail Cranes.
   j. Derricks.
   k. Projecting Rock in Cut.
   l. Snow Bank.
   m. Coal Pile.
   n. Stumps.
   o. Bridge and Trestle Supports.
   p. Cars on Sidings.
2. Objects Liable to Fall on Track.
   a. Trees.
   b. Earth and Stones.
3. Obstructions Dangerous under Foot.
   a. Snow and Ice.
   b. Stones—Gravel—Clinkers.
   c. Lumber, Timber, etc.
   d. Projecting Cross-Ties.
   e. Unsafe Cattle Guard.
   f. Uncovered Ditch.
4. Objects Overhead.
   a. Bridges.
      (1) Height Required.
      (2) Same—As to Brakemen on High Cars.
      (3) Escaping Liability by Giving Warning.
      (4) Warning Device to Be Properly Erected and Maintained.

b. Supporting Arch in Tunnel.
c. Overhead Wire.
II. Temporary Structures.
III. Structures Erected by Third Persons.
IV. Effect of Custom.
V. Effect of Necessity.
VI. Where Maintenance of Structure Not Negligence as to Employee Injured.
VII. Employers' Liability Acts.
VIII. Contract Exempting Company from Liability.
IX. Acts of Fellow Servants.
1. General Rule.
a. Qualification.
2. Concurring Negligence of Master and Fellow Servant.
3. Who Are Not Fellow Servants.
a. Trainmen and Sectionmen.
b. Servants of Another Company.
c. Servant Charged with Instructing Another.
X. Contributory Negligence.
1. General Principles.
2. Same—Presumption and Burden of Proof.
3. Whether Employee Chargeable with Knowledge of Danger—Right to Rely on Company's Performance of Duty.
4. Same—Same—Employee Not Excused from Using Due Care.
5. Whether Employee Having Knowledge of Danger Chargeable with Contributory Negligence.
6. Open and Obvious Danger—Negligence in Use of Senses.
7. Question for Jury in Debatable Cases.
8. Principles Discussed with Reference to Particular Acts and Omissions.
a. Failure of Employee to Perform Positive Duty.
b. Violation of Rules.
c. Same—Where Rule Not Enforced, or Employee Has No Knowledge Thereof.
d. Same—Unreasonable Rule.
e. Acting under Orders.
f. Where Duty Might Have Been Performed at Different Time.
g. Getting on and Off of Moving Train.
h. Coupling Cars in Motion.
i. Riding in Improper Place or Position.
j. Same—Where Employee Occupies Improper Place through No Fault of His Own.
XI. Assumption of Risk.
1. General Principles.
2. Employee Assisting in Abating Danger after Having Made Complaint.
3. Risk Not Assumed Where Danger Slight.
4. Where Employee Is Exercising Due Care at Time of Accident.
5. Sufficiency of Knowledge to Charge Employee with Assumption of Risk.
6. Same—Danger Open and Obvious.
7. Same—Question for Jury in Debatable Cases.
8. Employee Having Knowledge of One Danger, Does Not Assume Risk of Another.
9. Necessary Structures—Dangers against Which Company Cannot Reasonably Guard.

I. GENERAL RULE.

Under the well-settled principle in the law of master and servant, that the master owes to the servant the duty of exercising reasonable care to provide him a safe place in which to work, and in the matter of inspection to see that the same is kept safe, it is the duty of a railroad company to exercise reasonable care to see that no structure or object is permitted to be erected or maintained so near to, or over, its track

as to expose its employees, at work on and about trains, to any unusual or extraordinary hazard, unless the necessity for the erection or maintenance of the structure be such as to overbalance the consideration of the increased risk. Numerous authorities in support of this proposition will be found cited in the illustrations below.

ILLUSTRATIONS.

1. OBJECTS SO NEAR AS TO STRIKE EMPLOYEES OPERATING TRAINS.

a. Coal Chutes.

Thus it is actionable negligence for a railroad company to erect or permit the erection of a coal chute so near the track as to render the place unnecessarily dangerous to employees engaged in the operation of trains in the usual and ordinary manner, and exercising due care for their own safety. North Chicago Rolling Mills Co. *v.* Morrissey, 111 Ill. 646, 18 Am. & Eng. R Cas. 47; New York, etc., R. Co. *v.* Ostman, 146 Ind. 452, 6 Am. & Eng. R Cas., N. S., 588, 45 N. E. 651; Kelleher *v.* Milwaukee, etc., R. Co., 80 Wis. 584, 50 N. W. 942.

The deceased, while engaged in the performance of his duties on a freight train, was struck while ascending the side ladder of a car, by a foot-board projecting from a coal shed near the track. The shed itself was twenty-eight and one-half inches distant from the side of the car, but the foot-board, which was seven feet from the ground, was only sixteen and one-half inches from the side ladder. It was held that the company was negligent in maintaining the structure so near the track. Chicago, etc., R Co. *v.* Stevens, 189 Ill. 226, 20 Am. & Eng. R. Cas., N. S., 182, 59 N. E. 577.

In Michigan it is held, that as to elevators, coalbins, and similar structures located close to sidings for the purpose of facilitating the loading and unloading of cars, the company is not negligent, because of the practical necessity; but that it may be otherwise where they are located in dangerous proximity to the main line. Pahlan *v.* Detroit, etc., R. Co., 122 Mich. 232, 16 Am. & Eng. R. Cas., N. S., 309, 81 N. W. 103. See also, Phelps *v.* Chicago, etc, R. Co., 122 Mich. 171, 16 Am. & Eng. R. Cas., N. S., 302, 81 N. W. 101.

b. Buildings and Awnings.

In the erection of buildings and awnings, even though they are intended for use as depots, or for the protection of passengers from the elements, the company must have an eye to the safety of its employees, and not unnecessarily increase the risks ordinarily incident to the performance of their duties. Gulf, etc., R. Co. *v.* Darby (Tex. Civ. App.), 2 R. R. R. 327, 25 Am. & Eng. R Cas., N. S., 327, 67 S. W. 446; Nugent *v* Boston, etc., R. Corp., 80 Me. 62, 38 Am. & Eng. R. Cas. 52, 12 Atl. 797, 6 Am. St. Rep. 151; Chicago, etc., R. Co. *v.* Clark, 108 Ill. 113, 15 Am. & Eng. R. Cas. 261.

Thus in Illinois it was held to be negligence to construct a station house awning so that it was about even with, and eighteen inches above, a freight car standing on the side track: Illinois Cent. R. Co. *v.* Welch, 52 Ill. 183, 4 Am Rep. 593; and gross negligence to permit the shed of an adjacent building to project within seven inches of the side of a passing engine. Illinois, etc., R. Co. *v.* Whalen, 19 Ill App. 116.

In Ferren *v.* Old Colony R. Co., 143 Mass. 197, 9 N. E. 608, the plaintiff, while assisting in pushing a car, was injured by being caught between the car and a building which stood beside the track. Owing to a curve in the track, the space between the car and the building gradually narrowed as the car advanced, and the plaintiff, with all his energies bent upon pushing the car, was led into a kind of trap, as it were. It was held that the company was negligent in maintaining the building in such position, and that the plaintiff was entitled to recover. The Massachusetts court, however, is inclined to favor the master wherever possible, and in most instances it holds that, as to permanent structures beside the track, the servant must, as a matter of law, be held to have assumed the risk at the time of entering into the service. Fisk *v* Fitchburg R. Co., 158 Mass. 238, 33 N. E. 510; Lovejoy *v.* Bos- R. Corp., 125 Mass. 79, 28 Am. Rep. 206.

Notes

In another case, there was a cattle chute at a point on the side track some five or six hundred feet from the point where the side track left the main line. On this same side track, and about midway between the cattle chute and the point of departure from the main line, stood a section house, the roof of which projected to within thirteen or fourteen inches of the sides of passing cars. At the time the deceased was killed, he, and other members of the train crew, had just finished shifting a carload of stock to the cattle chute. Returning from the cattle chute, it was necessary for the deceased to climb down from one of the cars and be ready to leap from the train, while yet in motion, and throw the switch. While climbing down the side of the car, he was struck by this projecting roof, knocked from the car, and severely injured. It was contended on the part of the company that it was wholly unnecessary for the deceased to begin the descent from the top of the car so far from the switch, and that his action in so doing was a contingency against which it was unreasonable to require it to guard. The accident happened in the early morning, before it was light. The deceased was a new man on the road and had passed that station but once before, such previous trip having been made in the night. It was held, that it was for the jury to say whether the company was guilty of negligence in having the roof so near the sides of passing cars. Flanders *v.* Chicago, etc., R. Co., 51 Minn. 193, 53 N. W. 544.

c. Cattle Guards.

Where an engineer, engaged in correcting some defect in his engine, was working on the outside of the cab, and while so doing was struck by a cattle guard, which stood thirty inches from the rail at the bottom, and sloped outward until it was forty-eight inches from a perpendicular to the rail at the top, it was held to be a question for the jury to say whether the company was negligent in maintaining the structure so near the track. Murphy *v.* Wabash, etc., R. Co., 115 Mo. 111, 21 S. W. 862.

But where a brakeman, seeing stones whirled from under a car, stood on the side ladder, and leaning outward and downward, attempted to discover the trouble, and was struck while so doing by the "wing fence" of a cattle guard standing three feet ten inches from the rail, it was held that there was no negligence in placing the fence that distance from the track; such an accident having never before occurred, and it being one not likely to occur, or reasonably to be apprehended. McKee *v.* Chicago, etc., R. Co., 83 Iowa 616, 48 Am. & Eng. R. Cas. 154, 50 N. W. 209, 13 L. R. A. 817.

d. Cattle Chutes.

And so in the case of cattle chutes, the company must not place them so near the track as to endanger the lives and safety of employees engaged in operating trains. Allen *v.* Burlington, etc., R. Co., 57 Iowa 623, 5 Am. & Eng. R. Cas. 620, 11 N. W. 614, 64 Iowa 94, 19 N. W. 807; Dorsey *v* Phillips, etc., Co., 42 Wis. 583. And especially is this true if it be at a point where employees, in the performance of their duties, are required to get on and off trains in motion by means of side ladders and steps. Keist *v.* Chicago, etc., R. Co., 110 Iowa 32, 16 Am. & Eng. R. Cas., N. S., 297, 81 N. W. 181.

In New York, etc., R. Co. *v.* Ostman (Ind.), 41 N. E. 1037, it was held to be negligence to permit a cattle chute to stand within thirteen inches of the cab windows of passing engines.

And in Wood *v.* Louisville, etc., R. Co. (C. C.), 11 Am. & Eng. R. Cas., N. S., 525, it was said, that the company was bound at its peril, to see that cattle chutes were placed a sufficient distance from the track to avoid raking the brakemen from the side ladders of freight cars, under all circumstances; that the mere fact that a brakeman was raked from the side of a car established negligence per se, and that it was not a question as to whether the chute should have been placed farther from the track.

But where the plaintiff, a small man, five feet four inches high, was injured by striking a cattle chute, while riding upon the journal box,

holding to the car with one hand, and swinging out with his lantern in the other, having assumed such position in order that he might drop from the car to turn a switch a short distance ahead, and the company produced evidence to show that men of much larger stature had passed the place habitually without injury, one of them, a large man, having passed it riding in the same position as plaintiff, and with a boy on his back, it was held that the evidence did not show that the chute was dangerously near the track. Allen *v.* Burlington, etc., R. Co., 64 Iowa 94, 19 N. W. 870.

e. Telegraph Poles, Signal Posts, etc.

So it is negligence for a railway company to permit a telegraph pole, signal post, or similar object, to stand so near the track as to endanger the lives of employees engaged in the discharge of their duties on passing trains. Potter *v.* Detroit, etc., R. Co., 122 Mich. 179, 16 Am. & Eng. R. Cas., N. S., 264, 81 N. W. 80; Johnson *v.* St. Paul, etc., R. Co., 43 Minn. 53, 41 Am. & Eng. R. Cas. 293, 44 N. W. 884; Whipple *v.* New York, etc., R. Co., 19 R. I. 587, 5 Am. & Eng. R. Cas., N. S., 517, 35 Atl. 305; Crandall *v.* New York, etc., R. Co., 19 R. I. 594, 5 Am. & Eng. R. Cas., N. S., 543, 35 Atl. 307; Kearns *v.* Chicago, etc., R. Co., 66 Iowa 399, 22 Am. & Eng. R. Cas. 287, 24 N. W. 231.

In Chicago, etc., R. Co. *v.* Russell, 91 Ill. 298, the fact that the post had stood for three years within eighteen inches of passing freight trains, was held to establish the company's negligence.

In Whipple *v.* New York, etc., R. Co., 19 R. I. 587, 5 Am. & Eng. R. Cas., N. S., 517, 35 Atl. 305, it appeared that a telegraph pole stood three feet, five and one-quarter inches from the outside of the rail. It inclined towards the track until at the height of a box car there was a space of only 15 inches between it and the side ladder of the car. This space was sufficient to permit the passage of a man standing erect on the ladder, but not a man engaged in climbing the ladder. This pole stood in a freight yard, where trains were made up and where brakemen were constantly called upon, in the course of their duties, to ascend and descend the sides of moving cars. It was held that the company was negligent in permitting it to remain in such position.

And so where the poles between the double tracks of a street railway stood within three and one-half inches of the sides of passing cars, the company was held liable for the death of an employee who, while engaged in the performance of his duties, on the platform of a car which was not provided with a safety gate, was thrown against one of the posts and killed. Citizens' St. R. Co. *v.* Reed, 28 Ind. 629, 4 R. R. R. 43, 27 Am. & Eng. R. Cas., N. S., 43, 63 N. E. 770.

But where a fireman upon the defendant's road was called upon in the course of his duties to take notice of one of the boxes of the tender, or engine, which had become heated, and while leaning out of the engine for that purpose, was struck by a telegraph pole which cleared the side of the engine by only twelve inches, it was held to be a question for the jury as to whether the company was negligent in leaving the pole so near the track. Hall *v.* Union Pac. R. Co., 5 McCrary 257, 16 Fed. 744.

So where the company maintained a signal post within four feet of the track, in a large yard, where there were numerous tracks and constantly moving trains, it was held, there being evidence that the post was too near for the safety of employees engaged in the performance of their duties on trains, that the question of the company's negligence was for the jury. Johnson *v.* St. Paul, etc., R. Co., 43 Minn. 53, 41 Am. & Eng. R. Cas. 293, 44 N. W. 884.

In Thain *v.* Old Colony R. Co., 161 Mass. 353, 37 N. E. 309, the plaintiff, an engineer, was injured, while on duty, by being carried against a wooden post standing four feet from the track and two feet from the tender beam where he was at the time. The post was a temporary structure, erected for the purpose of supporting a bridge at that place. The plaintiff was an experienced engineer, and knew of the permanent dangers of this kind along the track, but had no knowledge of this post. It was held, as a matter of law, that the company was not negligent in

failing to give warning of the existence of this post, the court saying: "The company is not bound to give warning of every such structure to every person employed upon its trains. There must be some point within the limits which it is possible for a man on a train to reach, at which the railroad company has a right to build without notice, and to assume that those on the trains will keep out of the way. Everyone knows that there is danger as soon as he gets outside the line of the train when it is in motion." It was also held that it was immaterial that there was a rule of the company forbidding the placing of obstructions within six feet of the track.

f. Station-Limit Boards.

It is negligence for a railroad company to maintain a station-limit board so near the track that a fireman engaged in the proper discharge of his duty is injured thereby. Central Trust Co. *v.* East Tenn., etc., R. Co., 73 Fed. 661.

g. Water Tanks and Spouts.

So it is negligent to maintain a water tank so near the track that it will endanger the safety of employees engaged in the operation of trains and in the exercise of due care. East Tenn., etc., R. Co. *v.* Thompson, 94 Ala. 636, 10 So. 280; Choctaw, etc., R. Co. *v.* McDade, 1 R. R. R. 413, 24 Am. & Eng. R. Cas, N. S., 413, 112 Fed. 888; Gould, Adm'r, *v.* Chicago, etc., R. Co., 66 Iowa 590, 22 Am. & Eng. R. Cas. 289, 24 N. W. 227; Walsh *v.* Oregon Ry. & Nav. Co., 10 Ore. 250; Houston, etc., R. Co. *v.* Oram, 49 Tex. 341.

Owing to the length of chain by which it was suspended, the spout of a water tank extended eighteen inches farther over the track and hung a foot lower than such spouts ordinarily did. By reason of this, a brakeman was knocked from the top of a train and killed. It was held that the defendant company was guilty of negligence in failing to provide a safe appliance. Greenleaf *v.* Dubuque, etc., R. Co., 33 Iowa 52.

And so where the company negligently permits the spout of a tank to become and remain so out of order that, instead of springing back to an upright position after having been used, or remaining in such position after having been pushed back, it settles down to a horizontal position over the track, at such a height that it will sweep a brakeman from the top of a passing train, it is liable for injuries to an employee caused thereby. Northern Pac. Ry. *v.* Perry, 116 Fed. 609, 5 R. R. R. 177, 28 Am. & Eng. R. Cas., N. S., 177.

In Atlanta, etc., Ry. *v.* Woodruff, 66 Ga. 707, it appeared that the plaintiff was a baggage man on the defendant's train, and that in addition to his duties as such, it was also his duty to look after the condition of the cars, and any other matters which might affect the safety of the train or the passengers. On the trip on which he was injured, he was told that new trucks had been placed under one of the cars, and that he should look out for them. Before the train had proceeded very far, one of the wheels became hot, and began to make a noise. The plaintiff went to the side door of the baggage car, and leaned out to see if the hot wheels would endanger the safety of the train. While in this position, and without fault or negligence on his part, he was struck by the spout of a water tank which was sufficiently near the track to strike him while engaged in the performance of such duty in the ordinary and usual manner. It was held that these facts made out a case of negligence against the company. See, however, Atlanta, etc., R. Co. *v.* Webb, 61 Ga. 586, where it was held that there could be no recovery if the plaintiff's intestate could have passed the projecting spout of a water tank by using due care in the prosecution of his duties.

h. Switch Stands.

In regard to switch stands, it is to be taken into consideration that they are placed only where there is switching to be done, usually near stations and in yards where trains are made up; that the nature of the employment at those places is such, that those engaged therein are compelled to undergo greater exposure to danger from structures along the track; it being necessary for switchmen and brakemen to swing on

and off moving trains, and for engineers to lean from cab windows and look backward as well as forward, in order to observe the signals. In view of these facts, it is the duty of the company, in placing such objects as switch stands, to exercise a degree of care commensurate with the danger which its employees will be called upon to undergo; if possible they should be placed a safe distance from the track in every instance, and where that cannot be done, and a ground switch will answer equally well, it should be used instead. To this effect, see the following cases: Southern Kansas R Co. *v.* Michaels, 57 Kan. 474, 8 Am. & Eng. R. Cas., N. S., 761, 46 Pac 938 (target in shape of arrow so long as to strike brakemen on side ladders when turned towards track); Boss *v.* Northern Pacific R. Co., 5 Dak. 308, 40 N. W. 590, 2 N. Dak. 128, 49 N. W. 655, 33 Am. St. Rep. 756 (target negligently permitted to become and remain so bent towards track as to scrape sides of passing cars); Johnston *v.* Oregon, etc., R. Co.. 23 Ore. 94, 31 Pac. 283; Bonner *v.* La Noue, 80 Tex. 117, 15 S. W. 803 (stand within twenty-one inches of side ladders); Pidcock *v.* Union Pac. R. Co., 5 Utah 612, 19 Pac. 191, 1 L. R. A. 131 (stand within ten inches of passing cars where no necessity for same, and where ground switch would have done as well); Morrisette *v.* Canadian Pac. R. Co., 74 Vt. 232, 5 R. R. R. 219, 28 Am. & Eng. R. Cas., N. S., 219, 52 Atl. 520.

In Colf *v.* Chicago, etc., R. Co., 87 Wis. 272, 58 N. W. 408, the arm or target of the stand projected to within seven and one-half inches of the gangway steps of passing engines. It was shown that it stood considerably nearer the track than other stands in the same yard, and that it was never used. It was held that it was for the jury to say whether the company was guilty of negligence towards a night employee in leaving the stand so placed.

i. Mail Cranes.

It is negligence to place a mail crane so near the track as to endanger the safety of employees on trains, unless it is so placed through unavoidable necessity; as where the mail catches on the cars, constructed in accordance with the regulations of the federal government, could not be efficiently operated if the cranes were placed at a greater distance. Kenney *v.* Meddaugh, 118 Fed. 209, 5 R. R. R. 226, 28 Am. & Eng R. Cas., N. S., 226; Louisville, etc., R. Co. *v.* Milliken's Adm'r (Ky.), 14 Am. & Eng. R. Cas., N. S., 742, 51 S. W. 796; Chicago, etc., R. Co. *v.* Gregory, 58 Ill. 273; Sisco *v.* Lehigh, etc., R. Co., 75 Hun 582, 27 N. Y. Supp. 671.

j. Derricks.

Where a railroad company erects, or permits the erection, upon its right of way, of a derrick, which is an essentially dangerous contrivance, in that the boom, with its hook and pulley attached, is liable to swing over the track to the great danger of employees on passing trains, it is its duty to see that it is properly taken care of, and for any negligence in this respect, it will be liable to any employee injured thereby. Gates *v.* Chicago, etc., R. Co., 2 S. Dak. 422, 53 Am. & Eng. R. Cas. 245, 50 N. W. 907, 57 N. W. 200; McCreery's Adm'x *v.* Ohio River R. Co., 43 W. Va. 110, 20 Am. & Eng. R. Cas., N. S., 875, 27 S. E. 327, 49 W. Va. 301, 38 S. E 534.

So it is negligence for the company to permit an unused derrick to stand by the side of the track until the alternate thawing and freezing of a large bank of earth cause it to fall on the derrick and bring one of its guy ropes into such a position that it is liable to sweep employees from the top of passing trains. Holden *v.* Fitchburg R. Co., 129 Mass. 268, 2 Am. & Eng. R. Cas. 94, 37 Am. Rep. 343.

k. Projecting Rock in Cut.

It is ordinary care on the part of a railroad company, in constructing its track through a cut, to make the cut not only wide enough to admit of the safe passage of cars, but also sufficiently wide and free from projections to avoid injuring employees whose duties require them to use the side ladders while the train is in motion. Georgia Pac. R. Co. *v.* Davis. 92 Ala. 300, 9 So. 252, 25 Am. St. Rep. 47. See also, Wintuska's Adm'r *v.* Louisville, etc., R. Co., 14 Ky. L. Rep. 579, 20 S. W. 819.

Notes

l. Snow Bank.

A railroad company is not negligent in permitting a snow bank, ten feet high, and which slopes backward from the rails at an angle of forty to forty-five degrees, to remain by the side of the track. It would be unreasonable to require the company to do more than use ordinary care in keeping the tracks clear by the use of the snow plow; and having thrown the snow from the track by means of the plow, it cannot be required to go then and shovel up a world of snow, as it were, several feet back on each side of the track. The danger from snow banks heaped on the side of the track by the snow plow is one incident to all railroad service in regions where heavy snowfalls are customary, and must be held to be one of the risks assumed by the employees. Dowell *v.* Burlington, etc., R. Co., 62 Iowa 629, 15 Am. & Eng. R. Cas. 153, 17 N. W. 901. See also, Lawson *v.* Truesdale, 60 Minn. 410, 62 N. W. 546.

m. Coal Pile.

It is negligence to permit a coal pile to remain so near the track as to endanger the safety of trainmen engaged in the performance of their duty in a proper manner. Highland Ave. R. Co. *v.* Walters, 91 Ala. 435, 8 So. 357.

n. Stumps.

The company is guilty of negligence in permitting a stump to remain so near the track as to be dangerous to employees engaged in the discharge of their duties in the usual and ordinary manner. Riley *v.* Railway, 27 W. Va. 145. This, of course, does not apply where the road is in an unfinished condition, with many trees still standing near the track in plain view. A brakeman entering service on a construction train on such a road, will be held to have assumed the risk. Manning *v.* Chicago, etc., R. Co., 105 Mich. 260, 63 N. W. 312.

o. Bridge and Trestle Supports.

The defendant's track curved somewhat on a bridge. It was the duty of the deceased to ascend to the top of the cars on approaching this bridge, and look after the brakes. At one point on the bridge, the ends of the bolts in the side supports projected to within fifteen inches of the sides of passing cars. The deceased was killed by striking these bolts while ascending the side ladder in discharge of his duty. It was held that the company was guilty of actionable negligence. Bryce *v.* Chicago, etc., R. Co., 103 Iowa 665, 9 Am. & Eng. R. Cas., N. S., 832, 72 N. W. 780.

But where the plaintiff was knocked from the side of the car and into the river below by reason of the alleged negligence of the company in placing its track three and one-half inches nearer one side of the bridge than the other, the accident occurring just as he was responding to a signal for brakes, and while he was exercising due care for his own safety, it was held that the question of the company's negligence in placing the track as alleged, was properly left to the jury. Ft. Worth, etc., R. Co. *v.* Graves (Tex Civ. App.), 21 S. W. 606.

And where the deceased was swept from the side of the car, and killed, by the supporting timbers of a trestle, standing within fourteen and one-half inches of the side of the car, it was held that it was for the jury to say whether the company was negligent in permitting the timbers to remain so near the track. Robel *v.* Chicago, etc., R. Co., 35 Minn. 84, 27 N. W. 305.

p. Cars on Side Track.

Where injury from striking a car on a siding results from the fact that the siding is constructed so near the adjoining track that there is danger of striking the cars, regardless of how far they may be placed from the junction of the two tracks, the company is liable, for it has failed to provide a safe place. Pennsylvania Co. *v.* McCormack, 131 Ind. 250, 53 Am. & Eng. R. Cas. 107, 30 N. E. 27; Voorhees *v.* Lake Shore, etc, R. Co., 193 Pa. St. 115, 16 Am. & Eng. R. Cas., N. S., 316, 44 Atl. 335.

In Massachusetts it is held that, where the company has constructed its side tracks sufficiently far from the adjoining track to relieve its

employees of all danger of striking cars of the ordinary size in use on its road, and standing on those tracks, it is not guilty of negligence in using the cars of another line of such unusual size as to endanger the safety of brakemen on side ladders. Content *v.* New York, etc., R. Co., 165 Mass. 267, 3 Am. & Eng. R. Cas., N. S., 369, 43 N. E. 94.

But where the injury results not from the siding having been constructed too near the adjoining line, but from the negligence of the plaintiff's fellow servants in leaving the car too near the junction of the two tracks, the company is not liable unless it is made so by statute, such as an employers' liability act, or unless it has been negligent in discovering the dangerous situation and having the car removed. Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, 53 Am. & Eng. R. Cas. 115, 12 So. 88; Bence *v.* New York, etc., R. Co., 181 Mass. 221, 3 R. R. R. 295, 26 Am. & Eng. R. Cas., N. S., 295, 63 N. E. 417; Schaub *v.* Hannibal, etc., R. Co., 106 Mo. 74, 16 S. W. 924.

In Dacey *v.* Old Colony R. Co., 153 Mass. 112, 26 N. E. 437, under an employers' liability act making railroad companies liable in certain cases for injuries caused by the negligence of any employee "in charge of any locomotive engine or train," it was held that it was for the jury to say whether it was negligence to leave a car standing so near the intersection of two tracks, where trains were made up at night, as to allow a space of less than five inches between it and the car on the adjoining track.

Of course where the negligence of the defendant's servants, in placing a car too near the intersection of two tracks, results in injury to the servants of another company, no question of fellow servants will arise, and the defendant will be liable under the general principles touching the liability of masters for the torts of their servants. Thus where the defendant, having some cars to deliver to another company, sent them by night to the freight yard of such other company, in charge of its servants, who placed them so near the intersection of two tracks in the freight yard that a servant of the other company sustained injury by reason thereof, it was held that the defendant was liable. Martin *v.* Louisville, etc., R. Co., 95 Ky. 612, 26 S. W. 801.

The company not being liable where the presence of the car in dangerous proximity to the intersection of two tracks is due to the negligence of the plaintiff's fellow servants, a fortiori is it not liable where it is due to the acts of third persons, unless, as before said, it has been negligent in discovering and remedying the danger. Martin *v.* Louisville, etc., R. Co., 95 Ky. 612, 26 S. W. 801; Atchison, etc., R. Co. *v.* Slattery, 57 Kan. 499, 8 Am. & Eng. R. Cas., N. S, 761, 46 Pac. 941. In the latter case, it was held, where the car had been pushed out on the siding, and there blocked in the ordinary way, to prevent its drifting back on the main track, that the company was not negligent because of its failure to fit it with such blocks, or guards, as would have prevented its being pushed back by boys playing thereabouts If, however, a car standing on a side track escapes and runs down on the main line by reason of the company's failure to provide a brake sufficient to hold it stationary on the siding, the company is liable, because it has been negligent in the matter of providing a safe appliance. Henry *v.* Wabash, etc., R. Co., 109 Mo. 488, 19 S. W. 239. See, however, Hewitt *v.* Flint, etc., R. Co., 67 Mich. 61, 31 Am. & Eng. R. Cas. 249, 34 N. W. 659, where the court, although recognizing fully the doctrine of the master's obligation to use due care to provide proper materials and machinery: *held*, that under the circumstances of that case, the company was not negligent in placing on the siding a car without brakes of any kind, and without stop blocks to prevent its drifting out on the main line. To just what particular "circumstances of the case" it had reference, the court does not say, but it might have referred either to the fact that there was no evidence as to how the car came to be on the main line, whether through want of a brake or the acts of third persons, or to the fact that the evidence tended to show that the grade of the siding was below that of the main line, and therefore it was improbable that the car had drifted up hill.

2. OBJECTS LIABLE TO FALL ON TRACK.

a. Trees.

It is the duty of a railroad company to use ordinary care to keep its track free from obstructions that may endanger the lives of its employees. This, of course, includes the duty of removing all objects along the right of way which are in danger of falling on the track. The company neither warrants nor insures the safety of its track, but ordinary care in this connection, as elsewhere, is to be measured by the danger of the service and proportioned to it; and considering the dangerous machinery and powerful forces which a railroad company puts in motion, ordinary care must, in this connection, be held to mean a very high degree of care. Wilson *v.* Denver, etc., R. Co., 7 Colo. 101, 15 Am. & Eng. R. Cas. 192, 2 Pac. 1. In this case, an engineer came to his death by reason of the falling of a log across the track during the raging of a forest fire, of which fire it was alleged that the company had notice. It was held that the liability of the company depended upon whether it had exercised the high degree of diligence required by law by placing some one to look out for obstructions and give warning. And where an accident occurred as the result of the company's negligence in failing to comply with a statute requiring it to remove all trees which were liable to fall and obstruct the track, it was held that it was liable, although the tree stood on the land of a third person. Texas, etc., R. Co. *v.* Vallie, 60 Tex. 481.

b. Earth and Stones.

Where a railroad company, in constructing its track along the side of a mountain, leaves overhanging stones, which have been loosened by blasting, in such position that it is apparent to every one that there is danger of their falling on the track, it is, of course, liable for any injury sustained by an employee from their fall; and the fact that it has employed a track walker, whose duty it is to look out for overhanging stones, will not excuse its negligence in leaving them there in the first instance. Bean *v.* Western N. Car. R. Co., 107 N. Car. 731, 12 S. E. 600. Where the evidence in such a case was conflicting, that for the plaintiff tending to show that the stones had remained in a dangerous position, threatening the safety of the track, for so long a time that the company knew, or ought to have known of the danger, and that for the defendant going to show that the company had inspected the mountain side previous to the accident, and removed all stones which were considered as at all dangerous, it was held that the jury was warranted in finding the company negligent. Little Rock, etc., R. Co. *v.* Voss (Ark.), 18 S. W. 172.

3. OBSTRUCTIONS DANGEROUS UNDER FOOT.

a. Snow and Ice.

In latitudes where snow falls and ice forms in great quantities during the winter season, the business of railroading is of necessity attended with greater hazard than at other times, and all that can be required of the company is that it use reasonable care to keep its tracks and yards clear of snow and ice for the safety of its employees; for the rest, the employees must be held to have assumed the increased hazard. Lawson *v.* Truesdale, 60 Minn. 410, 62 N. W. 546. In this case, it was a part of the plaintiff's duties, as a switchman in the defendant's yard, to board cars which had been kicked down the line, ride them to the point where they were to be placed, and there stop them. In attempting to board such a moving car, on one occasion, he slipped on a pile of ice and snow, which was seven to ten feet long, two feet wide, and fifteen to eighteen inches high, and directly by the side of the track along which he had to walk in order to board the moving car. It was held that it was for the jury to say whether the company had used due care in removing the snow and ice from the track and yard.

In Cregg *v.* Chicago, etc., R. Co., 91 Mich. 624, 52 N. W. 62, the company permitted a bank of hard packed snow, two and one-half to four feet high, and sloping upward from the rails at an angle of forty or forty-five degrees, to remain between the tracks in its yard just as it was thrown by the snow plow. The plaintiff, while engaged in coup-

ling cars at that point, slipped and fell under the car, and was injured. It was held that the company was liable for its negligence in failing to have the snow removed.

b. Stones—Gravel—Clinkers.

A railroad company is chargeable with knowledge of the existence of a stone pile, and of negligence in not removing the same, where it has stood for several months near a switch at a place where switchmen, in the discharge of their duties, are required to jump on and off of moving trains for the purpose of throwing the switch. Donahue *v.* Boston, etc., R. Co., 178 Mass. 251, 20 Am. & Eng. R. Cas., N. S , 526, 59 N. E. 663. But a railroad company, proceeding with due care and caution, is not per se, nor even presumptively, guilty of negligence in dumping gravel at the side of its tracks, while it is engaged in filling in between the tracks and bringing its yard to a level, unless it suspends operations, when there is no necessity for so doing, and leaves the gravel heaped in such piles as to endanger the safety of its employees working in the yard. Hurst *v.* Kansas City, etc., R. Co., 163 Mo. 309, 21 Am. & Eng. R. Cas., N. S., 899, 63 S. W. 695.

The company is not liable for injuries sustained by a brakeman who, in descending from a moving train, in the ordinary discharge of his duties, steps on a clinker of unusual size on the margin of the track; for outdoor premises to be reasonably safe, it is not required that the surface should be kept clear of every object which may by chance cause accidental injury. Lee *v.* Central R. & Bkg. Co., 86 Ga. 231, 12 S. E. 307.

c. Lumber, Timber, etc.

So it is the duty of the company to exercise reasonable care to see that timbers are not permitted to remain scattered along the track where switching is to be done, or where employees are called upon to go in the discharge of their duties. Central R. Co. *v.* DeBray, 71 Ga. 406; Babcock *v.* Old Colony R. Co., 150 Mass. 467, 23 N. E. 325; Southern Pac. R. Co. *v.* Markey (Tex.), 19 S W. 392; Howe *v.* St. Clair, 8 Tex. Civ. App. 101, 27 S. W. 800; Bessex *v.* Chicago, etc., R. Co., 45 Wis. 477; Hullehan *v.* Green Bay, etc., R. Co., 68 Wis. 520, 31 Am. & Eng. R. Cas. 322, 32 N. W. 529.

d. Projecting Cross-Ties.

Where the defendant company removed a switch, and left the ties, to which it had been fastened, projecting a foot beyond the other ties, and two years afterward, the conductor of a freight train, in attempting to alight at that place, slipped or stumbled over the ties, fell under the train, and was injured, it was held that it was for the jury to say whether the company was negligent in leaving the track in such shape. Whitcher *v.* Boston, etc., R. Co., 70 N. H. 242, 20 Am. & Eng. R. Cas., N. S., 540, 46 Atl. 740.

e. Unsafe Cattle Guard.

Where a railway company constructs a cattle guard at a point where brakemen are compelled to constantly cross and recross while coupling and uncoupling cars, it must construct the same in a manner that will enable them to perform their duties with reasonable safety. It is not sufficient that the cattle guard reasonably answers the purpose for which it was mainly constructed, that of turning cattle; it is negligence if it is so constructed as to constitute a trap or footfall for brakemen engaged in the performance of their duties. Ford *v* Chicago, etc., R. Co., 91 Iowa 179, 59 N W. 5, 71 N. W. 332, 106 Iowa 85, 11 Am. & Eng. R. Cas , N. S., 489, 75 N. W. 650.

f. Uncovered Ditch.

Where the plaintiff's intestate was killed through the alleged negligence of the defendant in maintaining an open ditch, six inches wide and deep, under its track, and the evidence was conflicting as to whether a covered ditch would have been safer, it was held that the defendant company was not guilty of negligence, if at the time of constructing the ditch, it made due inquiry, and adopted the open ditch, believing it to be safer. DeForest *v.* Jewett, 19 Hun 509.

Notes

4. OBJECTS OVERHEAD.

a. Bridges.

According to the great majority of decided cases, it is the duty of a railroad company to see that the overhead and covered bridges along its route are maintained at such a height, that brakemen and other employees having duties to perform on the top of trains, may perform those duties with reasonable safety to themselves; failing in this, it is liable to any employee who, not having assumed the risk, and exercising reasonable care for his own safety, is injured by such a structure while engaged in the performance of his duties.

United States.—Myers *v.* Chicago, etc., R. Co. (C. C. A.), 14 Am. & Eng. R. Cas., N. S., 749; Goff's Adm'r *v.* Norfolk, etc., R. Co., 36 Fed. 299; Northern Pac. R. Co. *v.* Mortenson, 11 C. C. A. 335, 27 U. S. App. 313, 63 Fed. 530.

Alabama.—Louisville, etc., R. Co. *v.* Hall, 91 Ala. 112, 48 Am. & Eng. R. Cas 170, 8 So. 371, 24 Am. St. Rep. 863; Schlaff *v.* Louisville. etc., R. Co., 100 Ala. 377, 14 So. 105; Louisville, etc., R. Co. *v.* Banks, 104 Ala. 508, 16 So. 547.

Georgia.—Savannah, etc., R. Co. *v.* Day, 91 Ga. 676, 17 S. E. 959; Stirk *v.* Central R., etc., Co., 79 Ga. 495, 5 S. E. 105.

Illinois.—Chicago, etc., R. Co. *v.* Johnson, 116 Ill. 206, 4 N. E. 381; Cleveland, etc., R. Co. *v.* Walter, 147 Ill. 60, 35 N. E. 529, affirming 45 Ill. App. 642.

Indiana.—Louisville, etc., R. Co. *v.* Wright, 115 Ind. 378, 38 Am. & Eng. R. Cas. 41, 7 Am. St. Rep. 432, 17 N. E. 584; Baltimore, etc., R. Co. *v.* Rowan, 104 Ind. 88, 23 Am. & Eng. R. Cas. 390, 3 N. E. 627; Pennsylvania Co. *v.* Sears, 136 Ind. 460, 34 N. E. 15.

Iowa.—Wells *v.* Burlington, etc., R. Co., 56 Iowa 520, 2 Am. & Eng. R. Cas. 243, 9 N. W. 364.

Kansas.—Atchison, etc., R. Co. *v.* Rowan, 55 Kan. 270, 39 Pac. 1010; St. Louis, etc., R. Co. *v.* Irwin, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266; Atchison. etc., R. Co. *v.* Love, 57 Kan. 36, 4 Am. & Eng. R. Cas., N. S., 256, 45 Pac. 59.

Kentucky.—Cincinnati, etc., R. Co. *v.* Sampson's Adm'r, 97 Ky. 65, 30 S. W. 12; Louisville, etc., R. Co. *v.* Cooley's Adm'r (Ky.), 12 Am. & Eng. R. Cas., N. S., 553, 49 S. W. 339; Louisville, etc., R. Co. *v.* Tucker's Adm'r, 32 Ky. Law Rep. 1929, 23 Am. & Eng. R. Cas., N. S., 876, 65 S. W. 453.

Massachusetts.—Maher *v.* Boston, etc., R. Co., 158 Mass. 36, 32 N. E. 950; Maguire *v.* Fitchburg R. Co., 146 Mass. 379, 34 Am. & Eng. R. Cas. 9, 15 N. E. 904.

Missouri.—Devitt *v.* Pacific R. Co., 50 Mo. 302; Rains *v.* St. Louis, etc., R. Co., 71 Mo. 164.

New Hampshire.—Hardy *v.* Boston, etc., R. Co., 68 N. H. 523, 12 Am. & Eng. R. Cas , N. S., 565, 41 Atl. 179.

New York.—Fitzgerald *v* N. Y. Central R. Co., 88 Hun 359, 34 N. Y. Supp. 824, 154 N. Y. 263, 9 Am. & Eng. R. Cas., N. S., 434, 48 N. E. 514; Hines *v.* New York, etc., R. Co., 78 Hun 239, 28 N. Y. Supp. 829; Wallace *v.* Central of Vermont R. Co., 138 N. Y. 302, 33 N. E. 1069; Owen *v.* New York Cent. R. Co., 1 Lans. (N. Y.) 108; Williams *v.* Delaware, etc., R. Co., 155 N. Y. 158, 10 Am. & Eng. R. Cas., N. S., 147, 49 N. E. 672; Williams *v.* Delaware, etc., R. Co., 116 N. Y. 628, 41 Am & Eng. R. Cas. 254, 22 N. E 1117; Rock *v.* Retsoff Min. Co., 61 Hun 623, 15 N. Y. Supp. 872; Wallace *v.* Central of Vermont R. Co., 138 N. Y. 302, 59 Am. & Eng. R. Cas. 264, 33 N. E. 1069; Williams *v.* Delaware, etc., R. Co. (N. Y.), 39 Hun 430.

Pennsylvania.—Pittsburg, etc., R. Co. *v.* Sentmeyer, 92 Pa. St. 276, 37 Am Rep. 684; Brossman *v.* Lehigh Val. R. Co., 113 Pa. St. 490, 6 Atl. 226, 57 Am. Rep. 479.

Rhode Island.—Darling *v.* New York, etc., R. Co., 17 R. I. 708, 24 Atl. 462, 16 L. R. A. 643.

South Carolina.—Atlee *v.* Railroad Co., 21 S. Car. 550; Hooper *v.* Columbia, etc., R. Co., 21 S. Car. 541, 53 Am. Rep. 691.

Texas.—Galveston, etc., R. Co. *v.* Gormley, 91 Tex. 393, 9 Am. & Eng.

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R. Cas., N. S., 468, 43 S. W. 877; San Antonio, etc., R. Co. *v.* Wallace, 76 Tex. 636, 44 Am. & Eng. R. Cas. 564, 13 S. W. 565.

Vermont.—Carbine's Adm'r *v.* Bennington, etc., R. Co., 61 Vt. 348, 38 Am. & Eng. R. Cas. 45, 17 Atl. 491.

Virginia.—Clark's Adm'r *v.* Richmond & Danville R. Co., 78 Va. 709, 18 Am. & Eng. R. Cas. 78; Norfolk, etc., R. Co. *v.* Marpole, 97 Va. 594, 16 Am. & Eng. R. Cas., N. S., 291, 34 S. E. 462; Nelson's Adm'r *v.* Chesapeake, etc., R. Co., 88 Va. 971, 54 Am. & Eng. R. Cas. 82, 14 S. E. 838; Chesapeake, etc., R. Co. *v.* Hafner's Adm'r, 90 Va. 621, 19 S. E. 166, 96 Va. 528, 12 Am. & Eng. R. Cas., N. S., 556, 31 S. E. 899.

West Virginia.—Williamson *v.* Newport News, etc., R. Co., 34 W. Va. 657, 48 Am. & Eng. R. Cas. 276, 12 S. E. 824.

There are few, if any, actual decisions contrary to the rule above stated. In Maryland and New Jersey, it has been held that a railroad company is not required to construct its bridges of such height as to admit of the passage of brakemen standing erect on the cars, on the ground that such structures would often be inconvenient and perhaps impracticable; that low bridges are one of the risks assumed by employees whose duties require them to ride on the top of cars; and that the company is no more under obligation to notify them of the danger from such source, than it is to notify them that the usual rate of speed maintained by its trains will subject them to more or less hazard. Baltimore, etc., R. Co. *v.* Stricker, 51 Md. 47, 34 Am. Rep. 291; Baylor *v.* Delaware, etc., R. Co., 11 Vroom (N. J.) 23, 29 Am. Rep. 208. However, even in these cases, the decisions might have rested on the ground of contributory negligence or assumption of risk; it being shown in each case that the injured person had knowledge of the nature and location of the bridge; the plaintiff having in one instance passed under the bridge by which he was injured more than three thousand times. But even in New Jersey, where the danger is not so obvious, as where the obstruction overhead consisted of an iron rod connecting the superstructure of the bridge, and placed at such a height as to admit of the safe passage of a man standing erect on some cars but not on others, it was held that it was for the jury to say whether the company was guilty of negligence. New York, etc., R. Co. *v.* Marion, 57 N. J. L. 94, 30 Atl. 316.

In a Louisiana case, where the plaintiff was injured by striking a hoisting beam which spanned the track, it was said: "It is rare that abstract principles of law are so fixed and absolute as not to be modified or controlled by the special facts of the case to which they are sought to be applied." In other words, while, as a general rule, it is negligence for a railroad company to construct or permit to be constructed overhead structures so low as not to permit the passage of a brakeman standing erect on the top of the car, yet under exceptional circumstances, the maintenance of such a structure may not constitute negligence. Gusman *v.* Caffery Cent. Ref. & R. Co., 49 La. Ann. 1264, 8 Am. & Eng. R. Cas., N. S., 463, 22 So. 742. An illustration of this would be a case where the height of the bridge was a matter not within the company's control. Myers *v.* Chicago, etc., R. Co. (C. C. A.), 95 Fed. 406, 14 Am. & Eng. R. Cas., N. S., 749. In this case the bridge was constructed at a height prescribed by the city authorities. The company erected whipping-straps to warn employees of danger, and in addition, gave them verbal notice to beware of danger from that particular bridge. It was held that it had done all that it could reasonably be required to do and was guilty of no negligence.

(I) Height Required.

As to just how high a bridge should be in order that the company may avoid the charge of negligence, many of the cases are indefinite, it being usually expressed that the bridge must be of sufficient height for employees to perform their duties with reasonable safety; but perhaps in every case this is tacitly understood to mean high enough for a brakeman to pass while standing erect on the top of the car.

Alabama.—Schlaff *v.* Louisville, etc., R. Co., 100 Ala. 377, 14 So. 105; Louisville, etc., R. Co. *v.* Banks, 104 Ala. 508, 16 So. 547.

Notes

Iowa.—Wells *v.* Burlington, etc., R. Co., 56 Iowa 520, 2 Am. & Eng. R. Cas. 243, 9 N. W. 364.

Kansas.—Atchison, etc., R. Co. *v.* Love, 57 Kan. 36, 45 Pac. 59, 4 Am. & Eng. R. Cas., N. S., 256.

Kentucky.—Cincinnati, etc., R. Co. *v.* Sampson's Adm'r, 97 Ky. 65, 30 S. W. 12; Hughes *v.* Louisville, etc., R. Co., 104 Ky. 774, 12 Am. & Eng. R. Cas., N. S., 560, 48 S. W. 671; Louisville, etc., R. Co. *v.* Cooley's Adm'r (Ky.), 12 Am. & Eng. R. Cas., N. S., 553, 49 S. W. 339.

Missouri.—Rains *v.* St. Louis, etc., R. Co., 71 Mo. 164.

New York.—Williams *v.* Delaware, etc., R. Co., 39 Hun (N. Y.) 430; Williams *v.* Delaware, etc., R. Co., 116 N. Y. 628, 41 Am. & Eng. R. Cas. 254, 22 N. E. 1117; Wallace *v.* Central of Vermont R. Co., 138 N. Y. 302, 59 Am. & Eng. R. Cas. 264, 33 N. E. 1069.

South Carolina.—Hooper *v.* Columbia, etc., R. Co., 21 S. Car. 541, 53 Am. Rep. 691; Atlee *v.* Railroad Co., 21 S. Car. 550.

Virginia.—Nelson's Adm'r *v.* Chesapeake, etc., R. Co., 88 Va. 971, 54 Am. & Eng. R. Cas. 82, 14 S. E. 836.

(2) Same—As to Brakemen on High Cars.

And this although the car on which the employee is riding at the time of his injury, be one of extraordinary height; provided he has not assumed the risk and is using due care for his safety at the time of the accident. Northern Pac. R. Co. *v.* Mortenson, 11 C. C. A. 335, 27 U. S. App. 313, 63 Fed. 530; Stirk *v.* Central R., etc., Co., 79 Ga. 495, 5 S. E. 105; Pennsylvania Co. *v.* Sears, 136 Ind. 460, 34 N. E. 15; Atchison, etc., R. Co. *v.* Rowan, 55 Kan. 270, 39 Pac. 1010; Louisville, etc., R. Co. *v.* Tucker's Adm'r, 23 Ky. L. Rep. 1929, 23 Am. & Eng. R. Cas., N. S., 876, 65 S. W. 453; Maher *v.* Boston, etc., R. Co., 158 Mass. 36, 32 N. E. 950; Rock *v.* Retsoff Min. Co., 61 Hun 623, 15 N. Y. Supp. 872; Pittsburg, etc., R. Co. *v.* Sentmeyer, 92 Pa. St. 276, 37 Am. Rep. 684.

(3) Escaping Liability by Giving Warning.

It is competent for the company to relieve itself of liability for its negligence in maintaining a bridge too low, by giving warning to its employees of its location, either by actual verbal notice of the particular bridge (Louisville, etc., R. Co. *v.* Banks, 104 Ala. 508, 16 So. 547; Devitt *v.* Pacific R. Co., 50 Mo. 302; Clark's Adm'r *v.* Richmond & Danville R. Co., 78 Va. 709, 18 Am. & Eng. R. Cas. 78; Williamson *v.* Newport News, etc., R. Co., 34 W. Va. 657, 48 Am. & Eng. R. Cas. 276, 12 S. E. 824), or by posting placards showing the location of such bridges (Louisville, etc., R. Co. *v.* Hall, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863; Louisville, etc., R. Co. *v.* Banks, 104 Ala. 508, 16 So. 547), or by the erection of whipping-straps or telltales. Myers *v.* Chicago, etc., R. Co. (C. C. A.), 95 Fed. 406, 14 Am. & Eng. R. Cas., N. S., 749; Northern Pac. R. Co. *v.* Mortenson, 63 Fed. 530, 11 C. C. A. 335, 27 U. S. App. 313; Louisville, etc., R. Co. *v.* Hall, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863; Atlee *v.* Railroad Co., 21 S. Car. 550. See also, Schlaff *v.* Louisville, etc., R. Co., 100 Ala. 377, 14 So. 105; Fitzgerald *v.* New York Central, etc., R. Co., 88 Hun 359, 34 N. Y. Supp. 824.

(4) Warning Device to Be Properly Erected and Maintained.

But where a railroad company undertakes to give warning by means of whipping-straps or telltales, it is under the highest duty to see that those appliances are kept in proper order, so that a brakeman cannot pass through without striking the cords; otherwise it occupies the position of having lured an employee to his destruction by inducing him to rely on a device which fails to give the warning for which it was intended. Savannah, etc., R. Co. *v.* Day, 91 Ga. 676, 17 S. E. 959; Maher *v.* Boston, etc., R. Co., 158 Mass. 36, 32 N. E. 950; Wallace *v.* Central of Vermont R. Co., 138 N. Y. 302, 59 Am. & Eng. R. Cas. 264, 33 N. E. 1069; Hines *v.* New York, etc., R. Co., 78 Hun 239, 28 N. Y. Supp. 829; Hardy *v.* Boston, etc., R. Co., 68 N. H. 523, 12 Am. & Eng. R. Cas. 565, 41 Atl. 179. So it is equally negligent to construct them so near the bridge that there is not time for the brakeman to stoop and avoid injury after he has received the warning (Wallace *v.* Central of Vermont R. Co., 138 N. Y. 302, 59 Am. & Eng. R. Cas. 264, 33 N. E. 1069), or

to erect them too high ; as where the end of the straps were six inches higher than the lowest timbers of the bridge. They should be sufficiently low to give warning the moment any part of the employee's body rises above the level of the lower timbers of the bridge. Hardy *v.* Boston, etc., R. Co., 68 N. H. 523, 12 Am. & Eng. R. Cas., N. S., 565, 41 Atl. 179. And, of course, it is negligent to construct such a device so low and of such rigidity as to sweep a man from the top of a car, because in such case it is as dangerous as the bridge itself. Darling *v.* New York, etc., R. Co., 17 R. I. 708, 24 Atl. 462, 16 L. R. A. 643.

b. Supporting Arch in Tunnel.

In Hunter *v.* New York, etc., R. Co., 116 N. Y. 615, 41 Am. & Eng. R. Cas. 248, 23 N. E. 9, the plaintiff was injured by striking a supporting arch in a tunnel. The evidence showed that the entrance to the tunnel was sufficiently high to admit the passage of a man standing erect on a car, and there were also whipping-straps placed to give warning of the approach of the tunnel. But within the tunnel, beginning at a point two hundred feet from the entrance, and extending for a distance of eighty-five feet beyond, there was a brick arch which reduced the height of the roof by three feet, so that at that point it was only four feet and seven inches above the top of an ordinary car. It was held that the company was liable to the plaintiff for maintaining the arch at that height.

c. Overhead Wire.

It is the duty of a railroad company to see that an electric railway company does not stretch a wire across its tracks at such a height that it will sweep brakemen from the top of its trains. Erslew *v.* New Orleans, etc., R. Co., 49 La. Ann. 86, 6 Am. & Eng. R. Cas., N. S., 436, 21 So. 153.

In Dalton *v.* Receivers, 4 Hughes 180, Fed. Cas. 3,550, the plaintiff was dragged from the top of a car by a wire suspended across the track by third persons, about the height of the chin of a man standing on a freight car, and it was held that he could not recover because he had failed to report the existence of the wire in that position to the company, and had continued to work on trains in that vicinity.

II. TEMPORARY STRUCTURES.

Where a temporary structure is placed in dangerous proximity to the track, the company owes the same duty to discover and remove as if it were permanent. Thus in Texas, etc., R. Co. *v.* Hohn, 1 Tex. Civ. App. 36, 21 S. W. 942, the scaffolding by which the plaintiff was injured was so near the track that on the day before the injury, when the same train passed, the engineer was compelled to remove his screen to save it from being ruined, and it was held that the company was bound with notice of its existence in such dangerous proximity to the track, and was liable for its negligence in failing to have it removed.

III. STRUCTURES ERECTED BY THIRD PERSONS.

In regard to structures erected by third persons, the company is not liable unless it is guilty of negligence in failing to discover and remove the same; it may be that it cannot prevent their erection in the first instance, but it owes a duty to use reasonable care to discover them and have them removed. Dalton *v.* Receivers, 4 Hughes 180, Fed. Cas. 3,550; Highland Ave. R. Co. *v.* Walters, 91 Ala. 435, 8 So. 357; Kearns *v.* Chicago, etc., R. Co., 66 Iowa 399, 22 Am. & Eng. R. Cas. 287, 24 N. W. 231; Atchison, etc., R. Co. *v.* Slattery, 57 Kan. 499, 8 Am. & Eng. R. Cas., N. S., 761, 46 Pac. 941; Martin *v.* Louisville, etc., R. Co., 95 Ky. 612, 26 S. W. 801; Erslew *v.* New Orleans, etc., R. Co., 49 La. Ann. 86, 6 Am. & Eng. R. Cas., N. S., 436, 21 So. 153; Texas, etc., R. Co. *v.* Vallie, 60 Tex. 481.

In McCreery's Adm'x *v.* Ohio River, etc., R. Co., 43 W. Va. 110, 8 Am. & Eng. R. Cas., N. S., 755, 27 S. E. 327, 49 W. Va. 301, 20 Am & Eng. R. Cas., N. S., 875, 38 S. E. 534, the "dummy" train, of which the deceased was conductor, was caught and thrown from the track by the hook on the boom of a derrick, which had been left in a dangerous

position beside the track by some contractors engaged in building a bridge at that point some time previous to the accident, and it was held that the company was guilty of negligence in failing to have it removed.

IV. EFFECT OF CUSTOM.

In Allen *v.* Burlington, etc., R. Co., 64 Iowa 94, 19 N. W. 870, where the plaintiff was injured by striking a cattle chute near the track, it was held that evidence to the effect that it was the custom for other companies to build cattle chutes the same distance from the track as the one by which the plaintiff was injured, was immaterial; the court saying, that it did not help the negligence of the defendant any, but merely showed that the same negligence was habitually practiced by other corporations. And where an engineer was struck by a cattle guard while working outside of his cab, attempting to remedy some defect in the engine, it was held that the finding of negligence would not be disturbed because the cattle guard was the same distance from the track as all the other structures of that kind on the road. Murphy *v.* Wabash, etc., R. Co., 115 Mo. 111, 21 S. W. 862. In Dorsey *v.* Phillips, etc., Co., 42 Wis. 583, 597, the question, whether a uniform custom of railroad companies to erect cattle chutes and other structures so near the track as to injure the safety of employees operating trains, would excuse what would otherwise be negligence, was left undecided; but the court was strongly of the opinion that it would not, as appears from the following language: "But there is a public as well as a private interest. The operation of railroad trains is essentially highly dangerous, and it is the duty of railroad companies, too plain for discussion, to use all reasonable skill to mitigate, tolerating nothing to aggravate the necessary danger. This is not merely a private duty to individuals concerned, but a public duty to the state, concerned in the welfare of its citizens. And no custom, however uniform or universal, which unnecessarily exposes railroad employees to loss of life or limb, would seem to satisfy a duty which may be regarded as an implied condition of their charters."

In the supreme court of Michigan, on the other hand, the opinion prevails that that which is customary and usual, cannot be negligent, the court saying, in a case where the plaintiff was injured by striking a coal bin erected near a siding: "It is a well-known fact of which we may take judicial notice, that it is usual for sidings to be so constructed as to permit cars to stand close to buildings, thereby facilitating the loading and unloading, and reducing the cost and danger of the operation. This is uniformly true of elevators and coal bins, and every person of common intelligence may reasonably be presumed to know that the siding is made for such purposes, to which, perhaps, the main track could not be safely applied by reason of the duty owed to passengers, if not employees. Phelps *v.* Railroad Company, 122 Mich. 171, 16 Am. & Eng. R. Cas., N. S., 302, 81 N. W. 101. The plaintiff admits that he knew of this practice on defendant's road. *It being the common practice upon railroads to thus erect structures, it cannot be negligence, for the test of negligence is, what is usual in railroading?* (Italics ours.) And the trial court should not hesitate to say to a jury that it is not negligence for a railroad company to build or permit the erection and maintenance of coal bins in close proximity to sidings, and that one who enters the employment of a railroad company must expect to find them and other structures, such as depots and their awnings, bridges, warehouses, watertanks, elevators, etc., and that he assumes the risks incident to railroading in such places, in the night as well as the day, and the first time over the route as well as on subsequent trips." Pahlan *v.* Detroit, etc., R. Co., 122 Mich. 232, 16 Am. & Eng. R. Cas., N. S., 309, 81 N. W. 103.

V. EFFECT OF NECESSITY.

If, however, the structure is placed near the track from necessity, and not as a matter of mere custom or convenience, it is held not to be negligence. But it is apprehended that in such case the company is un-

der the duty of giving due notice and warning to its employees of its presence. Choctaw, etc., R. Co. *v.* McDade, 112 Fed. 888, 1 R. R. R. 413, 24 Am. & Eng. R. Cas., N. S., 413; Kenney *v.* Meddaugh, 118 Fed. 209, 5 R. R. R. 226, 28 Am. & Eng. R. Cas., N. S., 226; Louisville, etc., R. Co. *v.* Milliken's Adm'x (Ky.), 14 Am. & Eng. R. Cas., N. S., 742, 51 S. W. 796; Potter *v.* Detroit, etc., R. Co., 122 Mich. 179, 16 Am. & Eng. R. Cas., N. S., 264, 81 N. W. 80; Sisco *v.* Lehigh, etc., R. Co., 75 Hun 582, 27 N. Y. Supp. 671; Morrisette *v.* Canadian Pac. R. Co., 72 Vt. 232, 5 R. R. R. 219, 28 Am. & Eng. R. Cas., N. S., 219, 52 Atl. 520; Dorsey *v.* Phillips, etc., Const. Co., 42 Wis. 583, 597.

VI. WHERE MAINTENANCE OF STRUCTURE NOT NEGLIGENCE AS TO EMPLOYEE INJURED.

The liability of a railroad company for injuries to employees from structures near the track, rests upon the ground that it has unnecessarily created or increased a danger which the employee, in the performance of his duties, is compelled to undergo. Therefore, it is not liable where the employee sustains injury through having placed himself in a dangerous position, not in the performance of his duties, but unnecessarily and in the exercise of his own free will. Sundy *v.* Savannah St. R. Co., 96 Ga. 819, 23 S. E. 841.

The case of Pittsburg, etc., R. Co. *v.* Sentmeyer, 92 Pa. St. 276, 37 Am. Rep. 684, exactly illustrates this point. There the deceased, a flagman, was sent back to flag a train following his own. Having performed this duty, it was then his duty to board the train which he had flagged, and ride on the engine until he should overtake his own train. But instead of remaining on the engine, as he should have done, he went on top of the train, and was killed by striking an overhead bridge while riding in that position. It was held that the company was not liable, since he had exposed himself to the danger, not in the performance of his duties, but of his own free will.

VII. EMPLOYERS' LIABILITY ACTS.

A station house awning, erected for the protection of passengers from the elements while engaged in getting on and off trains, and which projects so near as to endanger the safety of a brakeman on a side ladder, is not a "defect" within the provisions of an employers' liability act, making employers liable for injuries sustained by employees by reason of any defect in their ways, works, or machinery. Fisk *v.* Fitchburg R. Co., 158 Mass. 238, 33 N. E. 510.

So it has been held as to a bridge over a side track owned by a third person, and which the railroad company used merely as licensee for the purpose of making free delivery of the goods of such person (Engel *v.* New York, etc., R. Co., 160 Mass. 260, 35 N. E. 547, 22 L. R. A. 283); and as to an oil box, left near the track in a freight yard (Louisville, etc., R. Co. *v.* Bouldin, 110 Ala. 185, 20 So. 325), and as to a movable object such as a car left temporarily on a siding too near its intersection with the adjoining track. Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, 53 Am. & Eng. R. Cas. 115, 12 So. 88. But it is otherwise as to a pipe projecting from a water tank. East Tennessee, etc., R. Co. *v.* Thompson, 94 Ala. 636, 10 So. 280.

VIII. CONTRACT EXEMPTING COMPANY FROM LIABILITY.

A contract of employment between an employee and a railroad company, whereby the employee stipulates that he knows that at certain points on the line there are structures dangerously near the track, and that he will inform himself of the location of such structures, and use due care to avoid injury therefrom, is void as against public policy, in so far as the company thereby attempts to relieve itself from the duty of providing a reasonably safe track, and of warning the employee of dangerous obstructions along the track. Gulf, etc., R. Co. *v.* Darby (Tex. Civ. App.), 2 R. R. R. 327, 25 Am. & Eng. R. Cas., N. S., 327, 67 S. W. 446; Texas, etc., R. Co. *v.* Swearingen, 122 Fed. 193, 8 R. R. R. 348, 31 Am. & Eng. R. Cas., N. S., 348. And a fortiori as to such a.

contract between the company and the next of kin of the deceased, where there is a statute requiring the company to construct its ladders either on the inside of the cars or at the end. Tarbell *v.* Rutland R. Co., 73 Vt. 347, 3 R. R. R. 368, 26 Am. & Eng. R. Cas., N. S., 368, 51 Atl. 6.

IX. ACTS OF FELLOW SERVANTS.

1. GENERAL RULE.

Where the presence of an object in dangerous proximity to the track is due to the negligence of a fellow servant of the person injured, the company is, in general, not liable. A typical illustration of this rule is the case of a car left too near the intersection of a siding and the adjoining track. Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, 53 Am. & Eng. R. Cas. 115, 12 So. 88; Dacey *v.* Old Colony R. Co., 153 Mass. 112, 26 N. E. 437; Hewitt *v.* Flint, etc., R. Co., 67 Mich. 61, 31 Am. & Eng. R. Cas. 249, 34 N. W. 659; Schaub *v.* Hannibal, etc., R. Co., 106 Mo. 74, 16 S. W. 924; Bence *v.* New York, etc., R. Co., 181 Mass. 221, 3 R. R. R. 295, 26 Am. & Eng. R. Cas., N. S., 295, 63 N. E. 417. So it was held where the accident was due to the negligence of a fellow servant in failing to report the presence of a wire, stretched across the track by third persons, at a height dangerous to brakemen ou the tops of cars. Dalton *v.* Receivers, 4 Hughes 180, Fed. Cas. No. 3,550.

a. Qualification.

This rule is subject, of course, to the limitation that the master must have used due care in the selection of his servants, and must not have been guilty of negligence in discovering and removing the danger. Thus, where the injury resulted from the boom of a derrick swinging free across the track, it was held that it was competent for the company to relieve itself of liability by showing that it had used due care to place the derrick in charge of competent servants; but that this was not shown where the evidence was, that upon the completion of the derrick, the mechanic who had constructed it, and who was not shown to have been otherwise connected with the road, called out the station agent and others who were expected to use it, and explained to them the working thereof, and cautioned them as to the importance of keeping the boom from over the track. Gates *v.* Chicago, etc., R. Co., 2 S. Dak. 422, 53 Am. & Eng. R. Cas. 245, 50 N. W. 907, 57 N. W. 200. And where the injury resulted from the falling of a derrick across the track, it was held that, although the employees on trains were fellow servants of those who had set up the derrick, yet the plaintiff was entitled to recover if the evidence showed that it had been a source of danger for quite a while, and the company had been negligent in not removing it. Holden *v.* Fitchburg R. Co., 129 Mass. 268, 2 Am. & Eng. R. Cas. 94, 37 Am. Rep. 343.

And so in the case of a scaffolding erected for the repair of a water tank, it is no defense that it was erected by the plaintiff's fellow servants, if the company had knowledge of its dangerous proximity to the track, or if with the exercise of reasonable diligence, it might have had such knowledge. Texas, etc., R. Co. *v.* Hohn, 1 Tex. Civ. App. 36, 21 S. W. 942.

2. CONCURRING NEGLIGENCE OF MASTER AND FELLOW SERVANT.

Where the injury would not have been sustained but for the negligence of the master, the master is liable notwithstanding it would have been prevented or avoided but for the negligence of a fellow servant. Howe *v.* St. Clair, 8 Tex. Civ. App. 101, 27 S. W. 800.

Thus where an employee, while riding on the platform of one of the defendant's cars, which position he was compelled to assume through no fault of his own, was injured through the combined negligence of the defendant in placing a switch stand too near the track, and the negligence of his fellow servants, who jostled and crowded him, causing him to project his head beyond the side of the coach, it was held that defendant was liable. Boss *v.* Northern Pacific R. Co., 2 N. Dak. 128, 49 N. W. 655, 33 Am. St. Rep. 756.

And in a North Carolina case, it was held, that conceding trainmen

and track walkers to be fellow servants, and that the track walker was negligent in failing to report the danger threatened by overhanging rocks on the mountain side, which had been loosened by blasting at the original construction of the road, the company was nevertheless liable, since the accident would not have occurred but for its failure to provide a safe place in the first instance. Bean *v.* Western N. Car. R. Co., 107 N. Car. 731, 12 S. E. 600.

3. WHO ARE NOT FELLOW SERVANTS.

a. Trainmen and Sectionmen.

In Kentucky and Wisconsin, where trainmen sustained injuries by reason of timbers scattered along the tracks, it was held that they were not fellow servants of those charged with keeping the track and right of way free from such obstructions. Kentucky Cent. R. Co. *v.* Ryle (Ky.), 18 S. W. 938; Hullehan *v.* Green Bay, etc., R. Co., 68 Wis. 520, 31 Am. & Eng. R. Cas. 322, 32 N. W. 529. And in similar cases in Texas, it was held that the company could not escape responsibility for failing to provide a safe track by pleading that the presence of such obstructions was due to the negligence of fellow servants. Southern Pac. R. Co. *v.* Markey (Tex.), 19 S. W. 392; Howe *v.* St. Clair, 8 Tex. Civ. App. 101, 27 S. W. 800.

b. Servants of Another Company.

And where the defendant's servants, engaged in delivering cars to another company, negligently left them too near the intersection of the tracks in the yard of such other company, and plaintiff's intestate, employed by the company to whom they were delivered, came to his death by reason thereof, the defendant could not escape liability on the theory that its servants were fellow servants of the deceased. Martin *v.* Louisville, etc., R. Co., 95 Ky. 612, 26 S. W. 801.

c. Servant Charged with Instructing Another.

Where a servant, by reason of youth or inexperience, is directed to do that which he is not competent to do, or does not know or appreciate the hazard or danger of doing, it is one of the nonassignable duties of the master to give him the full benefit of his superior knowledge, and such instruction as is suitable to the occasion. Thus, where a boy, employed as brakeman on a train, was directed by his superior servant, while the train was going down grade, to lean out of the engine, and see if the wheels were sliding, and was knocked from the train and injured by a stump standing near the track while so doing, it was held that the company could not plead that the negligence in directing him to perform such unusual and dangerous act, was that of a fellow servant, but that the servant who directed the act must be held to stand in the place of the principal, and that the principal was liable for his failure to instruct the boy and caution him against the danger of the performance. Riley *v.* Railway, 27 W. Va. 145.

X. CONTRIBUTORY NEGLIGENCE.

1. GENERAL PRINCIPLES.

The fundamental principle which precludes a recovery where the plaintiff's own negligence has contributed to his injury, applies in the case of accidents from overhead structures, and structures too near the track, as elsewhere. Citation of authority in support of this statement would be useless labor, but if any were needed, abundant illustration will be found in the discussion which is to follow. So far as we are aware, there is but a single dictum to the contrary. In a Kentucky case, it was said, that if the accident would not have happened but for the dangerous proximity of the girder to the track, the railroad company could not relieve itself of liability by showing that the deceased had knowledge of the bridge and of its dangerous proximity to the track, even though he was not exercising due care for his safety at the time of the accident, the exact language of the court being: "We are aware of many reported cases * * * where the absence of ordinary care and the means of knowing the condition of the bridge by the employee, have been held as relieving the railroad company from responsibility in such cases. This court, however, has

not followed or approved those decisions in reference to such structures." Hughes *v.* Louisville, etc., R. Co., 104 Ky. 774, 12 Am. & Eng. R. Cas., N. S., 560, 48 S. W. 671.

2. SAME—PRESUMPTION AND BURDEN OF PROOF.

Under the general principles of the law of negligence, applicable to this class of cases as elsewhere, it is the better view that the contributory negligence of the plaintiff is a matter of defense to be set up by the defendant.

United States.—Hemingway *v.* Illinois Cent. R. Co. (C. C. A.), 114 Fed. 843, 3 R. R. R. 899, 26 Am. & Eng. R. Cas., N. S., 899; Chicago, G. W. R. Co. *v.* Price (C. C. A.), 16 Am. & Eng. R. Cas., N. S., 324; Mobile & Ohio R. Co. *v.* Wilson (C. C. A.), 6 Am. & Eng. R. Cas., N. S., 97; Holmes *v.* Oregon, etc., R. Co., 5 Fed. 75, 6 Sawy. 262; Holmes *v.* Oregon, etc., R Co., 5 Fed. 523, 6 Sawy. 276; Hough *v.* Texas, etc., R. Co., 100 U. S. 213, 25 L. Ed. 612; Washington, etc., R. Co. *v.* Harmon, 147 U. S. 571, 58 Am. & Eng. R. Cas. 380, 13 Sup. Ct. 557; Washington, etc., R. Co. *v.* Gladmon, 15 Wall. 401, 21 L. Ed. 114.

Alabama.—Georgia Pac. Ry. *v.* Davis, 92 Ala. 300, 9 So. 252; Montgomery, etc., R. Co. *v.* Chambers, 79 Ala. 338; Montgomery Gas-Light Co. *v.* Montgomery, etc., R. Co., 86 Ala. 372, 5 So. 735.

Arizona.—Lopez *v.* Central Ariz. Min. Co., 1 Ariz. 464, 2 Pac. 748; Hobson *v.* New Mexico, etc., R. Co. (Ariz.), 28 Am. & Eng. R. Cas. 360, 11 Pac. 545.

Arkansas.—Little Rock & Ft. S. R. Co. *v.* Atkins, 46 Ark. 423; Little Rock, etc., R. Co. *v.* Leverett, 48 Ark. 333, 28 Am. & Eng. R. Cas. 459, 3 S. W. 50; Little Rock & Ft. S. R. Co. *v.* Cavenesse, 48 Ark. 106, 2 S. W. 505.

California.—MacDougall *v.* Cent. R. Co., 63 Cal. 431, 12 Am. & Eng. R. Cas. 143; Glascock *v.* Cent. Pac. R. Co., 73 Cal. 137, 14 Pac. 518; Trousclair *v.* Pac. Coast S. S. Co., 80 Cal. 521, 22 Pac. 258; Nehrbas *v.* Cent. Pac. R. Co., 62 Cal. 320, 14 Am. & Eng. R. Cas. 670; Robinson *v.* Western Pac. R. Co., 48 Cal. 409.

Colorado.—Sanderson *v.* Frazier, 8 Colo. 79, 5 Pac. 632; Kansas Pac. R. Co. *v.* Twombly, 3 Colo. 125.

Dakota.—Sanders *v.* Reister, 1 Dak. 151, 46 N. W. 680; Mares *v.* N. Pacific R. Co., 3 Dak. 336, 17 Am. & Eng. R. Cas. 620, 21 N. W. 5.

Florida.—Louisville, etc., R. Co. *v.* Yniestra, 21 Fla. 700.

Georgia.—Thompson *v.* Cent. R. & B. Co., 54 Ga. 509 (contra, Campbell *v.* Atl., etc., R. Co., 53 Ga. 488).

Idaho.—Hopkins *v.* Utah Northern R. Co., 2 Idaho 277, 13 Pac. 343.

Kansas.—St. Louis, etc., R. Co. *v.* Weaver, 35 Kan. 412, 28 Am. & Eng. R. Cas. 341, 11 Pac. 408; Kansas, etc., R. Co. *v.* Pointer, 14 Kan. 37; Kansas City, etc., R. Co. *v.* Phillibert, 25 Kan. 582.

Kentucky.—Bogenschutz *v.* Smith, 84 Ky. 330, 1 S. W. 578; Louisville, etc., R. Co. *v.* Tucker's Adm'r, 23 Ky. L. Rep. 1929, 23 Am. & Eng. R. Cas., N. S., 876, 65 S. W. 453; Louisville, etc., R. Co. *v.* Milliken's Adm'x (Ky.), 14 Am. & Eng. R. Cas., N. S., 742, 51 S. W. 796; Cahill *v.* Cincinnati, etc., R. Co., 92 Ky. 345, 49 Am. & Eng. R. Cas. 390, 18 S. W. 2; Paducah, etc., R. Co. *v.* Hoehl, 12 Bush 41.

Maryland.—Baltimore, etc., R. Co. *v.* State, 60 Md. 449, 12 Am. & Eng. R. Cas. 149.

Minnesota.—Clark *v.* Chicago, etc., R. Co., 28 Minn. 69, 9 N. W. 75; Whittier *v.* Chicago, etc., R. Co., 24 Minn. 394.

Missouri.—Buesching *v.* St. Louis Gas L. Co., 73 Mo. 219, 39 Am. Rep. 503; Crumpley *v.* Hannibal, etc., R. Co., 111 Mo. 152, 19 S. W. 820; Fulks *v.* St. Louis, etc., R. Co., 111 Mo. 335, 52 Am. & Eng. R. Cas. 280, 19 S. W. 818; Williams *v.* Missouri Pac. R. Co., 109 Mo. 475, 18 S. W. 1098; Huckshold *v.* St. Louis, etc., R. Co., 90 Mo. 548, 28 Am. & Eng. R. Cas. 659, 2 S. W. 794; Schuerman *v.* Missouri R. Co., 3 Mo. App. 565; Florida *v.* Pullman P. Car Co., 37 Mo. App. 598.

Nebraska.—Lincoln *v.* Walker, 18 Neb. 244, 20 N. W. 113; Omaha St. R. Co. *v.* Martin (Neb.), 4 Am. & Eng. R. Cas , N. S., 1, 66 N. W. 1007.

New Jersey.—New Jersey Exp. Co. *v.* Nichols, 33 N. J. L. 434, aff'g 32 N. J. L. 166.

North Carolina.—Cox *v.* Norfolk, etc., R. Co., 123 N. Car. 604, 12 Am.

Notes

& Eng. R. Cas. N. S., 390, 31 S. E. 848; Cawfield *v.* Asheville St. R. Co., 111 N. Car. 597, 16 S. E. 703; Aycock *v.* Raleigh, etc., R. Co., 89 N. Car. 321.

Ohio.—Baltimore, etc., R. Co. *v.* Whitacre, 35 Ohio St. 627.

Pennsylvania.—Bradwell *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 404, 20 Atl. 1046.

Rhode Island.—Cassidy *v.* Angell, 12 R. I. 447.

South Carolina.—Joyner *v.* S. Carolina R. Co., 26 S. Car. 49, 29 Am. & Eng. R. Cas. 258, 1 S. E. 52; Kaminitsky *v.* N. E. R. Co., 25 S. Car. 53; Crouch *v.* Charleston, etc., R. Co., 21 S. Car. 495, 29 Am. & Eng. R. Cas. 495; Carter *v.* Columbia, etc., R. Co., 19 S. Car. 20, 15 Am. & Eng. R. Cas. 414, 45 Am. Rep. 754.

Tennessee.—Illinois Cent. R. Co. *v.* Davis (Tenn.), 18 Am. & Eng. R. Cas., N. S., 708.

Texas.—Houston, etc., R. Co. *v.* Kelly, 13 Tex. Civ. App. 1, 34 S. W. 809; Central Tex., etc., R. Co. *v.* Bush, 12 Tex. Civ. App. 291, 3 Am. & Eng. R. Cas., N. S., 264, 34 S. W. 133; Lee *v.* International, etc., R. Co., 89 Tex. 583, 5 Am. & Eng. R. Cas., N. S., 376, 36 S. W. 63; Dallas, etc., R. Co. *v.* Spicker, 61 Tex. 427, 21 Am. & Eng. R. Cas. 160, 48 Am. Rep. 297; Gulf, etc., R. Co. *v.* Rediker, 67 Tex. 181, 2 S. W. 513.

Utah.—Silcock *v.* Rio Grande, etc., R. Co., 22 Utah 179, 18 Am. & Eng. R. Cas., N. S., 459, 61 Pac. 565; Bowers *v.* Union Pac. R. Co., 4 Utah 215, 7 Pac. 251.

Virginia.—Baltimore, etc., R. Co. *v.* Whittington, 30 Gratt. 805; Norfolk, etc., R. Co. *v.* Gilman, 88 Va. 239, 13 S. E. 475; Baltimore, etc., R. Co. *v.* McKenzie, 81 Va. 71, 24 Am. & Eng. R. Cas. 395.

Washington.—Northern Pacific R. Co. *v.* O'Brien, 1 Wash. 599, 21 Pac. 32; Spurrier *v.* Front St. Cable R. Co., 3 Wash. 659, 29 Pac. 346.

West Virginia.—Riley *v.* W. Va., etc., R. Co., 27 W. Va. 145; Comer *v.* Con. C. & M. Co., 34 W. Va. 533, 12 S. E. 476.

Wisconsin.—Kelley *v.* Chicago, etc., R. Co., 60 Wis. 480, 19 N. W. 521; Thoresen *v.* La Crosse City R. Co., 94 Wis. 129, 6 Am. & Eng. R. Cas., N. S., 101, 68 N. W. 548.

But in Massachusetts and a number of other states, the contrary doctrine prevails, and it is incumbent upon the plaintiff to prove a case free from contributory negligence.

Georgia.—Florida Cent., etc., R. Co. *v.* Burney, 98 Ga. 1, 6 Am. & Eng. R. Cas., N. S., 543, 26 S. E. 730.

Idaho.—Minty *v.* Railway Co., 2 Idaho 437, 21 Pac. 660, 4 L. R. A. 409; Rumpel *v.* Railway Co. (Idaho), 35 Pac. 700, 22 L. R. A. 725; Railway Co. *v.* Holt (Idaho), 40 Pac. 56; Haner *v.* Northern Pacific R. Co. (Idaho), 19 Am. & Eng. R. Cas., N. S., 628, 62 Pac. 1028.

Illinois.—Hawk *v.* Chicago, etc., R. Co., 147 Ill. 399, 35 N. E. 139; Blanchard *v.* Lake Shore, etc., R. Co., 126 Ill. 416, 18 N. E. 799; Aurora Branch R. Co. *v.* Grimes, 13 Ill. 585; Indianapolis, etc., R. Co. *v.* Evans, 88 Ill. 63; Chicago, etc., R. Co. *v.* Robinson, 8 Ill. App. 140.

Indiana.—Cincinnati, etc., R. Co. *v.* Butler, 103 Ind. 31, 23 Am. & Eng. R. Cas. 262, 2 N. E. 138; Ind., B. & W. R. Co. *v.* Greene, 106 Ind. 279, 25 Am. & Eng. R. Cas. 322, 55 Am. Rep. 736; Lyons *v.* Terre Haute, etc., R. Co., 101 Ind. 419; Louisville, etc., R. Co. *v.* Eves, 1 Ind. App. 224, 27 N. E. 580; Evansville St. R. Co. *v.* Gentry, 147 Ind. 408, 5 Am. & Eng. R. Cas., N. S., 500, 44 N. E. 311; Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35, 25 N. E. 863. See rule changed in Indiana by Act Feb. 17, 1899 (Acts of 1899, p. 58), Southern Indiana Ry. Co. *v.* Peyton (Ind.), 23 Am. & Eng. R. Cas., N. S., 343, 61 N. E. 722.

Iowa.—Rebelsky *v.* Chicago, etc., R. Co., 79 Iowa 55, 44 N. W. 536; Masser *v.* Chicago, etc., R. Co., 68 Iowa 602, 27 N. W. 776; Thiessen *v.* Bell Plain, 81 Iowa 118, 46 N. W. 854; Carlin *v.* Chicago, etc., R. Co., 37 Iowa 316.

Louisiana.—Moore *v.* Shreveport, 3 La. Ann. 645.

Maine.—State *v.* Maine C. R. Co., 76 Me. 357, 19 Am. & Eng. R. Cas. 312, 49 Am. Rep. 622; Gallagher *v.* Proctor, 84 Me. 41, 24 Atl. 459.

Massachusetts.—Riley *v.* Connecticut R. R. Co., 135 Mass. 292, 15 Am. & Eng. R. Cas. 181; Chase *v.* Maine Cent. R. Co., 167 Mass. 383, 6 Am. &

Eng. R. Cas., N. S., 343, 45 N. E. 911; Leonard *v.* Boston, etc., R. Co., 170 Mass. 318, 13 Am. & Eng. R. Cas., N. S., 825, 49 N. E. 621; Mayo *v.* Boston, etc., R. Co., 104 Mass. 137; Gaynor *v.* Old Colony R. Co., 100 Mass. 208.

Michigan.—Michigan Cent. R. Co. *v.* Coleman, 28 Mich. 440; Mynning *v.* Detroit, etc., R. Co., 67 Mich. 677, 35 N. W. 811; Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99.

Mississippi.—Vicksburg *v.* Hennessy, 54 Miss. 391; Miss. C. R. Co. *v.* Mason, 51 Miss. 234.

New York.—Powell *v.* New York, etc., R. Co., 109 N. Y. 613, 15 N. E. 891; Warner *v.* New York C. R. Co., 44 N. Y. 465; Fowler *v.* New York, etc., R. Co., 74 Hun 141, 26 N. Y. Supp. 218; Geoghegan *v.* Atlas S. S. Co., 51 N. Y. S. 868, 22 N. Y. Supp. 749; McGrath *v.* Hudson R. R. Co., 19 How. Pr. 211, 32 Barb. 144; Muhr *v.* Mayor, etc., N. Y., 16 N. Y. S. 688, 2 N. Y. Supp. 59; Winslow *v.* Boston, etc., R. Co., 11 N. Y. S. 831.

Vermont.—Bovee *v.* Danville, 53 Vt. 183.

Where this contrary doctrine prevails, and there is no positive evidence as to the manner in which the accident occurred, it will, in general, preclude a recovery; since in the absence of positive evidence, it will be difficult to prove a case free from contributory negligence. Thus in Corcoran *v.* Boston, etc., R. Co., 133 Mass. 507, 12 Am. & Eng. R. Cas. 226, it was in evidence that the ice on the sides of the cut projected to within one foot of the sides of the cars. The last seen alive of the deceased, he was descending the side ladder of a car, while the train was going through the cut, for the purpose of setting the brake on a platform car. The brake on the platform car was afterwards found to be set. His next duty was to ascend the ladder on the side of a house car and set the brake on it. His lighted lantern was seen on the top of that car, and the lantern was afterwards found there. Just beyond the spot where the ice projected from the side of the cut, there was an impression in the snow, as if something heavy had fallen there, and portions of the deceased's mangled body were found scattered between that spot and a point a quarter of a mile beyond. Further than this, there was no definite evidence, and it was held that there could be no recovery, because it was impossible to prove that the deceased was in the exercise of due care at the time of the accident. However, it is held, even in Massachusetts, that evidence of positive acts of care is not necessary in order to establish a case free from contributory negligence; the language in one case being, "While due care must be shown by a plaintiff, in order that it may be sure that injury to him was not occasioned by any contributory negligence on his part, it is not necessary that any positive act of care shall be proved. It may be inferred from mere absence of fault, when sufficient circumstances are shown to fairly exclude the idea of negligence on his part. If a person is in his place, where he may rightfully be engaged in duties which he may properly there perform, under circumstances which do not require the exercise of especial caution on his part against the acts or negligence of others, he is in the exercise of due care." Maguire *v.* Fitchburg R. Co., 146 Mass. 379, 34 Am. & Eng. R. Cas. 9, 15 N. E. 904. Thus where the deceased was ordered to climb to the top of a high refrigerator car, with instructions to watch the rear end of the train, and was afterwards found dead, with the evidence indicating that he was killed by striking a low bridge, from which the telltales were gone, it was held that there was no presumption of his contributory negligence, because he had the right to suppose that the telltales were in place, and was under no duty to look for a bridge until first warned by striking the telltales. Maher *v.* Boston, etc., R. Co., 158 Mass. 36, 32 N. E. 950.

3. WHETHER EMPLOYEE CHARGEABLE WITH KNOWLEDGE OF DANGER—RIGHT TO RELY ON COMPANY'S PERFORMANCE OF DUTY.

The law does not require of employees having duties to perform on trains, particularly those employees whose duties require them to work on the outside of the cars, to absolutely know of all the defects

of construction, and all the obstructions there may be alongside, or overhead of the track, nor that they shall neglect their duties to be on the constant lookout for such obstructions as may be dangerous. In other words, they have the right to rely, in some measure at least, upon the presumption that the company has performed its duty of providing them with a reasonably safe place in which to work.

United States.—Central Trust Co. *v.* East Tennessee, etc., R. Co., 73 Fed. 661; Wood *v.* Louisville, etc., R. Co. (C. C.), 11 Am. & Eng. R. Cas., N. S., 525.

Alabama.—Georgia Pac. R. Co. *v.* Davis, 92 Ala. 300, 9 So. 252, 25 Am. St. Rep. 47.

Georgia.—Savannah, etc., R. Co. *v.* Day, 91 Ga. 676, 17 S. E. 959.

Illinois.—Chicago, etc., R. Co. *v.* Johnson, 116 Ill. 206, 4 N. E. 381; Illinois Central R. Co. *v.* Welch, 52 Ill. 183, 4 Am. Rep. 593.

Indiana.—Pennsylvania Company *v.* McCormack, 131 Ind. 250, 30 N. E. 27; Citizens' St. R. Co. *v.* Reed, 28 Ind. 629, 4 R. R. R. 43, 27 Am. & Eng. R. Cas., N. S., 43, 63 N. E. 770.

Iowa.—Kearns *v.* Chicago, etc., R. Co., 66 Iowa 599, 22 Am. & Eng. R. Cas. 287, 24 N. W. 231.

Kansas.—So. Kansas R. Co. *v.* Michaels, 57 Kan. 474, 46 Pac. 938; St. Louis, etc., R. Co. *v.* Irwin, 36 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266.

Massachusetts.—Ferren *v.* Old Colony R. Co., 143 Mass. 197, 9 N. E. 608; Maher *v.* Boston, etc., R. Co., 158 Mass. 36, 32 N. E. 950.

Michigan.—Jarvis *v.* Flint, etc., R. Co., 128 Mich. 61, 22 Am. & Eng. R. Cas., N. S., 312, 87 N. W. 136.

Minnesota.—Johnson *v.* St. Paul, etc., R. Co., 43 Minn. 53, 41 Am. & Eng. R. Cas. 293, 44 N. W. 884.

New Hampshire.—Hardy *v.* Boston, etc., R. Co., 68 N. H. 523, 12 Am. & Eng R. Cas., N. S., 565, 41 Atl. 179.

New York.—Wallace *v.* Central Vermont R. Co., 138 N. Y. 302, 59 Am. & Eng. R. Cas. 264, 33 N. E. 1069.

North Carolina.—Bean *v.* Western N. Car. R. Co., 107 N. Car. 731, 12 S. E. 600.

North Dakota.—Boss *v.* Northern Pacific R. Co., 2 N. Dak. 128, 49 N. W. 655, 33 Am. St. Rep. 756.

Utah.—Pidcock *v.* Union Pacific R. Co., 5 Utah 612, 19 Pac. 191, 1 L. R. A. 131.

West Virginia.—Riley *v.* Railway Co., 27 W. Va. 145.

Thus it has been said: "It cannot be required of a brakeman that he should go about upon the line of the railroad upon which he is operating, and lay a foot-rule to all the structures of this kind, and see whether or not they may be so close as to make it necessary that he should be watchful when he is climbing ladders, or to avoid taking the ladders until the chute shall have been passed. The fact that no accident of this kind had happened before upon the railroad, and that trains were constantly passing this chute without the development of this danger, brings it directly within the class of what we may call 'concealed dangers.' This danger was lurking for years without its being known. The constituent element of it was a matter of mere inches, and that, in the very nature of things, could not be detected by ordinary observation. It is an idle struggle to escape the liability for this negligence to impute contributory negligence to the plaintiff under the circumstances of this case. Even if he had been aware of the fact that the cattle chute was there, it does not follow that he was aware of the fact that it was a few inches more or less too close to the track; and he had a right to rely upon and believe that the railroad company would not put it too close to the track, or would not permit the customers whom they allowed to build it to put it so close to the track, as to injure their employees." Wood *v.* Louisville, etc., R. Co. (C. C.), 11 Am. & Eng. R. Cas., N. S., 525.

In Georgia Pac. R. Co. *v.* Davis, 92 Ala. 300, 9 So. 252, 25 Am. St. Rep. 47, it was said: "Trainmen, having no functions to perform in respect of the construction and maintenance of the road-way, have a

right to assume its adaptation and sufficiency in all respects to a safe discharge of their duties in another and distinct branch of the general service, and are not held to a knowledge, which has never in point of fact been imparted to them, of defects and dangerous conditions in the culverts, bridges, tracks, embankments, road-bed, cuts, and tunnels of the railway company, or of the dangerous nature of adjacent structures erected or permitted by the company. The duty of the company to this class of its employees is to provide a road-way in all respects reasonably safe for the running of its trains and a performance of the functions imposed upon them by the exigencies of the service, and they have a right to assume, without inquiry or investigation, that this duty has been discharged."

Hence a fireman, leaning out of the cab to inspect the condition of a hot-box, pursuant to the orders of the engineer, is not bound with knowledge of the dangerous proximity of a station-limit board to the track. Central Trust Co. *v.* East Tenn., etc., R. Co., 73 Fed. 661. And so it was similarly held where a brakeman was injured by a station house awning which projected to within eighteen inches of the side of the car. Illinois Cent. R. Co. *v.* Welch, 52 Ill. 183, 4 Am. Rep. 593.

In Ferren *v.* Old Colony R. Co., 143 Mass. 197, 9 N. E. 608, the plaintiff, while assisting in pushing a car, at a place in which he had never worked before, was injured by being caught between the car and a building, which stood at such an angle to the track, that there was a gradually lessening distance between it and the moving car. It was held that he was not chargeable, as a matter of law, with knowledge of the proximity of the building to the track.

And where a trainman was injured by the fall of an overhanging rock, negligently left on the mountain side above the track, it was held that he was not chargeable with notice of the dangerous condition of the rock, which, though apparent to everyone from the track below, was not apparent from the view point of a person on top of a box car. Bean *v.* Western N. Car. R. Co., 107 N. Car. 731, 12 S. E. 600.

So an employee is not chargeable with knowledge of the dangerous proximity of a switch stand to the track from the mere fact that he has passed it several times while riding to and from his work on one of the defendant's trains. Boss *v.* Northern Pac. R. Co., 2 N. Dak. 128, 49 N. W. 655, 33 Am. St. Rep. 756. Nor is the mere fact that a switchman has seen and handled a switch, sufficient to charge him with knowledge of the fact that it is sufficiently near the track, when turned in a certain way, to strike brakemen on the sides of cars. So, Kansas R. Co. *v.* Michaels, 57 Kan. 474, 46 Pac. 938.

This rule, that the employee is entitled to rely upon the presumption that the company has performed its duty, finds frequent illustration where the company has failed to supply the whip-straps which it is required to erect for the purpose of giving notice of the approach of overhead bridges, or has erected or maintained them in such a negligent manner that they fail to give the warning for which they were intended. Savannah, etc., R. Co. *v.* Day, 91 Ga. 676, 17 S. E. 959; Maher *v.* Boston, etc., R. Co., 158 Mass. 36, 32 N. E. 950; Hardy *v.* Boston, etc., R. Co., 68 N. H. 523, 12 Am. & Eng. R. Cas., N. S., 565, 41 Atl. 179; Wallace *v.* Cent. of Vermont R. Co., 138 N. Y. 302, 59 Am. & Eng. R. Cas. 264, 33 N. E. 1069. Inasmuch as such a contrivance, negligently maintained, is but a trap to lure brakemen to their destruction, the courts have in some cases applied this principle with rigor against the defendant company. Thus in the case of Savannah, etc., R. Co. *v.* Day, 91 Ga. 676, 17 S. E. 959, it was held, that although the deceased, who was a new man, was expressly warned several times, and just as he was starting on the fatal trip, to beware of that particular bridge, the company was liable in damages for his death, because the whip-straps were so out of order as to fail to give the warning for which they were intended. And where the lower ends of the straps were six inches higher than the lower timbers of the bridge, it was held that the deceased was entitled to rely upon their being so placed as to give warn-

ing the moment any part of his body arose above the level of the lowest timber of the bridge. Hardy *v.* Boston, etc., R. Co., 68 N. H. 523, 12 Am. & Eng. R. Cas., N. S., 565, 41 Atl. 179.

And so, although the employee knows of the dangerous structures beside the track, he is entitled to assume that the company will perform its duty of maintaining a safety appliance, which it is required to maintain in order to protect him therefrom; as where an employee on a street car, knowing of the danger to be apprehended from posts between the tracks, was injured through the company's failure to perform its legal duty of maintaining a safety gate on the inside of the platform of the car. Citizens' St. R. Co. *v.* Reed, 28 Ind. App. 629, 4 R. R. R. 43, 27 Am. & Eng. R. Cas., N. S., 43, 63 N. E. 770.

4. SAME—SAME—EMPLOYEE NOT EXCUSED FROM USING DUE CARE.

What has been said under the foregoing head, in reference to employees being entitled to rely upon the assumption that the company has performed its duty of keeping its track and right of way free from dangerous obstructions, is not by any means to be understood, or construed, as relieving them of the duty to exercise reasonable care for their own safety. To say that they are not chargeable, as a matter of law, with knowledge of such obstructions, is a vastly different thing from saying that they may throw all care to the winds and go it blindly on the assumption that the company has, or will, perform its duty or promises. Schlaff *v.* Louisville, etc., R. Co., 100 Ala. 377, 14 So. 105. Especially is this true if they have actual knowledge of the danger, or equal opportunity to see and know. Norfolk, etc., R. Co. *v.* Marpole, 97 Va. 594, 16 Am & Eng. R. Cas., N. S., 291, 34 N. E. Rep. 462; Louisville, etc., R. Co. *v.* Banks, 104 Ala. 508, 16 So. 547.

Thus, where the plaintiff threatened to quit the service of the defendant unless the loose stones scattered about the yard, rendering his employment as a switchman more hazardous, were removed, and remained on the promise of the foreman that they would be speedily removed, it was held that he had no right to rely absolutely upon the statement of the foreman that they had been removed from a certain part of the yard, where he had equal opportunity to see and know the fact. Kan. City, etc., R. Co. *v.* Billingslea, 116 Fed. 335, 5 R. R. R. 167, 28 Am. & Eng. R. Cas., N. S., 167.

5. WHETHER EMPLOYEE HAVING KNOWLEDGE OF DANGER, CHARGEABLE WITH CONTRIBUTORY NEGLIGENCE.

And even though an employee has knowledge of an obstruction and its dangerous proximity to the track, the mere fact that he is injured by striking the same does not necessarily prove him guilty of contributory negligence, as matter of law. Greenleaf *v.* Dubuque, etc., R. Co., 33 Iowa 52; Ford *v.* Chicago, etc., R. Co. (Iowa), 71 N. W. 332, 11 Am. & Eng. R. Cas., N. S., 489, 106 Iowa 85, 75 N. W. 650; Harker *v.* Burlington, etc., R. Co., 88 Iowa 409, 55 N. W. 316; Babcock *v.* Old Colony R. Co., 150 Mass. 467, 23 N. E. 325; Fitzgerald *v.* New York Cent., etc., R. Co., 88 Hun 359, 34 N. Y. Supp. 824; Gulf, etc., R. Co. *v.* Darby (Tex. Civ. App.), 2 R. R. R. 327, 25 Am. & Eng. R. Cas., N. S , 327, 67 S. W. 446; Bessex *v.* Chicago, etc., R. Co., 45 Wis. 477. It may be that his duties were such as to absorb his whole attention, leaving him no time to think of defects, and where such is the case he is not prejudiced by his forgetfulness. Harker *v.* Burlington, etc., R. Co., 88 Iowa 409, 55 N. W. 316; Fitzgerald *v.* New York Cent., etc., R. Co., 88 Hun 359, 34 N. Y. Supp. 824. Or it may be that the case was one of emergency, or sudden alarm, disturbing his equanimity to such an extent as to render him irresponsible for his acts. Harper *v.* Burlington, etc., R. Co., 88 Iowa 409, 55 N. W. 316; Ford *v.* Chicago, etc., R. Co. (Iowa), 71 N. W. 332, 11 Am. & Eng. R. Cas., N. S., 489, 106 Iowa 85, 75 N. W. 650.

But where the deceased had passed safely under three sills of an overhead bridge, and was killed by striking the fourth, as the result of raising his head too soon, it was held that the ordinary signal for brakes, sounded at just that moment, was not such an emergency or sudden

alarm as to render him irresponsible for his acts. Haffner's Adm'r *v.* Chesapeake, etc., R. Co., 90 Va. 621, 19 S. E. 166, 96 Va. 528, 12 Am. & Eng. R. Cas., N. S., 556, 31 S. E. 899. See also, Baylor *v.* Delaware, etc., R. Co., 40 N. J. L. 23.

Of course where the injured employee's conduct was such as to evince a reckless disregard for his safety, or where he had been so recently and repeatedly warned against that particular danger that there is no explanation of the injury except that he was not using ordinary care at the time of the accident, it may be said that he was guilty of contributory negligence, as matter of law. Thus, in the case, several times cited, of the employee who passed safely under three sills of a bridge and was killed by striking his head against the fourth, it was held that he was guilty of contributory negligence as matter of law. Haffner's Adm'r *v.* Chesapeake, etc., R. Co., 90 Va. 621, 19 S. E. 166, 96 Va. 528, 12 Am. & Eng. R. Cas., N. S., 556, 31 S. E. 899. And so where the deceased knew of the danger from an overhead bridge, and was specially warned to look out for it just a few minutes before the accident, or where he recklessly disregarded the shouts and signals of his fellow brakemen warning him to stoop. Williamson *v.* Newport News, etc., R. Co., 34 W. Va. 657, 48 Am. & Eng. R. Cas. 276, 12 S. E. 824; Clark's Adm'r *v.* Richmond, etc., R. Co., 78 Va. 709, 18 Am. & Eng. R. Cas. 78. See also, Goff's Adm'r *v.* Norfolk, etc., W. R. Co., 36 Fed. 299; Owen *v.* New York Cent. R. Co., 1 Lans. (N. Y.) 108; Quibell *v.* Union Pac. R. Co., 7 Utah 122, 25 Pac. 734.

6. OPEN AND OBVIOUS DANGER—NEGLIGENCE IN USE OF SENSES.

And so the person injured may be said to have been guilty of contributory negligence, as matter of law, if the dangerous object or structure was so open and obvious that the only rational conclusion that can be drawn is that he was not exercising ordinary care in the use of his senses at the time of the accident.

Alabama.—Louisville, etc., R. Co. *v.* Banks, 104 Ala. 508, 16 So. 547.

Indiana.—Pennsylvania Co. *v.* McCormack, 131 Ind. 250, 80 N. E. 27; New York, etc., R. Co. *v.* Ostman, 146 Ind. 452, 6 Am. & Eng. R. Cas., N. S., 588, 45 N. E. 651.

Iowa.—Platt *v.* Chicago, etc., R. Co., 84 Iowa 694, 51 N. W. 254; Greenleaf *v.* Dubuque, etc., R. Co., 33 Iowa 52.

Kansas.—St. Louis, etc., R. Co. *v.* Irwin, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266.

Massachusetts.—Ryan *v.* New York, etc., R. Co., 169 Mass. 267, 9 Am. & Eng. R. Cas., N. S., 67, 47 N. E. 877.

Pennsylvania.—Kelly *v.* Baltimore, etc., R. Co. (Pa.), 11 Atl. 659.

Utah.—Quibell *v.* Union Pac. R. Co., 7 Utah 122, 25 Pac. 734.

West Virginia.—Riley *v.* Railroad Co., 27 W. Va. 145.

Thus where the danger from an overhead bridge was perfectly apparent to everyone, and where the deceased had passed under it more than one hundred times in safety, being obliged to stoop each time, the accident occurring at midday, when the bridge was not obscured, it was held that there could be no recovery because of his contributory negligence. Louisville, etc., R. Co. *v.* Banks, 104 Ala. 508, 16 So. 547.

And where the deceased, while climbing the side ladder on a slowly moving car, in compliance with an order to set the brakes, was crushed by the projecting roof of a station house platform, which was in plain view, and of which he had knowledge, and could readily have seen and avoided by a single look, it was held that the action was barred by his contributory negligence; there having been no reason for haste in complying with the order to set the brake. Platt *v.* Chicago, etc., R. Co., 84 Iowa 694, 51 N. W. 254.

So where the fence by which the plaintiff was injured, was a permanent, visible structure, three feet nine inches from the rail, it was held that he was guilty of contributory negligence, although previous to that time he had no actual knowledge of its existence, because he must have seen it had he been in the exercise of ordinary care at the

time of the accident. Ryan *v.* New York, etc., R. Co., 169 Mass. 267, 9 Am. & Eng. R. Cas., N. S., 67, 47 N. E. 877.

In another case, the deceased was killed by a coal chute near the track, while riding with his head out of the cab window and looking backward for signals. The chute was conspicuously near the track, in full view, and the deceased had passed it often, and was aware of its dangerous proximity to the track. Moreover, he was familiar with the printed rule of the company requiring him to familiarize himself with dangerous points along the track and to take time and exercise care for his safety while in the performance of his duties, whether acting under orders of a superior or not. It was held that there could be no recovery because of his contributory negligence. New York, etc., R. Co. *v.* Ostman, 146 Ind. 452, 6 Am. & Eng. R. Cas., N. S., 588, 45 N. E. 651.

Likewise, where an oil house was within eight or nine inches of the sides of passing cars, and was so open, visible, and dangerous that an employee switching cars on that track must have seen it but for negligence in the use of his senses, it was held that the action was barred by his contributory negligence. Kelly *v.* Baltimore, etc., R. Co. (Pa.), 11 Atl. 659.

But where a cattle chute projected to within thirteen inches of the cab window, it was held that a fireman, injured by striking same, was not guilty of contributory negligence, as matter of law, merely because it could be seen for half a mile distant. New York, etc., R. Co. *v.* Ostman (Ind.), 41 N. E. 1037.

And where the deceased was killed by striking the bolts projecting from the side timbers of a bridge, over which the track ran on a curve, it was held that he was not chargeable with contributory negligence, as matter of law, on the ground that the defect was so open and obvious, that in the exercise of ordinary care in the use of his senses he must have seen it; the bolts not being so near throughout the entire length of the bridge, but only at that one point. Bryce *v.* Chicago, etc., R. Co., 103 Iowa 665, 9 Am. & Eng. R. Cas., N. S., 832, 72 N. W. 780.

7. QUESTION FOR JURY IN DEBATABLE CASES.

From the foregoing it may be stated as a general rule, that wherever the question is fairly debatable, or the facts such that fairminded men might draw different inferences therefrom, the question of contributory negligence is one for the jury; taking into consideration the length of time the structure has existed in its then present condition, the length of time the injured person has been employed in the vicinity, his opportunities for observation, whether the danger was so obvious that a prudent man would have declined the risk, the injured person's conduct at the time of the accident, whether reckless or otherwise, and all the other surrounding circumstances.

Federal.—Northern Pac. R. Co. *v.* Mortenson, 63 Fed. 530, 11 C. C. A. 335, 27 U. S. App. 313.

Alabama.—East Tennessee, etc., R. Co. *v.* Thompson, 94 Ala. 636, 10 So. 280.

Arkansas.—Little Rock, etc., R. Co. *v.* Voss (Ark.), 18 S. W. 172.

Georgia.—Stirk *v.* Central R., etc., Co., 79 Ga. 495, 5 S. E. 105. See also, Atlanta, etc., R. Co. *v.* Webb, 61 Ga. 586.

Iowa.—Harker *v.* Burlington, etc., R. Co., 89 Iowa 409, 55 N. W. 316; Greenleaf *v.* Dubuque, etc., R. Co., 33 Iowa 52; Allen *v.* Burlington, etc., R. Co., 57 Iowa 623, 5 Am. & Eng. R. Cas. 620, 11 N. W. 614.

Kansas.—Atchison, etc., R. Co. *v.* Rowan, 55 Kan. 270, 39 Pac. 1010; St. Louis, etc., R. Co. *v.* Irwin, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266.

Kentucky.—Louisville, etc., R. Co. *v.* Milliken's Adm'x (Ky.), 14 Am. & Eng. R. Cas., N. S., 742, 51 S. W. 796; Louisville, etc., R. Co. *v.* Tucker's Adm'r, 23 Ky. L. Rep. 1929, 23 Am. & Eng. R. Cas., N. S., 876, 65 S. W. 453.

Maine.—Nugent *v.* Boston, etc., R. Co., 80 Me. 62, 38 Am. & Eng. R. Cas. 52, 12 Atl. 797, 6 Am. St. Rep. 151.

Massachusetts.—Babcock *v.* Old Colony R. Co., 150 Mass. 467, 23 N. E.

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325; Dacey *v.* Old Colony R. Co., 153 Mass. 112, 26 N. E. 437; Donahue *v.* Boston, etc., R. Co., 178 Mass. 251, 20 Am. & Eng. R. Cas., N. S., 526, 59 N. E. 663.

Michigan.—Jarvis *v.* Flint, etc., R. Co., 128 Mich. 61, 22 Am. & Eng. R. Cas., N. S., 312, 87 N. W. 136; Pahlan *v.* Detroit, etc., R. Co., 122 Mich. 232, 16 Am. & Eng R. Cas., N. S., 309, 81 N. W. 103.

Minnesota.—Robel *v.* Chicago, etc., R. Co., 35 Minn. 84, 27 N. W. 305; Flanders *v.* Chicago, etc., R. Co., 51 Minn. 193, 53 N. W. 544; Lawson *v.* Truesdale, 60 Minn. 410, 62 N. W. 546; Johnson *v.* St. Paul, etc., R. Co., 43 Minn. 53, 41 Am. & Eng. R. Cas. 293, 44 N. W. 884.

Missouri.—Murphy *v.* Wabash R. Co., 115 Mo. 111, 21 S. W. 862.

New Hampshire.—Whitcher *v.* Boston, etc., R. Co., 70 N. H. 242, 20 Am. & Eng. R. Cas., N. S., 540, 46 Atl. 740.

Oregon.—Johnston *v.* Oregon, etc., R. Co., 23 Ore. 94, 31 Pac. 283.

Rhode Island.—Crandall *v.* New York, etc., R. Co., 19 R. I. 594, 5 Am. & Eng. R. Cas., N. S., 543, 35 Atl. 307.

Texas.—Texas, etc., R. Co. *v.* Vallie, 60 Tex. 481; Gulf, etc., R. Co. *v.* Darby (Tex. Civ. App.), 2 R. R. R. 327, 25 Am. & Eng. R. Cas., N. S., 327, 67 S. W. 446.

Utah.—Pidcock *v.* Union Pac. R. Co., 5 Utah 612, 19 Pac. 191, 1 L. R. A. 131.

Virginia.—Nelson's Adm'r *v.* Chesapeake, etc., R. Co., 88 Va. 971, 54 Am. & Eng. R. Cas. 82, 14 S. E. 838.

West Virginia.—McCreery's Adm'x *v.* Ohio River R. Co., 43 W. Va. 110, 27 S. E. 327, 49 W. Va. 301, 20 Am. & Eng. R. Cas., N. S., 875, 38 S. E. 534.

Wisconsin.—Dorsey *v.* Phillips, etc., Co., 42 Wis. 583; Bessex *v.* Chicago, etc., R. Co., 45 Wis. 477; Colf *v.* Chicago, etc., R. Co., 87 Wis. 272, 58 N. W. 408.

In Bessex *v.* Chicago, etc., R. Co., 45 Wis. 477, the plaintiff, while assisting in pushing some cars about the yard, attempted to walk over a small pile of lumber, less than two feet in height, situated so near the track that it was impossible to pass between it and the car. He sustained injury by reason of one of the boards slipping and casting him under the car. It was held, that it could not be said as a matter of law, that the risk was one which no prudent man would have assumed, but that the question of his contributory negligence should be left to the jury.

In Jarvis *v.* Flint, etc., R. Co., 128 Mich. 61, 22 Am. & Eng. R. Cas., N. S., 312, 87 N. W. 136, the plaintiff, an experienced brakeman, and familiar with the track at that place, attempted to uncouple cars while they were moving at a speed of about four miles an hour. It was dark, and he ran along between the cars while doing the uncoupling. As he started to go from between the cars, he stepped in a hole beside the track and was injured. His testimony tended to show that the hole was outside the rail and had been excavated by sectionmen working there. The defendant's testimony was to the effect that the hole was at the switch, and was a necessary excavation to enable the switch to work properly, and had existed for a long time. It was held that it was for the jury to say whether the plaintiff was guilty of contributory negligence.

In Babcock *v.* Old Colony R. Co., 150 Mass. 467, 23 N. E. 325, the plaintiff, in attempting to board a moving engine, was injured by reason of some timbers near the track. He testified that he did not know that they were there, and did not remember ever to have seen them before he was hurt. It was held, that if he had never seen them, or if he had seen them before, but failed to remember them at the time of the accident, the question of his contributory negligence was for the jury.

Where a brakeman was knocked from the train by the projecting spout of a water tank, it was held that the jury, in passing upon his contributory negligence, might take into consideration the length of time it had existed in its then present condition. East Tenn., etc., R. Co. *v.* Thompson, 94 Ala. 636, 10 So. 280.

And where the deceased had been at work in the yard but two weeks,

and was killed by striking a signal post standing four feet from the rail, in a yard where there were many tracks and constantly moving trains, it was held that it was for the jury to say whether he was negligent. Johnson *v.* St. Paul, etc., R. Co., 43 Minn. 53, 41 Am. & Eng. R. Cas. 293, 44 N. W. 884.

And so where the switch stand by which the plaintiff was injured had remained in that same position for fourteen years, but plaintiff had been at work in that yard only seven or eight days, it was held that the question of his negligence should be passed upon by the jury. Pidcock *v.* Union Pacific R. Co., 5 Utah 612, 19 Pac. 191, 1 L. R. A. 131.

In Crandall *v.* New York, etc., R. Co., 19 R. I. 594, 5 Am. & Eng. R. Cas., N. S., 543, 35 Atl. 307, the plaintiff, a conductor on a passenger train, had run his train on a siding in order to let a freight pass. When his train stopped, he got off and stood near the first car, in order to prevent or warn any passengers attempting to cross in front of the freight. When the freight had passed, he signaled his engineer to start, and when in the act of stepping on the platform of the car nearest him, he was caught between the train and a telegraph pole, and injured. He was not familiar with the side track, knew nothing of the location of the pole, did not look ahead upon giving the signal to start, but was in a hurry to get his train out in order to make connection at another station. It was held that a finding of the jury that he was not guilty of contributory negligence would not be disturbed. Crandall *v.* New York, etc., R. Co., 19 R. I. 594, 5 Am. & Eng. R. Cas., N. S., 543, 35 Atl. 307.

In Little Rock, etc., R. Co. *v.* Voss (Ark.), 18 S. W. 172, the evidence showed that the plaintiff's intestate, an engineer, was running at a speed of from nine to seventeen miles per hour, at about five o'clock of a dark and rainy winter morning, when he plunged into a land slide at a place where he ought to have known there was danger of such accidents; and it further appeared that the engine was large and powerful, and easy of control; that the headlight lighted the track for one hundred yards ahead; and that no whistle for brakes was heard until the moment of the accident. It was held that a finding of the jury that he was not guilty of contributory negligence would not be disturbed.

8. PRINCIPLES DISCUSSED WITH REFERENCE TO PARTICULAR ACTS AND OMISSIONS.

a. Failure of Employee to Perform Positive Duty.

Where the failure of an employee to perform some positive duty imposed upon him either by rule of law, or by the rules of the company, or by the rules of common sense, contributes directly to his injury, he is, of course, barred of recovery. Thus, where the employee had knowledge of a wire stretched across the track by a third person, at about the height of the chin of a man standing on a freight car, and omitted to inform the company of its existence, and continued to work on trains in that vicinity, it was held, when he was afterwards injured by being dragged from the train thereby, that his action was barred by reason of his negligence in failing to report the existence of the wire. Dalton *v.* Receivers, 4 Hughes 180, Fed. Cas. No. 3,550.

As to whether such negligence on the part of an employee has contributed to his injury, should be left, in debatable cases, to the jury. Thus in McCreery's Adm'x *v.* Ohio River R. Co., 43 W. Va. 110, 27 S. E. 327, 49 W. Va. 301, 20 Am. & Eng. R. Cas., N. S., 875, 38 S. E. 534, it appeared that the boom of an unused derrick, standing near the defendant's track, was defective, so that it was liable to be swung by the wind over the track, to the danger of passing trains. The deceased was conductor of a dummy train, consisting of a small engine and one small car, passing the place about fourteen times a day. This dummy train was run sometimes with the engine in front and sometimes with the car in front. The deceased had charge of the train, and his orders were to run the train, when it was convenient to do so, with the engine in front. If the engine was not in front, it was his duty to stand himself on

the front platform of the car and keep a sharp lookout ahead during the time that he was not engaged in collecting fares. On the day of the accident it was storming, and the deceased, instead of being at his post on the front platform of the car, was inside, out of the weather. Had he been on the front platform, and the weather clear, he could have seen the boom, and the danger it threatened, several hundred yards distant on approaching it. As it was, no one saw it, and the train was caught by the hook on the end of the boom and thrown down a twenty-five foot embankment. It was held that the question of the deceased's contributory negligence was for the jury.

c. Violation of Rules.

The mere fact that the person injured was at the time of his injury violating a rule of the company, does not necessarily preclude a recovery. In order for it to have such an effect it must have been the proximate cause of the injury, either in whole or in part. Thus where a brakeman, injured by striking a car on a siding, was, at the time of the accident, climbing down the side ladder for the purpose of uncoupling the train in motion, such proceeding being strictly forbidden by the rules of the company, it was held that the action was barred by his contributory negligence. Schaub *v.* Hannibal, etc., R. Co., 106 Mo. 74, 16 S. W. 924.

In another case, the deceased was killed by a coal chute near the track while riding with his head out of the cab window and looking backward, watching for signals. This chute was conspicuously near the track, in full view, and the deceased had passed it often, and should have known of its dangerous proximity to the track. Moreover, he was familiar with the printed rules of the company which enjoined employees to familiarize themselves with dangerous points along the track and to take time and exercise care for their safety while in the performance of their duties, whether acting under the orders of a superior or not. It was held that the action was barred by his contributory negligence. New York, etc., R. Co. *v.* Ostman, 146 Ind. 452, 6 Am. & Eng. R. Cas., N. S., 588, 45 N. E. 651.

In Schlaff *v.* Louisville, etc., R. Co., 100 Ala. 377, 14 So. 105, the facts were, that a certain bridge on the line of the defendant company was sufficiently high, at a point directly over the foot-board on the top of freight cars, to admit of the passage of brakemen standing erect, but it sloped from the center to the sides until it was but two or three feet high at the edge of the cars. Under the rules of the company, the proper place for the deceased was either on the foot-board or at the brakes, but at the time he was injured, he was sitting on the edge of the car. He was perfectly familiar with the location of the bridge and its dangerous construction, and had in fact passed under it daily for four months. The accident happened at midday. It was held that the action was barred by his contributory negligence.

In San Antonio, etc., Railroad Company *v.* Wallace, 76 Tex. 636, 44 Am. & Eng. R. Cas. 564, 13 S. W. 565, the freight train on which plaintiff's intestate was conductor, had stopped at one side of a bridge which was undergoing repairs. As it started to move off, the deceased caught the ladder of a box car and climbed to the top, with the intention of making his way back to his post in the caboose. Before reaching the caboose, he was struck by a scaffolding suspended from the bridge, and killed. A rule of the company prohibited all employees from standing on the top of box cars while passing truss bridges. There was some evidence tending to show that he could not have made his way back to the caboose on the ground because of ties, bridge timber, and other material scattered along the track; but it was also in evidence that he could have easily and safely avoided the danger by boarding a flat car just in the rear of the box car. Under these circumstances, and in view of the fact that the train was under his control, and that he could have stopped it as the caboose came opposite to him, it was held that his violation of the above mentioned rule was the direct cause of his injury and that there could be no recovery.

But, where the conductor of a train left it standing on the main track,

and neglected to warn an approaching freight, which he knew was expected about that moment, and a collision ensued, in which a brakeman on the approaching freight was killed, it was held that an action by the administrator was not barred by the fact that the deceased, at the time of the accident, was riding on the engine in violation of the rules of the company; because such conduct on the part of the deceased was not the proximate cause of the injury. Daniel *v.* Chesapeake, etc., R. Co., 36 W. Va. 397, 53 Am. & Eng. R. Cas. 503, 15 S. E. 162, 32 Am. St. Rep. 870, 16 L. R. A. 383.

And, wherever the question is debatable or the facts such that different inferences may fairly be drawn therefrom, it should be left to the jury. Thus where a rule of the company prohibited employees from jumping off of engines or trains moving at a high rate of speed, and the plaintiff, a night switchman in the defendant's yard, was injured by striking a switch stand which stood seven and one-half inches from the gangway steps of the engine, just as he was in the act of swinging off the moving engine for the purpose of uncoupling a car, it was held that the question of his contributory negligence was for the jury. Colf *v.* Chicago, etc., R. Co., 87 Wis. 272, 58 N. W. 408.

In a similar case, a rule of the company prohibited employees from entering between moving cars for the purpose of uncoupling them, except under favorable conditions. The plaintiff, an experienced brakeman, and familiar with the track at that place, attempted to uncouple cars moving at a speed of about four miles an hour. It was dark, and he ran along the track between the cars. As he started to go from between the cars, he stepped into a hole and was injured. It was held that his contributory negligence was a question for the jury. Jarvis *v.* Flint, etc., R. Co., 128 Mich. 61, 22 Am. & Eng. R. Cas., N. S., 312, 87 N. W. 136.

And so where the defendant company had constructed a cattle guard which was a veritable footfall or trap, in a place where brakemen were constantly engaged in coupling and uncoupling cars, it was held to be competent evidence to go before the jury on the question of contributory negligence, that, at the time of the accident, the deceased was violating a rule of the company which prohibited employees walking between moving cars while engaged in uncoupling them. Ford *v.* Chicago, etc., R. Co., 91 Iowa 179, 59 N. W. 5.

c. Same—Where Rule Not Enforced, or Employee Has No Knowledge Thereof.

Where an employee has no knowledge of the rule, or where its violation is so habitual that it may be said to have become a dead letter, the violation thereof does not constitute contributory negligence. Thus the fact that a brakeman, when injured by a rock projecting from the side of a cut, was climbing up a side ladder, on his way from the caboose to his post of duty, was held not to render him guilty of contributory negligence because in violation of a rule of the company requiring him to remain at his "post" while the train was in motion, where it was not shown that the brakeman had knowledge of such rule, and where, on the other hand, it was shown that such rule was never enforced, and that it was the custom of brakemen, especially in bad weather, to remain in the caboose, with the knowledge and consent of the conductor, during the time they were not needed at the brakes, or until ordered out by him. Georgia Pac. R. Co. *v.* Davis, 92 Ala. 300, 9 So. 252, 25 Am. St. Rep. 47.

d. Same—Unreasonable Rule.

And so, if a rule is unreasonable, or such as may under some circumstances become impossible of observance, its violation, under those circumstances, does not constitute contributory negligence. Thus a rule prohibited employees from descending ladders on the side next to obstructions standing in dangerous proximity to the track. The deceased, at the time of the accident was going to the front of the train with orders from the conductor to the engineer in reference to a stop that was to be made a couple of miles farther on. In order to pass over

a flat car, it was necessary for him to descend a ladder on the side next to a coal chute near the track, and he was killed while so doing. It was held, that inasmuch as the ladder on the opposite side of the car was at its rear end, and therefore of no use in reaching the flat car just ahead, the violation of the rule, under such circumstances, was not sufficient to bar the action on the ground of contributory negligence. Chicago, etc., R. Co. *v.* Stevens, 189 Ill. 226, 20 Am. & Eng. R. Cas., N. S., 182, 59 N. E. 577.

e. Acting under Orders.

Where the danger is obvious, and such that it must be apparent to any man exercising ordinary care in the use of his senses, and of such a nature that an ordinarily prudent man would not undertake the risk, the injured employee cannot excuse what would otherwise be contributory negligence on the ground that he was acting under the orders of a superior officer at the time of the accident. Thus where the deceased, while hastily climbing a ladder in compliance with an order of the conductor to set the brake on a car, which he and others were engaged in pushing along the track to a point where it was to be unloaded, was crushed between the car and the projecting roof of the station house, the danger from which was so obvious that it could readily have been seen and avoided by a single look, it was held that the action was barred by his contributory negligence; there having been no reason for haste in complying with the order to set the brake. Platt *v.* Chicago, etc., R. Co., 84 Iowa 694, 51 N. W. 254.

As repeatedly stated, the question should be left to the jury where the facts are such that fairminded men might draw different inferences. Thus, where the bell cord had become entangled on the top of a car of unusual height, belonging to another company, but which was being hauled over the defendant's line, and the deceased went forward, pursuant to the orders of the conductor, to untangle the cord, and was crushed by a bridge which, although high enough to admit of the passage of a brakeman standing erect on top of an ordinary car, was not sufficiently high to admit of his passage on a car of such unusual height, it was held that it was for the jury to say whether or not the action was barred by his contributory negligence. Stirk *v.* Central R. & B. Co., 79 Ga. 495, 5 S. E. 105.

Where the danger was so slight that an ordinarily careful man might properly have assumed the risk, the company cannot escape liability on the ground that the injured employee was negligent in obeying the order of his superior. Thus where a brakeman, as the train drew near the station at a speed of four or five miles an hour, was ordered by the conductor to alight and be ready to couple some cars which were to be taken from a side track, and was thrown under the car by stumbling over some timbers known as skids, used in loading cars, and negligently left near the track, it was held that he was not guilty of contributory negligence in obeying the conductor's order to alight from the moving train; that as the conductor acted for the defendant corporation, it could not set up the wrongful act of itself or agent to excuse itself from liability to one who merely obeyed an order of this sort. Central R., etc., Co. *v.* DeBray, 71 Ga. 406.

f. Where Duty Might Have Been Performed at Different Time.

The mere fact that the employee might have escaped injury by performing the duty, in which he was engaged at the time of the accident, a few minutes earlier or later, does not prove him guilty of contributory negligence per se. Thus where a brakeman, who was injured while ascending the side ladder, by a projecting rock, might have escaped injury but for the fact that he delayed a moment to put on his overcoat and gloves before obeying the conductor's order to go to his post, it was held to be no evidence of contributory negligence. Georgia Pac. R. Co. *v.* Davis, 92 Ala. 300, 9 So. 252, 25 Am. St. Rep. 47. So where a brakeman, whose duty of inspecting the air brakes of the train required him to go on top of the cars, was injured by striking the superstructure of a bridge while engaged in the performance

of such duty, it was held, that the company could not escape liability by showing that it was not necessary for him to perform such duty just at the particular time that he did, and that he was guilty of contributory negligence in not performing it either earlier or later. Louisville, etc., R. Co. *v.* Tucker's Adm'r, 23 Ky. L. Rep. 1929, 23 Am. & Eng. R. Cas., N. S., 876, 65 S. W. 453.

Before it can be said that an employee is chargeable with contributory negligence in having performed the duty just at the particular moment in which he did, it must be shown that in so doing he assumed the risk of some danger, either known to him, or of which he should have had knowledge, and which, under the circumstances, an ordinarily careful man would have prudently declined. In other words, in order to constitute contributory negligence, it is not sufficient that his performing the duty just at the moment he did was a condition, but for the existence of which the accident would not have happened, but it must be shown that it was negligent in itself, and in whole or in part the cause of the accident. Thus in Sheeler's Adm'r *v.* Chesapeake, etc., R. Co., 81 Va. 188, 59 Am. Rep. 654, it appeared that on the line of the defendant company there was a bridge with sides five feet high, and coming up one foot above the floor of the engine cab. These sides cleared a passing engine by about twelve inches. The deceased knew the location of the bridge and its dangerous character. As the train was approaching it, he opened the ash pan, and the fire dropped on some woollen waste in a journal box, setting it on fire. The opening of the ash pan under such circumstances was itself a violation of the rules. No harm would have come by letting the waste burn until the train reached the next station; but, while the train was still approaching the bridge, the deceased, without orders and without necessity, leaned out between the engine and the tender and attempted to extinguish the fire with a hose. While so doing, he struck the side of the bridge and was killed. It was held that the action was barred by his contributory negligence.

And in Pennsylvania Co. *v.* Finney, 145 Ind. 551, 42 N. E. 816, the facts were, that the defendant company maintained a water plug so near its track that it was impossible for a brakeman on a side ladder to pass it without striking. The plaintiff's intestate had been in the service of the company for several months, and knew of the danger to be apprehended from the plug. It was a part of his duty to go to the top of the train when passing the station. The train had just passed the station, and the deceased, having gone to the top of the train, walked towards the rear of the car and began to descend while he was yet two hundred feet from the plug, and without looking to ascertain the danger. There was no necessity for his descending at that particular time. It was held that the action to recover damages for his death, caused by striking the plug, was barred by his contributory negligence.

And so where the plaintiff knew of the danger threatened by the projecting roof of a freight house platform, and knew that the car, which he was climbing at the time of the accident, was higher and wider than ordinary freight cars, and could have avoided the injury by delaying for a few moments to execute the order to set the brake, it was held that the action was barred by his contributory negligence. Platt *v.* Chicago, etc., R. Co., 84 Iowa 694, 51 N. W. 254.

In Horne *v.* Old Colony R. Co., 161 Mass. 180, 36 N. E. 792, the facts were, that a yard foreman, while hurrying across the track in front of an approaching train, to give an order, about which there was no special need for hurry, tripped over the uncovered wires of an interlocking system which was being installed, and was injured by the train. The wires had been in an uncovered position for two weeks, with which fact he was perfectly familiar. He might have avoided all danger by waiting until the train had passed. It was held that he was barred by his contributory negligence.

As has been repeatedly said, where the question is fairly debatable, or the facts such that different people might reasonably draw different

conclusions, it should be left to the jury to say whether the employee was guilty of contributory negligence. Thus where it was a part of the plaintiff's duties to board a moving engine, and he was injured by reason of a pile of stones near the track at the place where he made the attempt, and there was evidence tending to show that he should not have made the attempt at that place or time, but the plaintiff testified that he did not know of the danger, it was held that it should have been left to the jury to say whether or not he was guilty of contributory negligence. Donahue *v.* Boston, etc., R. Co., 178 Mass. 251, 20 Am. & Eng. R. Cas., N. S., 526, 59 N. E. 663.

And so where the plaintiff, who was unfamiliar with the locality, having passed that station only once before, and that in the night, was injured at night, by striking a projecting roof, while climbing down the side of the car in order to be ready to alight and throw a switch several hundred feet distant, it was held, that it was for the jury to say whether he was guilty of contributory negligence in descending the car just at the time he did. Flanders *v.* Chicago, etc., R. Co., 51 Minn. 193, 53 N. W. 544.

g. Getting on and Off of Moving Trains.

As to whether an employee, who sustains injury by slipping or stumbling over some object near the track, is guilty of contributory negligence because he was engaged at the time of the accident in an attempt to get on or off of a moving train, depends upon circumstances. In the case of switchmen and brakemen, it is not only customary, but oftentimes necessary and a part of their regular duties, to swing on and off of moving trains while engaged in the work of switching, and coupling or uncoupling cars; and their action in so doing cannot be said to constitute contributory negligence, unless the circumstances of the particular case were such that no prudent man would have attempted it. Thus where a switchman, engaged in switching trains in a yard, is injured through the negligence of the company in permitting stones, timbers, or similar objects to remain scattered about the yard, or heaped near the track, he is not guilty of contributory negligence because he was in the act of getting on or off of a moving train at the time of the accident. Kansas City, etc., R. Co. *v.* Billingslea, 116 Fed. 335, 5 R. R R. 167, 28 Am. & Eng. R. Cas., N. S., 167; Donahue *v.* Boston, etc., R. Co., 178 Mass. 251, 20 Am. & Eng. R. Cas., N. S., 526, 59 N. E. 663; Central R. Co. *v.* DeBray, 71 Ga. 406. In order that he may be held guilty of contributory negligence under such circumstances, it must be shown, as stated above, that the danger was so great that a prudent man would not have attempted it, or that he could just as easily and conveniently have waited until the train stopped, and voluntarily chose a dangerous manner of performing his duty when he might have performed it in a safer way which was equally convenient. Hurst *v.* Kansas City, etc., R. Co., 163 Mo. 309, 21 Am. & Eng. R. Cas., N. S., 899, 63 S. W. 695; Wolf *v.* East Tennessee, etc., R. Co., 88 Ga. 210, 14 S. E. 199.

Of course, in doubtful cases it should be left the jury to say whether the danger was so great as to render such action contributory negligence. Thus in Lawson *v.* Truesdale, 60 Minn. 410, 62 N. W. 546, the plaintiff, whose duties as a switchman in the defendant's yards required him to board moving cars as they came by and stop them at the proper place on the siding, was injured by slipping on a pile of snow and ice, while in the act of boarding a moving car. It was held that it was for the jury to say whether he was guilty of contributory negligence in so doing.

And so where a statute made the company liable for the negligence of its servants in handling trains and engines, and the deceased, while trying to board a moving train in the defendant's yard on a very dark night, was crushed by a car so placed on a siding that it cleared passing cars by only five inches, it was held that the question of his contributory negligence was for the jury. Dacey *v.* Old Colony R. Co., 153 Mass. 112, 26 N. E. 437.

In Whitcher *v.* Boston, etc., R. Co., 70 N. H. 242, 20 Am. & Eng. R.

Cas., N. S., 540, 46 Atl. 740, the evidence showed that the plaintiff, a conductor on a freight train, in attempting to alight from his train, which was moving at a speed of four to six miles an hour, in order to deposit his way bills at the freight house nearby, while the train proceeded to the station farther on, sustained injury by slipping or stumbling over the ends of ties from which a switch had been removed two years previously, and which projected a foot or more beyond the other ties. The accident happened about dusk, and there were two inches of sleet on the ground. The plaintiff testified that he did not know of the projecting ties, though he had frequently alighted at about that place in order to go to the freight house. It was held that his contributory negligence was a question for the jury.

And so where a rule of the company prohibited employees from jumping from engines or trains moving at a high rate of speed, and the plaintiff, a switchman in defendant's yard, was injured by striking a switch stand which stood within seven and one-half inches of the gangway step of the engine, just as he was in the act of swinging off of the moving engine for the purpose of uncoupling a car, it was held that it was for the jury to say whether he was guilty of contributory negligence in jumping from the moving engine. Colf *v.* Chicago, etc., R. Co., 87 Wis. 272, 58 N. W. 408.

h. Coupling Cars in Motion.

The fact that a brakeman, injured by reason of some defect or obstruction along the track, was engaged at the time of the accident in coupling or uncoupling moving cars, does not necessarily prove him guilty of contributory negligence. As to whether such action constitutes contributory negligence, is usually a question upon the facts for the jury. Thus in Gregg *v.* Chicago, etc., R. Co., 91 Mich. 624, 52 N. W. 62, it appeared that the defendant company had permitted snow to remain where it was thrown between the tracks by the snow plow until it was heaped into a hard packed mass, reaching two and one-half to four feet high and sloping upward from the rail at an angle of forty to forty-five degrees. At the time of the accident, the plaintiff was between the moving cars, attempting to couple them; but from some defect in the coupling apparatus, they failed to couple, and he walked between them on the track, making several unsuccessful attempts, remaining between them so long as he thought it was safe, and then attempting to get out to one side. In so doing, he slipped on the snow and ice before mentioned, fell under the car, and was injured. There was no snow beside the track where he first went between the cars, but at the time of the accident they had been pushed down beside the hard packed mass before mentioned. It was held that, in the absence of proof that he was negligent in coupling the cars, or that he had knowledge of the existence of the snow ridge beside the track, he could not be held guilty of contributory negligence. See, however, Carrier *v.* Union Pac. Ry. Co. (Kan.), 17 Am. & Eng. R. Cas., N. S., 513.

And so where a rule of the company prohibited employees entering between cars in motion for the purpose of coupling them except under favorable conditions, and the evidence showed that the plaintiff, after coupling cars which were moving at a speed of about four miles an hour, was injured by stepping into a hole beside the track as he attempted to go from between them, it was held that the question of his contributory negligence was for the jury, taking into consideration whether he knew or should have known of the excavation and the other surrounding facts and circumstances. Jarvis *v.* Flint, etc., R. Co., 128 Mich. 61, 22 Am. & Eng. R. Cas., N. S., 312, 87 N. W. 136.

In Ford *v.* Chicago, etc., R. Co., 91 Iowa 179, 59 N. W. 5, the plaintiff was injured by stepping into a defective cattle guard, which was so constructed as to prove a veritable footfall or trap for brakemen engaged in coupling cars at that place, and it was held to be competent evidence to go before the jury on the question of his contributory negligence, that, at the time of the accident, he was engaged in walking between moving cars and attempting to couple them.

And so where a brakeman was injured while climbing down the side

ladder for the purpose of uncoupling a train in motion, such proceeding being strictly forbidden by the rules of the company, it was held that he was guilty of contributory negligence and could not recover. Schaub *v.* Hannibal, etc., R. Co., 106 Mo. 74, 16 S. W. 924.

i. Riding in Improper Place or Position.

The liability of a railroad company for injuries sustained by employees coming in contact with overhead structures, or structures too near the side of the track, rests upon the ground that the company has unnecessarily or negligently subjected the employee to dangers which in good faith it should have guarded against. It would seem to follow logically from this, therefore, that the company is not liable where the employee sustains injury through having voluntarily, and without necessity, placed himself in an improper place or position on the train. In other words, if the structure overhead, or beside the track, is not dangerous to the employee so long as he remains in his proper place on the train, its maintenance is not, as to him, negligence, and if he sustains injury therefrom by getting out of his proper place or position, the case is analogous to that of a passenger who is injured by projecting his head or limb outside of the car, and the action is barred by his contributory negligence. Of course, there are exceptions based upon the facts of unusual cases, but reason and authority combine to support the foregoing general rule, as will be shown by the following examples.

Thus in Pittsburgh, etc., R. Co. *v.* Sentmeyer, 92 Pa. St. 276, 37 Am. Rep. 684, it was the duty of a flagman, after flagging a train which was following his own, to board the same and ride on the engine or caboose until his own train was overtaken; but instead of remaining in one or the other of those places, he mounted to the top of the train, and was killed by striking an overhead bridge while standing erect on the top of a car. It was held that he could not recover, since the accident was caused, not by the company's negligence, but by the contributory negligence of the deceased in voluntarily and without necessity, subjecting himself to the danger.

And so where the deceased, at the time of the accident, was riding on a side ladder, when his proper position was on top of the train, it was held, that there could be no recovery for his death, caused by striking a switch stand near the track. Ryan *v.* Canada So. R. Co., 10 Ont. Rep. C. P. Div. 745, 26 Am. & Eng. R. Cas. 344. So, it was similarly held where an employee, injured by striking the supply pipe of a water tank, was not engaged in the performance of his duty at the time, but was clambering down the side of a car for purposes of his own. Wilson *v.* Louisville, etc., R. Co., 85 Ala. 269, 4 So. 701.

In Pennington *v.* Detroit, etc., R. Co., 90 Mich. 501, 51 N. W. 634, it appeared that the deceased was perfectly familiar with the location of the post with which he came in contact, and that there was no rule of the company requiring him to go up or down the ladder while the train was in motion, and it was held that the action was barred by his contributory negligence.

In Devitt *v.* Pacific R. Co., 50 Mo. 302, the plaintiff's intestate had been killed by striking the superstructure of a bridge while he was riding sitting on the top of a brake on a freight car. He had been in the service of the defendant company as brakeman for some time; had passed over the bridge in question daily for the space of two or three weeks; and more than that, his attention had been particularly called to the danger of injury from this bridge and others along the route. It was held that there could be no recovery because of his contributory negligence.

In another case it appeared that a certain bridge on the line of the defendant company was sufficiently high at a point directly over the foot-board on the top of a freight car to admit of the passage of a brakeman standing erect, but that it sloped from the center to the sides until it was but two or three feet high at the edge of the cars. Under the rules of the company, the proper place for the deceased was either on the foot-board or at the brakes; but at the time he was injured, he was sitting on the edge of the car. He was perfectly familiar with the

location of the bridge and the danger which it threatened, having passed under it daily for four months. The accident happened at midday. It was held, that the action was barred by his contributory negligence. Schlaff *v.* Louisville, etc., R. Co., 100 Ala. 377, 14 So. 105.

And so where the proper place for the deceased, a conductor on a freight train, was in the caboose, and he was killed while violating a rule of the company which prohibited employees from standing on the top of freight cars while passing through truss bridges, it was held that the action was barred by his contributory negligence, notwithstanding there was some evidence to show that his presence on top of the car was due to the fact that he had been compelled to board the moving train by catching a side ladder in order to avoid being left. San Antonio, etc., R. Co. *v.* Wallace, 76 Tex. 636, 44 Am. & Eng. R. Cas. 564, 13 S. W. 565.

In Sundy *v.* Savannah St. R. Co., 96 Ga. 819, 23 S. E. 841, the plaintiff's intestate, a street railway employee, met his death by striking a post near the track while engaged in leaning out and looking backward and downward at something under the car, such action not being connected with anything in the line of his duty. It was held that all recovery was barred by his contributory negligence. And so it was held in McKee *v.* Chicago, etc., R. Co., 83 Iowa 616, 48 Am. & Eng. R. Cas. 154, 50 N. W. 209, 13 L. R. A. 817, upon very similar facts; the deceased, who was struck by the wing-fence of a cattle guard, being engaged at the time of the accident in standing on the side ladder and leaning backward and downward, trying to see if there was anything wrong under the train; such action being voluntary on his part, and without orders from any one.

But a fireman who is knocked from his engine by a station-limit board, while leaning out of the gangway, pursuant to the orders of the engineer, for the purpose of inspecting the condition of a hot-box, is not guilty of contributory negligence; because in so doing, he is simply engaged in the performance of his duty in a proper place and manner. Central Trust Co. *v.* East Tenn., etc., R. Co., 73 Fed. 661.

And so it was found by the jury, that there was no contributory negligence where an engineer, who had been compelled to crawl through the cab window to an exposed position, for the purpose of remedying some defect on the engine, was struck by a cattle guard while in that position; the circumstances being such that it was highly impracticable for him to stop the train for the purpose of remedying the defect, there being another train a few miles behind, and it being necessary for him to pass a third train at the next station. Murphy *v.* Wabash, etc., R. Co., 115 Mo. 111, 21 S. W. 862.

In other cases the act of the employee in riding in an improper place has been held either not to have been the proximate cause of the injury, or the whole question of his contributory negligence has been left to the jury. Thus, in Daniel *v.* Chesapeake, etc., R. Co., 36 W. Va. 397, 53 Am. & Eng. R. Cas. 503, 15 S. E. 162, 32 Am. St. Rep. 870, 16 L. R. A. 383, where the plaintiff's intestate had been killed in a collision, it was held, that the right of action was not barred by reason of the fact that the deceased, at the time of the accident, was riding on the engine in violation of the rules of the company, because such negligence on his part was not the proximate cause of the injury.

In Texas, etc., R. Co. *v.* Vallie, 60 Tex. 481, the plaintiff was injured by the train running into a tree across the track, which was there as the result of the company's negligence in failing to comply with a statute requiring it to remove all trees liable to fall and obstruct the track, and it was held that it was for the jury to say whether the plaintiff was guilty of contributory negligence in riding on the engine, which was not his proper place on the train.

And so where it was shown that a person could stand on one part of the car with safety, but that he would strike the braces of a bridge if standing on another part, and that it was difficult to estimate the distance between the braces and the top of a moving car, it was held that it was for the jury to say whether a conductor, whose duty seldom called

him to the top of the train, was guilty of contributory negligence in standing on that part of the car where he would strike the braces. St. Louis, etc., R. Co. *v.* Irwin, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266. See also, Chicago, etc., R. Co. *v.* Harrington, 192 Ill. 9, 23 Am. & Eng. R. Cas., N. S., 429, 61 N. E. 622, where it was held that it was for the jury to say whether an employee, who was injured through the negligence of the servants of another company in leaving a switch open, was guilty of contributory negligence in standing on the front foot-board of his employer's engine, while it was pushing cars about the yard, instead of occupying a safer position on the rear foot-board.

And although the proper position of an employee, strictly speaking, may be at a certain place on the train, yet if it has become customary for employees, with the knowledge and consent of the company, to seek more sheltered or comfortable positions while not actually engaged in the performance of their duties, they will not usually be held guilty of contributory negligence because they are occupying such places at the time of their injury. Thus where it was customary for brakemen to remain in the caboose in cold or rainy weather, with the knowledge and consent of the conductor, during the time they were not needed at the brakes, it was held that a brakeman who was injured by striking a projecting rock, was not guilty of contributory negligence because, at the time of the accident, he was engaged in climbing up the side ladder on his way from the caboose to his place at the brakes. Georgia Pac. R. Co. *v.* Davis, 92 Ala. 300, 9 So. 252, 25 Am. St. Rep. 47. And so where it was customary for brakemen, while not actually engaged in operating the brakes, to rest themselves by sitting on the edge of the car with their feet hanging down, it was held that it was for the jury to say whether a brakeman, who was knocked from the car by a mail crane while occupying such position, was guilty of contributory negligence. Louisville, etc., R. Co. *v.* Milliken's Adm'x (Ky.), 14 Am. & Eng. R. Cas., N. S., 742, 51 S. W. 796.

j. Same—Where Employee Occupies Improper Place Through No Fault of His Own.

Of course there is no contributory negligence where the employee is compelled to occupy an improper position through no fault of his own; a fortiori is this true where it is the fault of the company. Thus where it was customary for the roundhouse employees to ride on a certain train from the roundhouse to the depot, for dinner, and the plaintiff, running to catch the train, boarded the front end of the coach to find the door locked, and was compelled to remain on the platform for want of time to enter by the other end, it was held that an action to recover damages for injuries, sustained by reason of the other employees crowding him beyond the side of the coach, into a position where he was struck by a switch target, was not barred through any negligence in occupying an improper place. Boss *v.* Northern Pacific R. Co., 2 N. Dak. 128, 49 N. W. 655, 33 Am. St. Rep. 756.

And so it was held where the deceased was killed while in the discharge of his duty, but while leaning out from the steps on one side of the platform in order to avoid water which was blowing from a steam pipe in the car; it being impossible for him to occupy the steps on the other side of the platform because of their being occupied by another employee who was trying to escape the water also. Kelleher *v.* Milwaukee, etc., R. Co., 80 Wis. 584, 50 N. W. 942.

And so where a switchman was compelled to ride, swinging from the side ladder, because of the fact that the regular switching engine was laid off, and the engine in use had no foot-board, it was held, in an action to recover for injuries sustained while riding in this position, that it was for the jury to say whether he was guilty of contributory negligence. Johnston *v.* Oregon, etc., R. Co., 23 Ore. 94, 31 Pac. 283.

In Allen *v.* Burlington, etc., R. Co., 57 Iowa 623, 5 Am. & Eng. R. Cas. 620, 11 N. W. 614, it was held that the act of descending the side ladder of a train in motion did not constitute negligence per se, where

there were no other means of reaching the ground, but that the evidence should go to the jury.

And in no case is it contributory negligence per se, for the employee to occupy the side ladder of a moving car where the nature of his duties make it usual and proper for him to do so; as is frequently the case with yardmen and brakemen engaged in switching cars, making up trains, etc. Martin *v.* Louisville, etc., R. Co., 95 Ky. 612, 26 S. W. 801; Texas, etc., R. Co. *v.* Hohn, 1 Tex. Civ. App. 36, 21 S. W. 942. Of course the circumstances may be such that no prudent man would attempt to remain on the ladder, or to ascend or descend it just at the particular time, and in such cases the question of contributory negligence should be left to the jury wherever it is at all doubtful or debatable. Nugent *v.* Boston, etc., R. Co., 80 Me. 62, 38 Am. & Eng. R. Cas. 52, 12 Atl. 797, 6 Am. St. Rep. 151; Robel *v.* Chicago, etc., R. Co., 35 Minn. 84, 27 N. W. 305; Dorsey *v.* Phillips, etc., Co., 42 Wis. 583. So it cannot be said that a brakeman standing erect on a freight car, or riding on the top of a car of unusual height, is guilty of contributory negligence per se; because the top of the train is the right and proper place for a brakeman in the discharge of his duties; and if he is injured while on the top of a train, it is not because of his riding in an improper place, but his contributory negligence, if any, must be predicated upon his failure to use ordinary care for his own safety while occupying a proper place. Cincinnati, etc., R. Co. *v.* Sampson's Adm'r, 97 Ky. 65, 30 S. W. 12; Williams *v.* Delaware, etc., R. Co., 116 N. Y. 628, 41 Am. & Eng. R. Cas. 254, 22 N. E. 1117; Wallace *v.* Central Vermont R. Co., 138 N. Y. 302, 59 Am. & Eng. R. Cas. 264, 33 N. E. 1069; Nelson's Adm'r *v.* Chesapeake, etc., R. Co., 88 Va. 971, 54 Am. & Eng. R. Cas. 82, 14 S. E. 838. See also, Northern Pacific R. Co. *v.* Mortenson, 63 Fed. 530, 11 C. C. A. 335, 27 U. S. App. 313; Atchison, etc., R. Co. *v.* Rowan, 55 Kan. 270, 39 Pac. 1010; Rock *v.* Retsof Min. Co., 61 Hun 623, 15 N. Y. Supp. 872; Pittsburg, etc., R. Co. *v.* Sentmeyer, 92 Pa. St. 276, 37 Am. Rep. 684; Clark's Adm'r *v.* Richmond & Danville R. R. Co., 78 Va. 709, 18 Am. & Eng. R. Cas. 78; Williamson *v.* Newport News, etc., R. Co., 34 W. Va. 657, 48 Am. & Eng. R. Cas. 276, 12 S. E. 824.

XI. ASSUMPTION OF RISK.

1. GENERAL PRINCIPLES.

The danger to be apprehended from overhead structures, and from structures dangerously near the track, is an extraordinary risk which an employee does not necessarily assume by entering into a contract of service.

Alabama.—Louisville, etc., R. Co. *v.* Hall, 91 Ala. 112, 48 Am. & Eng. R. Cas. 170, 8 So. 371, 24 Am. St. Rep. 863; Georgia Pac. R. Co. *v.* Davis, 92 Ala. 300, 9 So. 252, 25 Am. St. Rep. 47; Louisville, etc., R. Co. *v.* Banks, 104 Ala. 508, 16 So. 547.

Indiana.—New York, etc., R. Co. *v.* Ostman (Ind.), 41 N. E. 1037.

Louisiana.—Erslew *v.* New Orleans, etc., R. Co., 49 La. Ann. 86, 6 Am. & Eng. R. Cas., N. S., 436, 21 So. 153.

Minnesota.—Johnson *v.* St. Paul, etc., R. Co., 43 Minn. 53, 44 N. W. 884, 41 Am. & Eng. R. Cas. 293.

Missouri.—Murphy *v.* Wabash R. Co., 115 Mo. 111, 21 S. W. 862.

New York.—Hunter *v.* New York, etc., R.Co., 5 N. Y. St. Rep. 64, 116 N. Y. 615, 41 Am. & Eng. R. Cas. 248, 23 N. E. 9.

North Dakota.—Boss *v.* Northern Pacific R. Co., 2 N. Dak. 128, 49 N. W. 655, 33 Am. St. Rep. 756.

Oregon.—Johnston *v.* Oregon, etc., R. Co., 23 Ore. 94, 31 Pac. 283.

Rhode Island.—Crandall *v.* New York, etc., R. Co., 19 R. I. 594, 5 Am. & Eng. R. Cas., N. S., 543, 35 Atl. 307.

Texas.—Gulf, etc., R. Co. *v.* Darby (Tex. Civ. App.), 2 R. R. R. 327, 25 Am. & Eng. R. Cas., N. S., 327, 67 S. W. 446.

Utah.—Pidcock *v.* Union Pac. R. Co., 5 Utah 612, 19 Pac. 191, 1 L. R. A. 131.

Notes

Vermont.—Morrisette *v.* Canadian Pac. R. Co., 74 Vt. 232, 5 R. R. R. 219, 28 Am. & Eng. R. Cas., N. S., 219, 52 Atl. 520.

Wisconsin.—Dorsey *v.* Phillips, etc., Co., 42 Wis. 583.

But if he has been given due notice and warning of the character and location of the danger, or if he otherwise acquires or becomes chargeable with knowledge of the existence of the danger, and continues in the service, knowing that there is no probability of its being abated, he must, under a familiar principle of the law of master and servant, be held to have assumed the risk.

Federal.—Myers *v.* Chicago, etc., R. Co. (C. C. A.), 95 Fed. 406, 14 Am. & Eng. R. Cas., N. S., 749.

Alabama.—Louisville, etc., R. Co. *v.* Hall, 91 Ala. 112, 48 Am. & Eng. R. Cas. 170, 8 So. 371, 24 Am. St. Rep. 863; Louisville, etc., R. Co. *v.* Banks, 104 Ala. 508, 16 So. 547; Georgia Pac. R. Co. *v.* Davis, 92 Ala. 300, 9 So. 252, 25 Am. St. Rep. 47.

Georgia.—Blackstone *v.* Central of Ga. R. Co., 112 Ga. 762, 20 Am. & Eng. R. Cas., N. S., 365, 38 S. E. 79.

Iowa.—Ford *v.* Chicago, etc., R. Co., 91 Iowa 179, 59 N. W. 5; 71 N. W. 332; 106 Iowa 85, 11 Am. & Eng. R. Cas., N. S., 489, 75 N. W. 650.

Kentucky.—Louisville, etc., R. Co. *v.* Milliken's Adm'x (Ky.), 14 Am. & Eng. R. Cas., N. S., 742, 51 S. W. 796.

Louisiana.—Erslew *v.* New Orleans, etc., R. Co., 49 La. Ann. 86, 6 Am. & Eng. R. Cas., N. S., 436, 21 So. 153.

Maryland.—Baltimore & O. R. Co. *v.* Stricker, 51 Md. 47, 34 Am. Rep. 291.

Massachusetts.—Content *v.* New York, etc., R. Co., 165 Mass. 267, 3 Am. & Eng. R. Cas., N. S., 369, 43 N. E. 94; Fisk *v.* Fitchburg R. Co., 158 Mass. 238, 33 N. E. 510; Bence *v.* New York, etc., R. Co., 181 Mass. 221, 3 R. R. R. 295, 26 Am. & Eng. R. Cas., N. S., 295, 63 N. E. 417; Vining *v.* New York, etc., R. Co., 167 Mass. 539, 9 Am. & Eng. R. Cas., N. S., 65, 46 N. E. 117.

Michigan.—Potter *v.* Detroit, etc., R. Co., 122 Mich. 179, 16 Am. & Eng. R. Cas., N. S., 264, 81 N. W. 80.

Minnesota.—Johnson *v.* St. Paul, etc., R. Co., 43 Minn. 53, 44 N. W. 884; Smith *v.* Winona, etc., R. Co., 42 Minn. 87, 41 Am. & Eng, R. Cas. 289. 43 N. W. 968; Clark *v.* St. Paul, etc., R. Co., 28 Minn. 128, 2 Am. & Eng. R. Cas. 240, 9 N. W. 581.

Missouri.—Devitt *v.* Pacific, etc., R. Co., 50 Mo. 302; Rains *v.* St. Louis, Iron Mountain, etc., R. Co., 71 Mo. 164, 5 Am. & Eng. R. Cas. 610.

North Dakota.—Boss *v.* Northern Pacific R. Co., 2 N. Dak. 128, 49 N. W. 655, 33 Am. St. Rep. 756.

Oregon.—Johnston *v.* Oregon, etc., R. Co.. 23 Ore. 94, 31 Pac. 283.

Pennsylvania.—Brossman *v.* Lehigh Val. R. Co., 113 Pa. St. 490, 6 Atl. 226, 57 Am. Rep. 479.

Rhode Island.—Crandall *v.* New York, etc., R. Co., 19 R. I. 594, 5 Am. & Eng. R Cas., N. S., 543, 35 Atl. 307.

South Carolina.—Hooper *v.* Columbia, etc., R. Co., 21 S. Car. 541, 28 Am. & Eng. R. Cas. 433, 53 Am. Rep. 691.

Vermont.—Morrisette *v.* Canadian Pac. R. Co., 74 Vt. 232, 5 R. R. R. 219, 28 Am. & Eng. R. Cas., N. S., 219, 52 Atl. 520.

Virginia.—Clark's Adm'r *v.* Richmond & Danville R. R. Co., 78 Va. 709, 18 Am. & Eng. R. Cas. 78.

West Virginia.—Williamson *v.* Newport News, etc., R. Co., 34 W. Va. 657, 48 Am. & Eng. R. Cas. 276, 12 S. E. 824.

Wisconsin.—Dorsey *v.* Phillips, etc., Co., 42 Wis. 583.

There are probably no cases contrary to the rule above laid down that the employee assumes the risk where he has knowledge of the danger and continues in the service, knowing that there is no probability of its being abated. There are several Iowa cases which hold that the employee does not assume the risk provided he makes complaint to the company in regard to the matter. Greenleaf *v.* Dubuque, etc., R. Co., 33 Iowa 52; Wells *v.* Burlington, etc., R. Co., 56 Iowa 520, 2 Am. & Eng. R. Cas. 243, 9 N. W. 364. But it is not understood from these cases to be the

doctrine of the Iowa court that the employee, having made complaint, can then remain in the service of the company indefinitely without being chargeable with having assumed the risk. See Ford *v.* Chicago, etc., R. Co., 91 Iowa 179, 59 N. W. 5, 71 N. W. 332, 106 Iowa 85, 11 Am. & Eng. R. Cas., N. S., 489, 75 N. W. 650. In a Louisiana case it is said, that it is rare that abstract principles of law are so fixed and absolute as not to be modified or controlled by the special facts of the case to which they are sought to be applied, and that while it may be true, as a general rule, that a brakeman having knowledge of a dangerous overhead structure, and continuing in the service, will be held to have assumed the risk, yet the mere fact of such knowledge does not carry with it, necessarily and on all occasions, and under all circumstances, the cutting off of the remedy for injuries received from such structures. Gusman *v.* Caffery Cent. Ref. & R. Co., 49 La. Ann. 1264, 8 Am. & Eng. R. Cas., N. S., 463, 22 So. 742. This, however, is a mere generalization which might be affirmed of any well settled principle. The Kentucky court, in a case where an employee was injured by striking a bridge truss, said: "We are aware of many reported cases * * * where the absence of ordinary care and the means of knowing the condition of the bridge by the employee have been held as relieving the railway company from responsibility in such cases. This court, however, has not followed or approved those decisions in reference to such structures." Hughes *v.* Louisville, etc., R. Co., 104 Ky. 774, 12 Am. & Eng. R. Cas., N. S., 560, 48 S. W. 671. But an examination of the facts of that case will show such statement to have been a dictum, and not supported by the previous Kentucky decisions reviewed in the opinion.

Notice Must Be Reasonable.

But in order for the company to excuse itself on the ground that it has given the employee notice and warning of the danger, such notice and warning must have been reasonable. Thus where the company constructed a cattle chute within thirteen inches of the cab window of passing engines, and a fireman was injured thereby, it was held that it could not escape liability on the ground that it had promulgated a rule requiring its employees to familiarize themselves with dangerous places along the track, where it was found as a fact that the fireman had no knowledge of the dangerous proximity of the chute to the track. New York, etc., R. Co. *v.* Ostman (Ind.), 41 N. E. 1037. And so it was similarly held where it had been specified in the employee's contract of service that he was to inform himself of such dangers along a line more than one thousand miles in length, and assume the risk therefrom. Gulf, etc., R. Co. *v.* Darby (Tex. Civ. App.), 2 R. R. R. 327, 25 Am. & Eng. R. Cas., N. S., 327, 67 S. W. 446.

But it has been held that such notice was sufficient, although the precise location of the danger was not stated, as where a brakeman, employed on a section of four miles of road, was notified that there were stone piles beside the railroad, and so near that a person on the side of a car would be liable to strike them. Smith *v.* Winona, etc., R. Co., 42 Minn. 87, 41 Am. & Eng. R. Cas. 289, 43 N. W. 968. And where a brakeman is injured by coming in contact with an overhead bridge, it is competent for the company to show that it had posted a placard or bulletin in the cabooses of its trains, and at other places, showing the location of such bridges, and warning the employees against danger therefrom, in order to prove that the brakeman had knowledge of the dangerous character of the bridge and its location, and had assumed the risk. Louisville, etc., R. Co. *v.* Hall, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863. Of course the employee cannot complain of the company's failure to warn him of what he already knew; as where an employee, having knowledge that the yard in which he worked was too small for the amount of business transacted therein, and that it was dangerously crowded at all times, continued in the service until he was injured by striking a car left too near the intersection of two tracks. Bence *v.*

New York, etc., R. Co , 181 Mass. 221, 3 R. R. R. 295, 26 Am. & Eng. R. Cas., N. S., 295, 63 N. E. 417.

In Louisville, etc., R. Co. *v.* Milliken's Adm'x (Ky.), 14 Am. & Eng. R. Cas., N. S., 742, 51 S. W. 796, a brakeman was injured by striking a mail crane, the accident being caused by the oscillation of the train, due to the high rate of speed at which it was moving. It was held that the brakeman must be deemed to have assumed the risk; there being no law regulating the speed of trains, and he having knowledge of the speed at which that train was accustomed to run.

2. EMPLOYEE ASSISTING IN ABATING DANGER AFTER HAVING MADE COMPLAINT.

And even though the employee may have made complaint and threatened to quit unless the defect is remedied, it will be held, where the danger is so great that no prudent man would undertake it, that he has assumed the risk, notwithstanding the company may proceed at once to abate the same. Thus where the plaintiff threatened to quit unless the company immediately cleared its yard of loose stones and other material scattered near the track, which rendered his employment as switchman extremely hazardous, and was injured by slipping on the stones while assisting in the cleaning up of the yard, which the company had immediately set about, it was held that he had assumed the risk, notwithstanding such prompt action on the part of the company. Kansas City R. Co. *v.* Billingslea, 116 Fed. 335, 5 R. R. R. 167, 28 Am. & Eng. R. Cas., N. S., 167.

3. RISK NOT ASSUMED WHERE DANGER SLIGHT.

It is otherwise where the danger is so slight that the employee reasonably believes that he can remain in the service and escape injury by the exercise of reasonable care. Hurst *v.* Kansas City, etc., R. Co., 163 Mo. 309, 21 Am. & Eng. R. Cas., N. S., 899, 63 S. W. 695. As to whether the danger was so great as to render him chargeable with negligence and assumption of risk by remaining in the service, should be left, in doubtful cases, to a jury. Thus where a brakeman, whose duty it was to go between the cars for the purpose of coupling and uncoupling them, had been in the service of the company about two weeks, and knew that there was wood scattered along the track near the woodpiles, but did not know that there was wood scattered at the place where he was injured, it was held that it was for the jury to say whether he had assumed the risk by continuing in the service. Hullehan *v.* Green Bay, etc., R. Co., 68 Wis. 520, 31 Am. & Eng. R. Cas. 322, 32 N. W. 529.

4. WHERE EMPLOYEE IS EXERCISING DUE CARE AT TIME OF ACCIDENT.

Where the employee is chargeable with having assumed the risk, it is immaterial that the accident happens on a rainy night, or when, owing to the escape of steam, or because of smoke, fog, darkness, or similar cause, he is unable to discern the danger even with the exercise of great care. Kenney *v.* Meddaugh, 118 Fed. 209, 5 R. R. R. 226, 28 Am. & Eng. R. Cas., N. S., 226; Norfolk, etc., R. Co. *v.* Marpole, 97 Va. 594, 16 Am. & Eng. R. Cas., N. S., 291, 34 S. E. 462.

5. SUFFICIENCY OF KNOWLEDGE TO CHARGE EMPLOYEE WITH ASSUMPTION OF RISK.

In Dorsey *v.* Phillips, etc., Co., 42 Wis. 583, where the plaintiff had received injuries from striking a cattle chute near the track, it was said: "If he knew, or ought reasonably to have known, the precise danger to him, in the course of his employment, of the cattle chute in question, and saw fit, notwithstanding, to continue in his employment, he might be held to have assumed the extraordinary risk, as well as the ordinary risks, of his service. The authorities cited by the learned counsel for the appellant all agree in the general proposition. But it appears to us that this consequence of acquiescence ought to rest upon positive knowledge, or reasonable means of positive knowledge, of the precise danger assumed; not on vague surmise of the possibility of danger." And so where the employee was knocked from the train by an overhead wire, it was said, that before employees could be held to

have assumed the risk, they must have had positive knowledge or reasonable means to acquire positive knowledge of the precise danger. Erslew *v.* New Orleans, etc., R. Co., 49 La. Ann. 86, 6 Am. & Eng. R. Cas., N. S., 436, 21 So. 153.

In other cases, however, the rulings have not been so strict as to require that the employee should be chargeable with knowledge of the precise danger before he could be held to have assumed the risk. Thus where an engineer was struck by a signal post which cleared the sides of the locomotive by two and one-half feet, and the evidence showed that not only was the post the same distance from the track as all other posts of like character on the line, but that the abutments of forty-six bridges, numerous buildings, entrances to stations, and other structures on the line, were the same distance from the track, all of which was known to the plaintiff, it was held that the action was barred by his having assumed the risk, regardless of whether he had knowledge of the location of the particular post by which he was injured or not. Lovejoy *v.* Boston, etc., R. Co., 125 Mass. 79, 28 Am. Rep. 206. And where a brakeman was injured by striking a cattle guard which stood in dangerous proximity to the track, and it was shown that he had knowledge of the fact that many of the cattle guards were placed dangerously near the track, he was held to have assumed the risk, notwithstanding he had no knowledge of the dangerous proximity of that particular cattle guard. Missouri Pacific R. Co. *v.* Somers, 71 Tex. 700, 9 S. W. 741. So where a brakeman employed on a section of four miles of road was notified that there were stone piles beside the road, so near as to strike a person on the sides of passing cars, it was held that he must be deemed to have assumed the risk from such cause, although their precise location was not stated to him. Smith *v.* Winona, etc., R. Co., 42 Minn. 87, 41 Am. & Eng. R. Cas. 289, 43 N. W. 968.

6. SAME—DANGER OPEN AND OBVIOUS.

Where the danger to be apprehended is so open and obvious that employees working in that vicinity, or passing that way on trains, must, in the exercise of ordinary care in the use of their senses, become acquainted therewith, they will be held to have assumed the risk the same as if they had continued in the service after actual knowledge.

Arkansas.—Little Rock, etc., R. Co. *v.* Voss (Ark.), 18 S. W. 172.

Michigan.—Phelps *v.* Chicago, etc., R. Co., 122 Mich. 171, 16 Am. & Eng. R. Cas., N. S., 302, 81 N. W. 101.

North Dakota.—Boss *v.* Northern Pacific R. Co., 2 N. Dak. 128, 49 N. W. 655, 33 Am. St. Rep. 756.

Oregon.—Johnston *v.* Oregon, etc., R. Co., 23 Ore. 94, 31 Pac. 283.

Pennsylvania.—Kelly *v.* Baltimore, etc., R. Co. (Pa.), 11 Atl. 659.

Rhode Island.—Crandall *v.* New York, etc., R. Co., 19 R. I. 594, 5 Am. & Eng. R. Cas., N. S., 543, 35 Atl. 307.

Vermont.—Carbine's Adm'r *v.* Bennington, etc.. R. Co., 61 Vt. 348, 38 Am. & Eng. R. Cas. 45, 17 Atl. 491.

Thus where the danger from a land slide from overhanging rock on a mountain side, was patent to everyone, an engineer who had been running past the place so long that he must have known, or ought to have known, of the danger, was presumed to have assumed the risk. Little Rock, etc., R. Co. *v.* Voss (Ark.), 18 S. W. 172. And so it was similarly held where an oilhouse, an open, notorious, and visible danger, cleared the sides of passing cars by only eight or nine inches. Kelly *v.* Baltimore, etc., R. Co. (Pa.), 11 Atl. 659. In Carbine's Adm'r *v.* Bennington, etc., R. Co., 61 Vt. 348, 38 Am. & Eng. R. Cas. 45, 17 Atl. 491, it appeared that the deceased, while riding on a coal car, which was higher than ordinary cars, was killed by striking the arch of a bridge. It was in evidence that he was a brakeman of many years' experience, and had been in the service of the defendant about seven months; that he had frequently ridden on such cars, and had passed through the bridge daily. It was held that he had assumed the risk and that there could be no recovery.

But where the track curved all the way over a bridge, and the bolts in

the side timbers of the bridge projected to within fifteen inches of the sides of passing cars at only one point on the bridge, it was held that the danger was not so obvious as to charge the employee with knowledge and with having assumed the risk, notwithstanding he was an experienced brakeman and had passed that way twice a day for fourteen months, though usually on the top of the cars, which were twice as high as the trusses from which the bolts projected. Bryce *v.* Chicago, etc., R. Co., 103 Iowa 665, 9 Am. & Eng. R. Cas., N. S., 832, 72 N. W. 780.

And so where a telegraph pole stood sufficiently distant from the track to permit the passing of a man standing erect on a side ladder, but not far enough to permit the passing of a man climbing a ladder, it was held not to be such an obvious danger as to charge the plaintiff with knowledge and with the assumption of the risk, where there was no evidence to show that he had ever passed the pole while standing erect on a side ladder, and that his only opportunity of observing its distance from the track was when passing by on the top of cars, or while walking by it on the ground. Whipple *v.* New York, etc., R. Co., 19 R. I. 587, 5 Am. & Eng. R. Cas., N. S., 517, 35 Atl. 305.

And where a signal post stood within one foot of the side of passing cars, which was unusually near as compared with similar posts along the road, it was held that it was not such an obvious danger as to charge an employee, making his first trip as brakeman, and having no knowledge that there were such structures so near the track, with having assumed the risk. Scanlon *v.* Boston, etc., R. Co., 147 Mass. 484, 38 Am. & Eng. R. Cas. 48, 18 N. E. 209.

So the danger arising from a switch post standing in a freight yard, within twenty inches of the sides of passing cars, is not so obvious as to charge the brakemen employed in the yard with knowledge and assumption of the risk as matter of law. Johnston *v.* Oregon, etc., R. Co., 23 Ore. 94, 31 Pac. 283.

Where a foot-board on a coal shed stood seven feet from the ground and projected to within sixteen and one-half inches of the side ladders, it was held that the plaintiff's intestate was not chargeable with having assumed the risk, although he had made several trips past the shed, his train stopping there on two of those occasions for coal. Chicago, etc., R. Co. *v.* Stevens, 189 Ill. 226, 20 Am. & Eng. R. Cas., N. S., 182, 59 N. E. 577.

And so a pile of stones, one and one-half to three feet high, and within eighteen inches of the track, at a place where there are no similar piles of stones, is not such an obvious danger as to charge a switchman, whose duties require him to jump on and off of moving trains, with knowledge of its existence, and consequently, with the assumption of the risk, as matter of law. Donahue *v.* Boston, etc., R. Co., 178 Mass. 251, 20 Am. & Eng. R. Cas., N. S., 526, 59 N. E. 663.

7. SAME—QUESTION FOR JURY IN DEBATABLE CASES.

And, in general, it may be said, that whenever the question of the employee's knowledge of the danger, and his assumption of the risk, is fairly debatable, it should be left to the decision of the jury, taking into consideration, under proper instructions, the character of the danger, whether obvious or concealed, and the employee's opportunities for acquiring knowledge thereof, including the nature of his duties, the length of time he has been in the service, etc. Choctaw, etc., R. Co. *v.* McDade, 112 Fed. 888, 1 R. R. R. 413, 24 Am. & Eng. R. Cas., N. S., 413; Potter *v.* Detroit, etc., R. Co., 122 Mich. 179, 16 Am. & Eng. R. Cas., N. S., 264, 81 N. W. 90; Robel *v.* Chicago, etc., R. Co., 35 Minn. 84, 27 N. W. 305; Pierce *v.* Camden, etc., R. Co., 58 N. J. L. 400, 5 Am. & Eng. R. Cas., N. S., 548, 35 Atl. 286; Williams *v.* Delaware, etc., R. Co., 155 N. Y. 158, 10 Am. & Eng. R. Cas., N. S., 147, 49 N. E. 672; Dorsey *v.* Phillips, etc., Co., 42 Wis. 583; Colf *v.* Chicago, etc., R. Co., 87 Wis. 273, 58 N.W. 408.

In Robel *v.* Chicago, etc., R. Co., 35 Minn. 84, 27 N. W. 305, the evidence showed that one of the tracks in the defendant's yard ran under a trestle, the supporting timbers of which cleared the sides of passing

cars by fourteen and one-half inches. At the time of the accident, plaintiff's intestate had been employed in the yard for three or four days, and had passed over that particular track two or three times. He was killed by being swept from the side of the car by the supporting timbers of the trestle. It was held that it was for the jury to say whether he had knowledge of the danger and had assumed the risk.

In Colf *v.* Chicago, etc., R. Co., 87 Wis. 273, 58 N. W. 408, it was shown that the arm of an unused switch stand in the defendant's yard projected to within seven and one-half inches of the step of passing engines, which was nearer the track than other switch stands in the same yard. It bore no light. Plaintiff had worked in the yard for some time, but always at night; he had never thrown the switch because it was not used; and at the time of his injury his attention was momentarily drawn from his own safety by the necessity of giving instructions to a new hand. It was held that it was for the jury to say whether he was chargeable with having assumed the risk.

In another case the evidence showed that the plaintiff's intestate, a street railway conductor, was killed while standing on the foot-board on the side of the car, and just as he was in the act of reaching up to pull the register or bell rope, by striking the back of his head against a pole which stood six and one-half inches from the platform steps; that there were only five or six poles standing so near the track, and that the pole just before it was distant ten inches; that the conductor had been in the service of the defendant only one month, and had been over that line but once before. It was held, to be a question for the jury as to whether he had knowledge of the danger and had assumed the risk. Pierce *v.* Camden, etc., R. Co., 58 N. J. L. 400, 5 Am. & Eng. R. Cas., N. S., 548, 35 Atl. 286.

8. EMPLOYEE HAVING KNOWLEDGE OF ONE DEFECT DOES NOT ASSUME RISK OF ANOTHER.

Because a servant knows of one defect he does not take the risk of another of which he has no knowledge, and if both contribute to injure him, he is entitled to recover, provided but for the unknown defect, the accident would not have happened. Thus, where the injured brakeman knew and assumed the risk of operating a brake which was so defective that in operating it he was compelled to project his body beyond the side of the car, it was held that he did not assume the risk of danger from a cattle guard negligently placed too near track, and of which he had no knowledge, and by which he was injured while engaged in operating the defective brake. Missouri Pac. R. Co. *v.* Somers, 78 Tex. 439, 14 S. W. 779. It is otherwise if he not only had knowledge and assumed the risk of danger from the defect in the brake, but also had knowledge that the cattle guards along the track were, many of them, dangerously near the track, although he had no knowledge as to the particular cattle guard by which he was injured. Missouri Pac. R. Co. *v.* Somers, 71 Tex. 700, 9 S. W. 741.

9. NECESSARY STRUCTURES—DANGERS AGAINST WHICH COMPANY CANNOT REASONABLY GUARD.

Where the structure is one which is rendered absolutely necessary by the nature of the business, or such as the company cannot guard its employees against even with the exercise of reasonable care, it is not guilty of negligence in failing to abate the same, and the employee must be held to have assumed the risk absolutely. Thus the company is not liable to a brakeman who is injured by falling over a clearance post, used for marking the limits within which cars are to be placed on side tracks, because such posts are necessary appurtenances to the road, and when properly placed, the employee must be held to assume whatever risk may result therefrom. Scidmore *v.* Milwaukee, etc., R. Co., 89 Wis. 188, 61 N. W. 765.

And so it has been held in the case of coal bins, elevators, etc., erected near sidings. Pahlan *v.* Detroit, etc., R. Co., 122 Mich. 232, 16 Am. & Eng. R. Cas., N. S., 309, 81 N. W. 103. See also, Phelps *v.* Chicago, etc., R. Co. (Mich.), 20 Am. & Eng. R. Cas., N. S., 137, 84 N. W. 66, where it is held that brakemen are required to exercise a higher degree of care

for their safety in looking out for such obstructions placed near side tracks, than when they are placed near the main track, for the reason that they are necessary in yards and by the sides of switches, where trains are loaded and unloaded.

So a brakeman who enters the service of the company on a construction train on a road which he can see is unfinished, assumes the risk from trees which have not yet been removed from beside the track and which stand in plain view. Manning v. Chicago, etc., R. Co., 105 Mich. 260, 63 N. W. 312.

In latitudes where snow falls and ice forms in quantities on the track and in the yards, the business of railroading must of necessity be attended with greater risk during the winter season, notwithstanding the company may use all reasonable care to keep its tracks and yards clear of snow and ice, and this extra hazard the employee must be held to have assumed. Lawson v. Truesdale, 60 Minn. 410, 62 N. W. 546; Dowell v. Burlington, etc., R. Co., 62 Iowa 629, 15 Am. & Eng. R. Cas. 153, 17 N. W. 901.

R.

MCDANNALD v. WASHINGTON & C. R. RY. CO.

(*Supreme Court of Washington, April 18, 1903.*)

[72 Pac. Rep. 481.]

Injury to Employee—Post near Track—Negligence—Question for Jury.*

A conductor on a freight train in attempting to board his train was struck by one of the posts of a cattle guard. The guard was within 85 feet of a station. There was a space of only 12 or 14 inches between the posts of the guard and the side of the car, and it did not appear that there was any necessity for such location of the posts: *held*, that the question of the company's negligence was for the jury.

Same—Same—Assumption of Risk—Question for Jury.

The conductor was boarding the train in the usual way. It was moving slowly at the time. He was about 25 feet away from the cattle guard when he attempted to get on. If his attention had been called to the posts he could have seen them. It was the first time he had stopped off at the particular station. He could not have boarded the train at any other place, owing to the grade of the track. Just as he was getting on, his attention was called to a man who was running toward the train, evidently desiring passage thereon. His foot slipped, and he had to make another step for the car. He did not see the posts, and was struck by one of them: *held*, that the question as to whether he had assumed the risk was for the jury.

Same—Same—Contributory Negligence.

The question of contributory negligence was for the jury.

Harmless Error.

Failure of the court to in terms strike out an answer to a question which was not responsive was immaterial, where it subsequently told the jury they could not consider evidence of that character.

Same.

An instruction requested by defendant was modified by the court. As given, it stated the law correctly. The modification was stated as an exception to the general rule which was being defined. It did not come within the issues of the case, and the court did not intend to apply it to the case. Plaintiff did not claim recovery by reason of the exception: *held*, at most, harmless error.

Excessive Verdict.

A conductor on a freight train, recovered judgment for $10,000 for

*See preceding case and note.

injuries received. No bones were broken, and at the trial there were no marks on his person, and evidence of any permanent impairment was very slight. When injured he went upon his train with assistance, did some work on the way in, rode from his train home in a buggy, and was in bed about six days. The doctor who examined him by the aid of an X ray at the time of the trial, could find no evidence of physical injury, and the whole injury appeared to be to his nervous system. For several months after the injury he was incapacitated for work more or less, and suffered much pain. The lower court intimated that the verdict should be reduced to $6,000: *held*, that the verdict would be reduced to that amount.

Appeal from Superior Court, Walla Walla County; Thos. H. Brents, Judge.

Action by S. W. McDannald against the Washington & Columbia River Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed conditionally.

B. S. Grosscup and W. T. Dovell, for appellant.
Garrecht & Dunphy and Bennett & Sinnott, for respondent.

MOUNT, J. Action for personal injuries. Plaintiff obtained judgment in the court below for $10,000. Defendant appeals.

The appellant is a railroad company operating a line of railway between Walla Walla and Pleasant View in Walla Walla county, Wash. On September 15, 1901, the respondent was an employee of appellant company as conductor in charge of one of appellant's trains of cars operated between the points above mentioned. This train, going out of Walla Walla on the morning of September 15th, consisted of an engine, four water-tank cars, several box cars for freight, a caboose and a regular passenger coach. On the way out one of the water-tank cars was left at a place known as "Day's Cistern." The place of this cistern was not a regular station, but the trains stopped there whenever water was to be left or cars picked up, and had been doing so for eight years. There was no switch at this point, and cars loaded with water were left standing on the main track, and the water was drawn from the car by means of a trough from the car to the cistern. When the water-tank car was left at this point, the valve of the tank was opened and the car left to empty itself, while the train proceeded on to Pleasant View. On the way back to Walla Walla the train consisted of the engine, two freight cars, the caboose, and the passenger car. When the train arrived at Day's Cistern a brakeman was sent forward by the conductor to couple the water-tank car onto the engine in front. This car was not quite empty and a delay of some few minutes was occasioned. The respondent thereupon, as was his duty, got off the train, and went forward to the head of the train to see what was the cause of the delay. About the time he arrived there the tank car was emptied and the car coupled onto the engine in front, and the respondent gave the signal to go ahead. The track at this point was on a

grade some 3½ or 4 feet high. About 50 feet beyond the cistern, on the same side of the track easterly, and in the direction the train was going, was a wagon roadway graded up so as to make a crossing over the railway track. This wagon roadway was about 16 feet wide. About 15 feet beyond the wagon roadway was a cattle guard of three posts on each side of the track parallel therewith, on which boards were fastened, and up to which a barbed wire fence connected on each side of the track. The posts of the cattle guard were about 2 feet 4 inches from the rail of the track at the bottom, and slanted out from the perpendicular about 8 inches or a foot at the top. These posts were about 5 feet in height. The cars projected over the rail about 2 feet 3 inches, so that there was a space of about 12 inches between the side of the car and the top of the cattle-guard posts. On account of the high grade along this place, the conductor was not able to get onto the train at the place where he gave the signal to go ahead, so he ran forward a distance of about 50 feet to the road crossing, in order to get onto the train when the rear cars came up to him. The train was running at the rate of about five miles per hour. It was shown that it was usual for the conductor and trainmen to get on the train when it was in motion. When the rear end of the caboose came up to where the respondent was, he was on the left-hand side of the train as it was going easterly. He took hold of the handles on the side of the car, and attempted to step on the rear end of the caboose. Just then his attention was called by a passenger standing on the rear platform of the passenger coach to a man who was running towards the train, evidently desiring passage thereon. Thereupon the respondent's foot slipped, and he had to make another step for the car. He did not see the cattle-guard posts, and, while he was in the act of getting on the train, he was carried against one of these posts, which struck him on the back and knocked him under the car. He was struck again by the brake beam, and thrown from under the car and injured. Respondent had make five trips over the road prior to this one, but had not stopped at this place before. He did not know of the nearness of the cattle-guard posts to the side of the car. There were some 30 of these cattle guards along this line, but only two of them were as near to the car as this one. Respondent did not know that there was any difference in the location of these cattle guards with reference to their proximity to the track. It was broad daylight, and respondent could have seen the posts if he had looked, but, with his attention called to the passenger in the opposite direction, and while looking for a footing on the steps, he did not see it until after he was struck. There was some defect in the step of the car, but it is conceded that respondent knew of this, and that he cannot recover in this action on account thereof.

The principal questions in the case are whether it was negligence for the appellant to maintain the cattle guard so near

the track, and, if so, did the respondent know or should he have seen the danger, and had he therefore assumed the obvious risk? We think both of these questions, under the circumstances of this case, were properly questions for the jury. If the erection and maintenance of the cattle guard so near the side of the track was such that an ordinarily prudent person should have foreseen that an accident was liable to happen to persons who had a right to be upon the side of a passenger train at this point, then it was negligence of the company to place it and maintain it there. The conditions surrounding each particular case have much to do in determining what a prudent person would do. When it was shown that this cattle guard was within about 85 feet of a station or place where trains were accustomed to stop, where the trainmen were usually at or upon the side of the cars, where the posts are so close to the side of the car that there is only a space of 12 or 14 inches between the posts and the car, and where there appears to be no necessity for such location of the posts, the question of negligence is one for the jury.

Counsel for appellant, however, rely upon the second point, and insist that the respondent, under the circumstances of this case, must be held to have assumed the risk. Numerous authorities are cited from this court and other courts to the effect that where an employee knows, or in the reasonable exercise of his faculties should know, the dangers which surround him, he must be held to have assumed the risk. The following cases are cited from this court: Week v. Fremont Mill Co., 3 Wash. St. 629, 29 Pac. 215; Jennings v. Tacoma Ry. & Motor Co., 7 Wash. 275, 34 Pac. 937; Bullivant v. City of Spokane, 14 Wash. 577, 45 Pac. 42; Hoffman v. American Foundry Co., 18 Wash. 287, 51 Pac. 385; Anderson v. Telephone Co., 19 Wash. 575, 5 Pac. 657, 41 L. R. A. 410; Brown v. Tabor Mill Co., 22 Wash. 317, 60 Pac. 1126; French v. First Avenue Ry. Co., 24 Wash. 83, 63 Pac. 1108; Robare v. Seattle Traction Co., 24 Wash. 577, 64 Pac. 784; Danuser v. Seller, 24 Wash. 565, 64 Pac. 783. It is unnecessary to review these cases separately. They all, in effect, announce the rule stated above. It is enough to say that in each of the cases cited it was held either that the plaintiff knew of the danger, or that he should have known it in the exercise of ordinary observation. In this case it is not contended that the respondent knew of the cattle-guard post by which he was injured. The evidence shows conclusively that he did not know of its dangerous position in relation to the track. The question then narrows down to whether he should have known it. In this respect this case is more like the case of Johnson v. Tacoma Mill Co., 22 Wash. 88, 60 Pac. 53, than any of the cases from this court above cited. In that case, where a carpenter was employed to change a pipe in a mill, he was injured by stepping backward into a barrel of hot water. The barrel was sunk into the ground, and unnoticeable by

reason of the fact that pieces of bark were floating on the surface of the water. In that case, after reviewing some of the cases above cited, the court said: "But how different this case is from any of the cases above noticed! There is no question involved here of working with dangerous machinery, or of working in the immediate vicinity of dangerous machinery. The plaintiff was not injured by anything he was working with or upon. The cause of his injury was entirely disconnected with, and separate and distinct from, the subject of his work. It is true that if a man is working in a mill or factory, where common intelligence will take notice that dangerous machinery is used, and steps back upon a saw or into a furnace, or upon any dangerous device or machine, he cannot recover damages, because, being charged with knowledge of the existence of these dangerous objects, the danger must be held to be apparent; and while it is true that the plaintiff in this case could doubtless have seen the barrel, if he had looked at it—and that is the admission which the counsel for respondent sought to obtain, and did obtain—he was under no obligation to look for it, and naturally would not look for it, for he had no actual notice of its existence, and it does not appear that it was a necessary or common attachment to mills, or, if it was, that it was the custom to leave it uncovered. It was not a danger incident to the business of putting up a pipe, and under the testimony it was not so conspicuous as to challenge attention; and the plaintiff, being rightfully there in the discharge of his duty, had a right to rely upon the duty of the master to furnish him a safe place in which to work, and, the place evidently not being safe and the danger not apparent, the master, under the authorities, is liable to damages."

The circumstances of that case, it is true, are not the same as those in the one before us, but the case serves to show that the difficulty in all cases of this character is not with the rule of law, because the rule of law is well settled and understood, but arises when we come to apply the rule to cases where the danger is not known, and where it must be determined from the fact that the danger should have been known by the employee. The question, then, resolves itself into this: Do the facts in this case show that respondent should have known the danger? The facts are not disputed, and they are, substantially, that respondent was boarding the train in the usual and ordinary way; that the train was running slowly; that he was about 25 feet away from the cattle-guard posts; that if his attention had been directed towards these posts he could have seen them; that this was the first time he had stopped off at this place; that he could not board the train except at the crossing; that he had been in the railroad business for about 20 years, was acquainted with the location of cattle guards, and had never known them to be placed so near the track as this one, or to be dangerous; that

it was necessary, when boarding a moving train, to look toward the rear of the train, not in the direction the train was moving, and that it was also his duty to look after passengers desiring to board the train; and, while the plaintiff testified that if his attention had been called to the cattle guard he could have seen it, yet it nowhere appears that he could have known, even if he had seen the cattle guard, that it was dangerously close to the cars. We know from common experience that it is difficult to tell how near a car will come to objects along the side of a railway track, and, until the car stands by the object, one cannot very well judge whether it is dangerous or not. We know, too, that the respondent's attention must have been centered on boarding the train, as he says it was, and that a customary object near the track, like a cattle guard, would not ordinarily attract attention as a dangerous obstacle. Even if respondent could have seen the cattle guard when he ran forward to within 25 or 30 feet of it, or even if he should have seen it, we do not think it necessarily follows that he must be held to have known that it was dangerous, especially in the absence of warning or knowledge that it was dangerous; because, in the absence of warning or knowledge, he had a right to assume it was safe, and that it was placed as was usual and customary for such guards to be placed; in other words, that the company had performed its duty by placing the cattle guards far enough away from the cars so as not to be dangerous. For these reasons we think the questions of assumed risk and contributory negligence were for the jury, and that the court could not hold that as a matter of law respondent assumed the risk. The following cases, very much like the case at bar, are in point upon this question: Sweet v. Michigan Central R. R. Co., 87 Mich. 559, 49 N. W. 882, 48 Am. & Eng. R. Cas. 395; Johnson v. St. Paul, etc., Ry. Co., 43 Minn. 53, 44 N. W. 884, 41 Am. & Eng. R. Cas. 293; Bryce v. Chicago, etc., Ry. Co., 103 Iowa, 665, 72 N. W. 780, 9 Am. & Eng. R. Cas., N. S., 832; Whipple v. New York, etc., R. R. Co., 19 R. I. 587, 35 Atl. 305, 5 Am. & Eng. R. Cas. 517, 61 Am. St. Rep. 796.

Two other questions are presented in the case, one of which is the refusal of the court to strike out an answer to a question because it was not responsive. While the court in terms did not strike the answer, it subsequently told the jury that they could not consider evidence of that character, and this we think was sufficient. The other was an instruction requested by appellant which was modified by the court. The instruction, as given, stated the law correctly. The modification was stated as an exception to the general rule which was being defined. It did not come within the issues of the case, the court did not intend to apply it to the case, and the jury must have so understood it. The respondent did not claim recovery by reason of the exception, and at most it was harmless.

We do, however, think the verdict was excessive in proportion to the injury. No bones were broken, and at the time of the trial there were no marks or disfigurements upon the person of respondent, and evidence of any permanent impairment of the respondent was very slight. At the time he was injured he went upon his train with assistance, did some work on the way in, road from his train home in a buggy, and was in bed for about six days thereafter. The doctor who examined him by the aid of an X ray at the time of the trial could find no evidence of physical injury, and the whole injury at the time of the trial appeared to be to his nervous system, which might or might not remain permanently. It is true that for several months after the injury be was incapacitated for work more or less, and it is no doubt true that he suffered much pain. Counsel for respondent makes a strong argument against this court's reducing the amount, and several cases are cited where we have in effect said it is only in cases where the verdict is clearly in excess of any just measure to such an extent that it shows passion and prejudice on the part of the jury that a verdict will be set aside. It is true, also, that the jury and the court below have advantages in judging of damages which we do not have. But it seems to us that a verdict for $10,000, in a case where the injuries are so obscure as they are in this case, is clearly in excess of the just measure. In addition to this, the trial court, in passing upon a motion for new trial upon this ground, said: "I feel somewhat inclined to sustain the defendant's motion to set aside the verdict as excessive, and grant a new trial, unless the plaintiff remit the damages awarded in excess of $6,000. Should I require the plaintiff to file a remitter in this excess as a condition for overruling the motion, and he should decline to do so, he could not appeal from my action without going through a new trial. If he could have my action reviewed by the Supreme Court without doing this, I should feel more inclined to take this course. Should I err in requiring this, or in granting a new trial, it would entail much more trouble and expense on the parties than if I should err in overruling the motion for a new trial; and, besides, if the Supreme Court should conclude that I had erred in this and in no other respect, it may itself require the plaintiff to remit a part of his verdict and judgment, or, if he declines, reverse and order a new trial. Partially for these reasons, and while I have some misgiving on this point as to the damage being excessive, I deem it the better course—the course that will best conserve the rights of both parties—that will present the question for consideration of the Supreme Court, without jeopardizing the rights of either party, to deny the motion."

The trial judge, who heard the evidence, saw the witnesses, and was in a position equal with the jury to judge of the damages, was not satisfied that the amount of the verdict was not excessive. He was inclined to reduce the amount to

$6,000. He did not do so, because, as he says, he had some misgivings as to the amount being excessive, and because this court would do so if we concluded he had erred in denying the motion on that ground. These statements of the trial court, taken in connection with our own views from a reading of the evidence, convince us that the verdict is excessive, and that $6,000 is a large measure for the damages proven. The respondent will, therefore, be required to remit $4,000 from the amount of the judgment in the case within 30 days from the date of the filing of this opinion; whereupon the judgment will be affirmed. Otherwise the judgment will be reversed, and a new trial ordered. Appellant to recover costs on this appeal in either event.

FULLERTON, C. J., and ANDERS and DUNBAR, JJ., concur.

BARKSDALE v. CHARLESTON & W. C. RY. CO.

(*Supreme Court of South Carolina, April 28, 1903.*)

[44 S. E. Rep. 743.]

Injury to Conductor—Contributory Negligence—Inspection of Cars.

It is not the duty of a railroad conductor to examine the cars turned over to him before taking them out on a train, where a car inspector is employed at the station by the railroad company.

Same—Same—Same.

Const. art. 9, § 15, providing that knowledge of defects in machinery shall be no defense in an action for injuries caused thereby, except as to conductors in charge of unsafe cars voluntarily operated by them, a conductor is not barred of his right to recover for injuries arising from defective cars, unless he would have regarded them as dangerous or unsafe if he had exercised ordinary prudence.

Same—Same—Use of Defective Cars.

It is the duty of a freight conductor, after starting with a car and discovering defects in it, to exercise his best judgment as to whether he should carry it in his train or not.

Gary, A. J., and Jones, J., dissenting in part.

Appeal from Common Pleas Circuit Court of Laurens County; Watts, Judge.

Action by Walter E. Barksdale against the Charleston & Western Carolina Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

S. J. Simpson and Simpson & Cooper, for appellant.
N. B. Dial, for respondent.

WOODS, J. The plaintiff in this action claims damages against the defendant, alleging that the defendant delivered to him, as one of its freight conductors, for transportation from Augusta, Ga., to Greenwood, S. C., a car old, worn out, and with flat wheels, and negligently loaded by defendant with lumber in an insecure and unsafe manner, with only two standards on each side, and with improper appliances and equipments; that, by reason of the defective cars and

appliances and improper loading, the lumber became loose and disarranged, and was about to derail the train to which the car was attached, and cause a wreck; that, the train being without a bell cord or signal, or means by which he could stop it, plaintiff undertook to arrange the lumber so as to prevent disaster, and to save the lives of the railroad's employees and its property, and while so engaged the lumber was thrown against him, by reason of which he suffered great bodily injury. There were other allegations, not essential to the decision of the case as now presented. The defendant denied negligence on its part, charging the plaintiff's injury was caused by his own negligence, and further alleged that, if the injury was caused by any negligence of defendant, plaintiff contributed to it, and so could not recover. At the close of plaintiff's case, defendant moved for a nonsuit, "First, on the ground that it appears clearly from the testimony that whatever defects there were in the car in this loading were well known to the plaintiff; second, that the facts which have appeared here from the testimony of plaintiff, to my mind, show beyond a question that the plaintiff, even if the defendant was guilty of negligence, was himself guilty of contributory negligence, and therefore he cannot recover; third, that he had such knowledge of these defects."

The plaintiff had testified, in substance, that he did not examine the car before he left Augusta, it not being his duty to do so, because at that point the company had car inspectors; that he knew nothing of defects until after leaving Augusta, but carried the car several stations after he discovered them, thinking the trouble not serious enough to warrant him in dropping the car. The plaintiff further said it would have been a great deal safer if he had stopped trying to arrange the lumber when he saw it would not strike a car on the siding which the train was then passing, and that, if he had not continued in this, he thought the accident would not have occurred. It is on this testimony, as we understand, the motion for a nonsuit was based. If the defendant did not usually require its freight conductors at Augusta to examine the cars, but imposed that duty on another officer, then it is manifest the plaintiff could not be charged with negligence for failing to examine and ascertain the defects before taking the car, and the nonsuit could not be granted on that ground.

Nor do we think the motion should have been granted on the ground that plaintiff failed to cut out and leave it at a siding after he discovered the defects. The Constitution provides (article 9, § 15): "Knowledge of any employee injured of the defective or unsafe character or condition of any machinery, ways or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them." It will be observed that in the first line of this section the terms used are "defective or

unsafe," while, in the exception made as to conductors and engineers, they are "dangerous or unsafe." A conductor, therefore, is not precluded from recovering for an injury arising from voluntarily operating a defective car, unless it is so defective as to be dangerous or unsafe. This exception in the Constitution, we think, did not in any way change the limitation before existing upon the right of recovery of conductors and engineers for injuries arising from defects in engines and cars known to them. It was not the law before the adoption of the Constitution, and it was not made the law by the clause above quoted, that an engineer or conductor carries forward his train at his peril, on the discovery after he has started on his trip of any defect in his engine or cars which could possibly produce injury. Even slight defects under unforeseen conditions may produce disaster, but they could not for that reason be judicially declared sufficient to make the car or engine unsafe or dangerous. To defeat the claim of a conductor or engineer for injury in cases of this character, the knowledge must be of defects which the conductor or engineer believed to be dangerous or unsafe, or which he ought to have regarded dangerous or unsafe, in the exercise of ordinary prudence and reason. Any other view would not only be straining the meaning of words, but would be unreasonable, and result in an intolerable hardship both to the public and those charged with the conduct of railroads, for it would require an engineer or conductor, upon discovery of any slight defect of machinery, to stop his train or proceed at his peril. 1 Shearman & Redfield on Negligence, §§ 211, 214; Lasure v. Mfg. Co., 18 S. C. 280; Snow v. R. Co., 8 Allen, 441, 85 Am. Dec. 720; Parker v. R. Co., 48 S. C. 384, 26 S. E. 669, 16 Am. & Eng. R. Cas., N. S., 731; Bussey v. R. Co., 52 S. C. 443, 30 S E. 477, 11 Am. & Eng. R. Cas., N. S., 474; Bodie v. R. Co., 61 S. C. 478, 39 S. E. 715, 22 Am. & Eng. R. Cas., N. S., 818. The true rule is well stated in Hurst v. R. Co., 163 Mo. 309, 63 S. W. 695, 85 Am. St. Rep. 539, 21 Am. & Eng. R. Cas., N. S., 899. "When an employee has full knowledge of the risks of his situation, and accepts them, he assumes such risks as are incident to their discharge, and, if subsequently injured by such risks, he will not be entitled to recover damages for injuries sustained in consequence thereof, against his master, unless 'it was not so dangerous as to threaten immediate injury, or if he might have reasonably supposed that he could safely work about it by the use of care and caution.'" It was therefore a question for the jury to determine whether the defects in the car which the plaintiff says he discovered after he started on his trip were such that he regarded the car dangerous or unsafe, or such that he ought to have so regarded it in the exercise of ordinary prudence and judgment. If the defects were of this character, and the plaintiff was in charge of the car, and could have dropped it before the accident, he could not recover.

The presiding judge could not determine this inquiry, and the motion for nonsuit was properly refused.

It is unnecessary to discuss any duty of the plaintiff as conductor to look out for and discover the alleged defects in the car after it left Augusta, for the plaintiff testified he actually did discover them before the accident occurred.

It follows, from the views expressed in considering the motion for nonsuit, that the exceptions to the charge covered by the second and fifth grounds of appeal, and the third ground of appeal down to and including subdivision "b," must be overruled.

The presiding judge instructed the jury: "If it was the duty of the conductor to make up his train in the city of Augusta, and see that everything was in good order and that the cars were properly loaded, and if plaintiff in this case was the conductor, and it was his duty, in the city of Augusta, to see that everything was in good shape (in good order) when he left there; if he had knowledge of the fact that the cars were unsafe and unsuitable and dangerous—if he had knowledge of that fact, and moved those cars, then he assumed the duties incident to his office, being conductor, and he cannot recover. But if the duty was imposed upon the railroad authorities, and such authorities loaded that car and turned it over to him, and it was not his duty to investigate as to whether everything was safe and suitable and in good order (the train which was turned over to him in the city of Augusta loaded by the officials there), then the conductor had a right to assume that safe and suitable appliances had been furnished, that the car turned over to him was properly loaded, and that the machinery to run it was safe, and that the appliances were safe and suitable." This was all appellant could ask as to the plaintiff's duty before leaving Augusta, but it does not cover his duty after the discovery of defects on the journey. The portion of the charge quoted would, I think, convey the impression to the jury that the plaintiff might continue to assume the car was not dangerous even after he had discovered on his journey the alleged defects, and it negatives the idea that he owed any duty to exercise judgment or discretion as to whether he should undertake to carry the car on after he knew of the defects. But it is argued that this erroneous impression made on the minds of the jury was removed by the general instructions given on the subject of contributory negligence, which were quite free from objection, and by the defendant's second request, which was given to the jury in the following words: " 'If the jury believe from the evidence that the plaintiff, Barksdale, knew of the defects alleged to be in the lumber car—the train he was operating—and the manner in which the lumber referred to in the complaint was loaded, and voluntarily operated the same, and took the risks of injury therefrom, then he cannot recover.' I charge you that, taken in connection with what I have heretofore said to you

along that line." As has been remarked, what had been before said on this point had, by implication, negatived the idea that there was any duty of the plaintiff to cease to operate dangerous machinery, if he had discovered the danger after leaving Augusta. The general statement made in this respect, standing alone, might be construed to cover the duty of the plaintiff in this regard both before he had commenced his trip and while he was on his journey, for it might refer to one as well as the other; but, when it is remembered that the presiding judge had before practically excluded from the jury the consideration of any duty of the plaintiff to abandon a car discovered on the trip to be dangerous, I think the jury must reasonably have supposed he intended this statement also to refer only to any discovery of defects made before leaving Augusta. This conviction is much strengthened when we observe the presiding judge expressly says this instruction is given in connection with a portion of the charge which certainly tended to lead the jury to think they were to consider only such knowledge of defects as plaintiff had before leaving Augusta. The general statement of the law of contributory negligence could not cure the error, because it consisted in using language tending to produce the impression on the minds of the jury that this general law did not require the plaintiff to abandon a dangerous car unless he had discovered its defects before it was turned over to him. I do not lose sight of the fact that the defense of assumption of risk was not pleaded by defendant, nor of the distinction between that defense and contributory negligence. In Bodie v. Ry. Co., 61 S. C. 478, 39 S. E. 715, 11 Am. & Eng. R. Cas., N. S., 474, Associate Justice Jones remarks: "The doctrine of assumption of risk by the employee is distinct from the doctrine of contributory negligence, although there may arise a certain condition of facts capable of supporting either inference." This is followed by as clear a distinction between the two defenses as the nature of the subject will allow, concluding with this statement: "When, therefore, a case arises in which it is shown (upon proper pleadings) that the employee has assumed the risk from which the injury arose, or, what is the same thing in effect, has waived his right to hold the employer responsible for the risk, the employee's action is defeated because of his agreement, and not because of negligence. 'Contributory negligence,' on the other hand, rests in the law of torts, as applied to negligence; and, when such defense is established, the plaintiff's action is defeated, not because of any agreement, express or implied, but because his own misconduct was a proximate cause of the injury." The defense of assumption of risk and contributory negligence are so similar that they may fade into each other. The broad line of the difference is to be kept in view, but refined distinctions between them do not advance the administration of the law. Nearly every case of contributory negligence on

the part of an employee involves, in a general sense, some assumption of risk, because, in order to be guilty of contributory negligence, there must be the risk of apparent danger. When a servant risks this danger in the discharge of duty imposed on him in the course of usual duty, this would be, in an exact sense, a case of assumption of risk. But if he improperly risks the danger, which becomes the proximate cause of the injury, in doing that which is not imposed on him in the course of his usual duty, it would be contributory negligence. Erskine v. Beet Sugar Co. (C. C.) 71 Fed. 270; Baird v. Ry. Co., 61 Iowa, 361, 13 N. W. 731, 16 N. W. 207, 8 Am. & Eng. R. Cas. 128; Kilroy v. Foss, 161 Mass. 138, 36 N. E. 746; Le Bahn v. R. Co., 80 Hun, 116, 30 N. Y. Supp. 7; So. Pacific Co. v. Pool, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. Ed. 485. It is to be observed in the case now under consideration that the conductor had complete control of the train. The evidence on this point was to the effect that, so far from the company imposing upon him any duty to carry with his train a dangerous or unsafe car, he was directed by the company to cut out any car he regarded in that condition. Under these circumstances, the vital inquiry is whether he was guilty of contributory negligence in carrying forward the car, after he discovered the defects, of his own will, without any obligation being imposed upon him by the company to do so. If he did this without good reason, it would not be the assumption of a risk imposed in course of his employment, but carelessness and misconduct on his part in voluntarily carrying with the train a defective car. For this reason, I venture to think the defense of contributory negligence was the appropriate one under which this issue should have been submitted to the jury. As we have seen, if the plaintiff discovered defects in the car after he had started on his trip, and they were such as to induce the belief in his mind that the car was dangerous or unsafe, or if they would have made the car appear unsafe or dangerous to a man of ordinary prudence and reason in like situation, and if the plaintiff was in charge of the train, and had the opportunity to drop the car before the accident, he would then be operating a dangerous or unsafe car in his own charge; and if there was a voluntary operation by him of a dangerous or unsafe car, producing the injury, or contributing to it as a proximate cause, without which it would not have occurred, the plaintiff could not recover. The portions of the charge above quoted should, in my opinion, have been accompanied by a statement of this principle of law. The fourth exception and subdivisions "c" and "d" of the third exception cover this error, and I think they should be sustained, and a new trial ordered.

POPE, C. J., concurs.

GARY, A. J. (dissenting on one point). The assignments of error which, in the opinion of Mr. Justice Woods, should

be sustained, are subdivisions "c" and "d" of the third exception, and the fourth exception. They are as follows:

"Because the presiding judge erred in charging the jury as follows: 'If it was a rule of the company for the cars to be made up by the train master in the city of Augusta, and turned over to the conductor who was to take them out of the city of Augusta, and that conductor had nothing to do with the making up of the train there, then the conductor of the train had a right to assume that suitable and safe appliances had been furnished him, and that the cars had been properly loaded when he took charge of them. If it was the duty of the conductor to make up his train in the city of Augusta, and see that everything was in order and that the cars were properly loaded, and if the plaintiff in this case was the conductor, and if it was his duty, in the city of Augusta, to see that everything was in good shape (in good order) when he left there; if he had knowledge of the fact that the cars were unsafe and unsuitable and dangerous—if he had knowledge of that fact, and moved those cars, then he assumed the duties incident to his office, being conductor, and he cannot recover. But if the duty was imposed upon the railroad authorities, and such authorities loaded that car and turned it over to him, and it was not his duty to investigate as to whether everything was safe and suitable and in good order—the train which was turned over to him in the city of Augusta, loaded by the officials there—then the conductor had a right to assume that safe and suitable appliances had been furnished, that the car turned over to him was properly loaded, and that the machinery to run it was safe, and that the appliances were safe and suitable.' The error—(c) being the burden of defendant's defense—was, whatever may have been the obligations of the plaintiff in relation to taking the train out from the city of Augusta, he was bound to know, as conductor, and did know very soon after he started from Augusta, of the defects complained of, and because of such knowledge, and because of his conduct with reference to such alleged defects after knowledge of them, he was not entitled to recover; and the portion of the charge here complained of ignores the question of the existence of any defects after leaving the city of Augusta, and the obligation of the plaintiff with reference thereto, and it was therefore erroneous and greatly prejudicial to the defendant. (d) The charge, in effect, charged the jury that if it was not the duty of the plaintiff, as conductor, to see that the cars were safe and properly loaded when he left Augusta, no duty in this regard was afterwards placed upon him, and during the entire trip he might assume such cars and such loading continued to be safe and proper.

"(4) Because the presiding judge, while instructing the jury as to the law in relation to the knowledge of employees of defects in machinery committed to them, erred in charging as follows: 'If the conductor here was injured, and if he had

knowledge of any defect or unsafe character or condition, machinery, ways, and appliances, and if he knew that the train of cars or anything appertaining to it was dangerous, and he voluntarily took charge of that train, then he assumed the risks incident to his position, and he cannot recover.' The error being in instructing the jury, in effect, that a conductor would be prevented from recovering if, having such knowledge, he voluntarily took charge of the defective train, and, inferentially, that such knowledge acquired after beginning to operate such train, however long before the accident, would have no such effect in preventing a recovery."

His honor the presiding judge charged the following requests presented by the defendant:

" '(1) If the jury believe from the evidence that the plaintiff, Barksdale, knew of the defects alleged to be in the lumber car —the train he was operating, and the manner in which the lumber referred to in the complaint was loaded—and voluntarily operated the same and took risks of injury therefrom, then he cannot recover.' I charge you that, taken in connection with what I have heretofore said to you along that line.

" '(2) If the jury believe from the evidence that the injury of the plaintiff was caused by his own negligence, and not by the negligence of the railway company, then they must find for the defendant railway company.' I have already charged you that, and I recharge it to you, as good law.

" '(3) If the jury believe from the evidence that the injury of the plaintiff, Barksdale, was directly caused both by the negligence of the railroad company and the negligence of the plaintiff, Barksdale, then the plaintiff cannot recover, and the verdict must be for the defendant railway company.' I have already charged you that, and I recharge it to you."

His honor concludes his charge as follows: "Now, gentlemen, if, in your opinion, the plaintiff here was injured by negligence and carelessness of the railway company, and he did not contribute to his own injury, and the carelessness and negligence of the railway company was the direct and proximate cause of his injury, then your verdict will be for him, in such sum as you think he has sustained, proportionate to the injury sustained by him. If you believe the plaintiff was injured, and that injury was brought about by his own carelessness and negligence, then your verdict will be for the defendant. Or if you believe the railway company was negligent, and that negligence was the direct and proximate cause of the injury of the plaintiff, and the plaintiff was also negligent, and his negligence contributed as a direct and proximate cause of the injury, and the injury sustained by him, if any were sustained by him, was an admixture of negligence of the railway company and the plaintiff himself, then your verdict will be for the defendant." The charge of the circuit judge must be viewed in two lights—first, as charging the law generally that was applicable to the case; and, second, as

charging specifically upon the questions presented by the requests. Furthermore, the entire charge must be considered in determining whether any particular portion thereof was erroneous. After quoting that portion of the charge set out in the third exception, commencing with the words, "If it was the duty of the conductor," Mr. Justice Woods uses this language: "This was all appellant could ask as to the plaintiff's duty before leaving Augusta, but it does not cover his duty after the discovery of defects on the journey. The portion of the charge quoted would, I think, convey the impression to the jury that the plaintiff might continue to assume the car was not dangerous after he had discovered on his journey that he owed any duty to exercise judgment or discretion as to whether he should undertake to carry the car on after he knew of the defects." Conceding that his portion of the charge, standing alone, would convey the impression mentioned by Mr. Justice Woods, and that it should have been accompanied by a statement of the principles announced in his opinion, let us see if the principles were elsewhere charged. The defendant's first request was: "If the jury believe from the evidence that the plaintiff, Barksdale, knew of the defects alleged to be in the lumber car—the train he was operating—and the manner in which the lumber referred to in the complaint was loaded, and voluntarily operated the same and took the risks of injury therefrom, then he cannot recover." The presiding judge said: "I charge you that, taken in connection with what I have heretofore said to you along that line." Mr. Justice Woods, in considering the exception assigning error in the charge, holds that it was not erroneous, and we concur with him in this conclusion. If, then, there was no error in the manner in which the request was charged, we fail to see how the jury could have been misled into supposing that the plaintiff could recover if he knew of the defects and voluntarily operated the train. When that portion of the charge set out in the exception is considered in connection with the whole charge, and with the request which was specifically charged, it could not have misled the jury.

The court being equally divided upon the matter discussed above, the judgment of the circuit court must stand affirmed, under the Constitution.

JONES, J. I concur in the view of Mr. Justice Gary, that the judgment of the circuit court should be affirmed. As shown in the case of Bodie v. R. Co., 61 S. C. 478, 39 S. E. 715, the defenses of "assumption of risk" and "contributory negligence" are distinct. Being affirmative defenses, they must be pleaded, to be available. 13 Ency. Pl. & Pr. 914. The defendant not having pleaded assumption of risk, it did not have any right to have the jury instructed with reference to such matter. In so far, therefore, as the circuit court undertook to instruct the jury in that regard, the appellant received favor, and not prejudice, and cannot complain if the

court failed to cover every aspect of the doctrine of assumption of risk. The fact that a servant remains in the master's service after knowledge of the defective or unsafe condition of the machinery or appliances furnished him to operate, bears upon the defense of contributory negligence as well as upon the question of assumption of risk; but in neither case is it proper to instruct the jury, as matter of law, that a servant cannot recover for injuries sustained in the operation of defective or unsafe machinery or appliances after knowledge of such condition, but in all such cases it must be left to the jury, from all the circumstances, to determine the proper inference to be drawn from the continuance to operate after knowledge of the defective or unsafe condition. The charge of which the complaint is made, stated correctly, is as follows: "If it was the duty of the conductor to make up his train in the city of Augusta, and see that everything was in good order and that the cars were properly loaded, and if plaintiff in this case was the conductor, and it was his duty, in the city of Augusta, to see that everything was in good shape (in good order) when he left there; if he had knowledge of the fact that the cars were unsafe and unsuitable and dangerous—if he had knowledge of that fact, and moved those cars, then he assumed the duties incident to his office, being conductor, and he cannot recover. But if the duty was imposed upon the railroad authorities, and such authorities loaded that car and turned it over to him, and it was not his duty to investigate as to whether everything was safe and suitable and in good order—the train which was turned over to him in the city of Augusta, loaded by the officials there—then the conductor had a right to assume that safe and suitable appliances had been furnished, that the car turned over to him was properly loaded, and that the machinery to run it was safe, and that the appliances were safe and suitable. Now, under the Constitution of this state, a conductor of a train is excepted from other employees of the railroad company. If the conductor here was injured, and if he had knowledge of any defective or unsafe character or condition of the machinery, ways, or appliances, and if he knew that the train of cars, or anything appertaining to it, was dangerous or unsafe, and he voluntarily took charge of that train, then he assumed the risks incident to his position, and he cannot recover. If the cars were unsuitable, and the appliances were unsuitable and unsafe. and he had no knowledge of the danger he was running, or if he had no knowledge of the fact that they were unsuitable or unsafe—if they were not plain to the eye, but the defects were hidden—then he would be entitled to recover, provided you think he was injured through the carelessness and negligence of the railroad, and he didn't by his own act contribute towards his injury. The defendant has requested me to charge you the following proposition of law: '(1) If the jury believe from the evidence that the plain-

tiff, Barksdale, knew of the defects alleged to be in the lumber car—the train he was operating—and the manner in which the lumber referred to in the complaint was loaded, and voluntarily operated the same, and took the risks of injury therefrom, then he cannot recover.' I charge you that, taken in connection with what I have heretofore said to you along that line." This charge, it seems to me, was too favorable to the appellant, first, in submitting to the jury whether plaintiff had assumed the risk in continuing to operate the cars after knowledge of their unsafe condition, when no such defense had been pleaded; and, second, in so far as the charge might be construed as relating to the plea of contributory negligence, in denying plaintiff's right to recover if he voluntarily took charge of the train and operated it after knowledge that it was unsafe, instead of leaving it to the jury to decide whether such facts, under the circumstances, warranted a conclusion that the plaintiff thereby proximately contributed to his injury. But when the whole charge to the jury is considered, and especially that portion relating directly to the matter of contributory negligence, it is manifest that defendant's issue of contributory negligence was fully, fairly, correctly, and explicitly submitted to the jury. It must also be observed that the objection urged against the charge relates to a mere omission to charge as to a matter not brought to the attention of the court by a specific request to charge the matter omitted.

Therefore, while I concur in the views of ASSOCIATE JUSTICE WOODS that the motion for a nonsuit was properly refused, I agree with MR. JUSTICE GARY that the judgment of the circuit court should be affirmed.

In re TEN-HOUR LAW FOR STREET RY. CORPORATIONS.

(*Supreme Court of Rhode Island, June 27, 1902.*)

[54 Atl. Rep. 602.]

Street Railway Employees—Hours of Employment—Limitation—Constitutionality of Statute.

Pub. Laws, c. 1004, enacted April 4, 1902, limiting the hours of labor of certain employees of street railway corporations to 10 hours a day, is within the police power of the Legislature.

Same—Same—Same—Same.

The act is not unconstitutional, as infringing the right of contract.

Same—Same—Same—Same.

The act is not unconstitutional, though it exempts from its operation cases of existing written contracts.

Same—Same—Same—Same—Contracts.

Pub. Laws, c. 1004, enacted April 4, 1902, § 1, forbids an officer of a street railway company to "exact" more than 10 hours' work from certain employees. Section 2 provides that "the true intent and purpose of this act is to limit the usual hours of labor of the employees of street railway corporations, as aforesaid, to ten hours' actual work a day, to

be performed within a period of twelve consecutive hours": *held* illegal for a street railway company to make a contract with its employees to labor more than 10 hours a day, even if they make no objection.

Blodgett, J., dissenting.

Opinion to the Governor in the Matter of the Ten-Hour Law for Street Railway Corporations.

Providence, June 24, 1902.

To His Excellency, Charles Dean Kimball, Governor of the State of Rhode Island and Providence Plantations:

We have received from your excellency the following questions, viz.:

"First. Are the provisions of chapter 1004 of the Public Laws, passed April 4, 1902, entitled 'An act to regulate the hours of labor of certain employees of street railway corporations,' or any of such provisions, in violation of the Constitution of the state of Rhode Island?

"Second. If not, is there anything in the provisions of said chapter 1004 to make it illegal for a street railway corporation to make a contract with its employees to labor more than ten hours within the twenty-four hours of the natural day, and within twelve consecutive hours, except as provided in said chapter?"

In response to these questions, we have the honor to submit the following opinion:

Chapter 1004 of the Public Laws relates to the hours of labor on street railways. It therefore relates also to the exercise of public franchises upon public streets for public accommodation. When a law is made to affect corporations created by and subject to the legislative authority, it is held to be an amendment to the several charters and sustainable on that ground. A notable instance of this sort is found in the weekly payment law of 1891. The case of State v. Brown & Sharpe Mfg. Co., 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856, so fully and carefully covered the scope and authority of such laws that we need not here repeat its reasoning. It was there decided that the law was not in violation of any of the constitutional provisions of the United States or of this state. The same reasoning is applicable to the statute in question, so far as it relates to corporations.

There is also a common assent that the Legislature has the right of control in all matters affecting public safety, health, and welfare, on the ground that these are within the indefinable but unquestioned purview of what is known as the police power. It is indefinable, because none can foresee the ever-changing conditions which may call for its exercise; and it is unquestioned, because it is a necessary function of government to provide for the safety and welfare of the people. Private rights are often involved in its exercise, but a law is not on that account rendered invalid or unconstitutional. The first inquiry is whether the subject of the law is within the power; for, if it is, the Legislature has jurisdiction to

enact it, and its terms are subject to a reasonable legislative discretion.

The constitutionality of the law under consideration may also be sustained as an exercise of the police power of the Legislature. In Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, the Supreme Court of the United States held that a statute of Utah which limited the hours of labor in mines to eight hours per day, except in cases of emergency, was a valid exercise of the police power, and not in conflict with the fourteenth amendment to the Constitution of the United States. That decision goes much farther than the question here presented, because the law affected cases based primarily on private contracts. The law before us is more clearly within such power, for the triple reason that it deals with public corporations, the use of a public franchise, and a provision for public safety. It has been held, in many cases, that any one of these grounds is sufficient to sustain an exercise of the police power. In answering your question, therefore, we have to look to possible objections to the details of the law, rather than to the affirmative authority of its scope.

It may be objected that it infringes the right of contract; but that objection is answered, by the decision above quoted, on the ground that the police power stands above private rights in matters affecting the public welfare. Also, as stated by this court in State v. Dalton, 22 R. I. 77, 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. Rep. 818: "This inalienable right is trenched upon and impaired whenever the Legislature prohibits a man from carrying on his own business in his own way, provided always that the business and the mode of carrying it on are not injurious to the public, and provided, also, that it is not a business which is affected with a public use or interest." The law in question is clearly within the latter proviso.

It may also be objected that this law is not a proper exercise of the power, because it exempts from its operation cases of existing written contracts. Granting that the Legislature has jurisdiction of the subject-matter, it must also be granted that it has reasonable discretion in acting upon it. All intendments will be made in favor of a law not obviously void upon its face. As said by Mr. Justice Brewer in Atchison v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909: "It is also a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it had transcended its power." Both this court in State v. Peckham, 3 R. I. 289, and the Supreme Court of the United States in Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, have declared that the Legislature is

the exclusive judge of the propriety and necessity of legislative interference within the scope of legislative power. If a state of facts could exist which would justify legislation, it is to be presumed that it did exist. To the same effect is the statement of Chief Justice Durfee in State v. Narragansett, 16 R. I. 424, 16 Atl. 901, 3 L. R. A. 295: "The rule generally laid down is that statutes should be sustained unless their unconstitutionality is clear beyond a reasonable doubt. A reasonable doubt is to be resolved in favor of the legislative action, and the act sustained." Nevertheless, as held in Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, a law may be invalid if it makes discriminations which are clearly unreasonable, arbitrary, oppressive, or partial.

If, however, intendments are presumed in favor of a law under the former rule, they can only be overcome under the latter rule when the vice of the law is apparent on its face. A law need not state its purpose, and it seldom does. Courts are usually able to see the purpose from the terms of the act itself, and so, also, to see therein its arbitrary or unlawful provisions, if such there be.

While there may be no obvious reason for exempting from the operation of the present statute cases of existing written contracts under which there might be as great danger to the public from the strain of excessive labor as in cases where there is no such contract, so, on the other hand, such exemption is not obviously arbitrary, partial, or oppressive. Assuming knowledge of the facts on the part of the legislature, it may be that written contracts were so few, or held by men of such experience and skill, or applicable to such conditions of labor, as to make the exemption reasonable and proper so far as the public are concerned.

It is a general rule that a law must apply equally to all of the class affected by it, and this law applies to all contracts for labor on street railroads other than those under existing written contracts. It is prospective in its operation, and as the written contracts expire it will embrace all. The mere fact that one class is not embraced in a law when it might be is not enough of itself to render the law invalid. An example of this is found in State v. Justus, 88 N. W. 759, 56 L. R. A. 757. where the Supreme Court of Minnesota declared an act constitutional which forbade the blacklisting of discharged employees by corporations or partnerships. It was claimed that the law was unequal because it exempted individuals, and that the mischief of blacklisting by an individual was as great as that done by a corporation or partnership. But the court held that the act, being applicable to all members of the class, was not invalid because limited to that class.

It is a common thing for laws to take effect at a future date, when acts done before that date would be as great a menace

to public safety as those done after it; but evidently that would not vitiate the law.

Statutes limiting the hours of labor for women and children have been very generally adopted in this country.

The statute relating to the practice of medicine exempts those who were honorably engaged in practice prior to January, 1892, from producing a diploma from a medical college or submitting to an examination, one of which forms of evidence of qualification is required from all others. Yet the constitutionality of the act has not been questioned on that ground.

Very many cases might be cited in which there has been considerable difference of opinion upon questions closely allied to that here presented, but we do not think it would serve a useful purpose to discuss them nor to point out differences which might tend to distinguish them. The general rules which we have quoted are sufficient to give the reasons for our conclusion, which is that the law in question does not violate any provision of the Constitution of this state or of the United States in its scope and character, nor by reason of violating rights of contract, nor by reason of an apparent and arbitrary exercise of power in the exception to which we have referred. If there is any other ground upon which it may be claimed to be unconstitutional, it does not now occur to us.

The second question calls for a construction of the act with reference to the right to contract under it.

The first section forbids an officer of a company to exact more than 10 hours' work, from which an inference might arise that it could accept if it rendered voluntarily, as by contract. The second section, however, rebuts such an inference, for in that section the intent is explained as follows: "The true intent and purpose of this act is to limit the usual hours of labor of the employees of street railway corporations, as aforesaid, to ten hours' actual work a day, to be performed within a period of twelve consecutive hours." This express intention to limit the hours is quite inconsistent with an inference to permit it by contract. If such an inference could stand, it would be possible for parties to avoid the act by their simple consent, and thus to render it a nullity. The apparent purpose of the act is not to create a right in favor of the employees, which they might waive, so much as to guard the public safety from service too prolonged for alertness in the exercise of reasonable care. If this be so, the public safety cannot be made dependent upon private contracts.

We therefore reply to the second question of your excellency that it is illegal for a street railway company to make a contract with its employees to labor more than 10 hours within the 24 hours of the natural day, and within 12 hours, except as provided in said chapter.

Mr. Justice Douglas, being interested in one of the

companies to which the act applies, deems it proper that he should not express an opinion.

[Signed] JOHN H. STINESS.
PARDON E. TILLINGHAST.
GEORGE A. WILBUR.
HORATIO ROGERS.
EDWARD CHURCH DUBOIS.

BLODGETT, J. (dissenting).

To His Excellency, Charles Dean Kimball, Governor of the State of Rhode Island and Providence Plantations:

The request of your excellency for an opinion upon the constitutionality of chapter 1004 of the Public Laws, entitled "An act to regulate the hours of labor of certain employees of street railway corporations," calls for a critical examination of the provisions of a penal statute enacted on April 4, 1902, to take effect on June 1, 1902.

The corporations referred to in the act are quasi public corporations, and their property is in a large measure impressed with a public use. And it is indisputable, as a general proposition, that, where peculiar privileges are granted by the state, peculiar responsibilities supervene and special regulations may be prescribed; for the bestowal and reception of special privileges beget legitimately the right to impose special burdens. But the right to restrict is not an unlimited right. The restrictions must apply equally to all under the same conditions, since otherwise there is a denial of that equal protection of the laws which is guarantied by the Constitution of the United States (article 14 of amendments, § 1), which, being by its own terms the supreme law of the land, is, in a sense, also incorporated into the Constitution of this state; for article 6 of the Constitution of the United States provides as follows: "This Constitution * * * shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Upon the question of the right to restrict the liberty of contract in a lawful calling, as between employers and employees, the decisions of the courts of different states are in conflict. When these restrictions fall equally upon all in the same circumstances, there are authorities which sustain the right of the legislature to impose them. But even this right is not universally conceded. Judge Cooley, in his great work on Constitutional Limitations (6th Ed.) p. 484, says: "The doubt might also arise whether a regulation made for any one class of citizens entirely arbitrary in its character, and restricting their rights and privileges or legal capacity in a manner before unknown by the law, could be sustained notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended, like the want of capacity in infants and insane persons; and if the Legislature should undertake to provide that

persons following some special lawful trade or employment should not have capacity to make contracts or to build such houses as others were allowed to erect, or in any other way make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative authority, even though no express constitutional provision could be pointed out with which it must come in conflict. To forbid an individual or a class the right to the acquisition and enjoyment of property in such manner as should be permitted to the community at large must be to deprive them of liberty in particulars of primary importance to their pursuit of happiness; and those who shall claim a right to do so ought to be able to show specific authority therefor, instead of calling upon others to show how and where the authority is negatived." Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315; In re Morgan, 26 Colo. 415, 58 Pac. 1071, 47 L. R. A. 52, 77 Am. St. Rep. 269; Low v. Rees Printing Co., 41 Neb. 137, 59 N. W. 362, 24 L. R. A. 702, 43 Am. St. Rep. 670.

The act itself contains no explanation of the exigency for its passage, but it is contended that it is fully justified as a valid exercise of the police power of the state, and, if that contention be made good, the act must unquestionably be upheld. Two grounds only are urged, or, indeed, exist, in support of the act as a police regulation, viz., the public safety and the somewhat more doubtful ground of the health of the employees; and if either or both of these are found upon examination to be the uniform and controlling objects to be subserved, and if its provisions bear alike under the same conditions upon all who are within its terms, and if, in its classifications, it includes all who are under the same conditions, and excludes none of those whose conditions or needs render such legislation necessary or appropriate to them as a class, sufficient justification for the enactment may be found.

But the validity or invalidity of such an act as this may, and often does, depend upon the facts disclosed in the particular case before the court. This not being an adversary proceeding, such facts only can be properly considered as are of common knowledge or of public record, or, it may be, such as have come to our notice in the course of judicial proceedings before us. Nor is precedent wanting for considering other matters than the express provisions of the act; for in the case of Atchison, Topeka & Santa Fe Railroad Company v. Matthews, decided in 1898 (174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909, 14 Am. & Eng. R. Cas., N. S., 89), the Supreme Court of the United States, approving Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, says: "In that case a municipal ordinance of San Francisco, designed to prevent the Chinese from carrying on the laundry business, was adjudged void. This court looked beyond the mere letter

of the ordinance to the condition of things as they existed in San Francisco, and said that under the guise of regulations an arbitrary classification was intended and accomplished."

While the language of the act is not entirely clear in all its parts, it may fairly be said that it prohibits in its terms all officers and agents of street railway corporations from "exacting" from certain classes of their employees, viz., conductors, gripmen, and motormen, more than 10 hours' labor in 12 consecutive hours in any day of 24 hours, with certain exceptions. And it undoubtedly follows that, if the corporation cannot require, as of right, from the employee longer service than this, the employee cannot make a valid contract with the corporation for such longer service; for a contract must be mutually enforceable to be binding on the parties to it.

It will not be questioned that the act is to be strictly construed, since it is penal in its nature, and it is therefore to be noted:

First. That it is restricted in its application to and includes only street railway corporations and three classes of persons in their employ, namely, conductors, gripmen, and motormen. And thus our first inquiry is as to the necessity for thus restricting the natural liberty of contract between the employer and the man of full age whom he employs. This freedom of contract is still left unrestricted in the other avocations of our people, and this statute constitutes a unique exception to the otherwise universal rule. Has the policy hitherto pursued in this respect proved detrimental to the public welfare, or are these employees so many in point of numbers as to properly require special legislation as a class, or is the operation of street railways so related to the public safety that the dangers arising therefrom require, and therefore justify, these restrictions on the liberty of contract between these companies and their employees, or is the act found to be not justified by any of these considerations?

If evidence be desired of the prosperity which has resulted to our people under the relations which have heretofore existed between employer and employee, it may be found in the records of the United States census of 1900 (Bulletin 93, pp. 3, 5), summarized in these words: "In the percentage of the total population employed in manufacturing, in the variety and importance of products, * * * Rhode Island is not surpassed. * * * It is doubtful whether so large a share of the material wealth and resources of any other commonwealth can be attributed to the enterprise and skill of its citizens in the enlargement and extension of old and established industries and the development of new forms of productive industry." It therein appears (table 6) that out of the total population of 428,556 people of this state there were 64,508 wage-earning male employees over 16 years of age employed in the mechanical and manufacturing industries of the state alone, without reference to those employed in agricul-

tural or other pursuits, to no one of whom does any law restricting his right to contract as to his hours of labor apply.

The act in question was passed on April 4, 1902, which was the last day of the January session of the General Assembly. The official report of the state railroad commissioner for the year 1901, concerning "the condition and proceedings of the several railroad corporations" of the state, which is required by chapter 809 of the Public Laws to be made to the General Assembly at its January session, had therefore been in its possession for the maximum period, and that body is chargeable with notice of its contents. It therefore becomes especially appropriate to consider that report, in order, if possible, that it may be seen in what manner and to what degree it may show that the public safety was endangered by the operation of the street railway companies in the state; for when actual knowledge is shown the legal presumption of knowledge no longer obtains. It there appears (page 74) that there are nine street railway companies, operating within the limits of the state 753 motor cars and 93 other cars (such as construction and sand cars, etc.), or 846 cars of all descriptions. The danger to public safety arising from the operating of street railways, and arising otherwise than from defective construction or repair of roadbed or equipment, with which motormen, gripmen, and conductors are in no wise concerned, must, therefore, be caused by these 846 cars; and the total number of persons subject to the provisions of the act is the number required to operate them, which is evidently a very small percentage of the total population of the state. Now, if special and peculiar dangers affecting the public safety attend upon the operation of street railways, and these dangers will be remedied by restricting the liberty of contract between the companies and the three classes of employees above mentioned, in manner and form as contained in this act, such dangers will doubtless constitute sufficient justification for so doing; but otherwise the exigency for such special and class legislation is not apparent. Fortunately, exact statistics showing the degree of danger to the public safety are at hand; for on page 75 of this report it appears that there were transported in the year ending June 30, 1901, on all the street railroads in the state, the great number of 58,924,846 passengers, and that, in so doing (page 77), 12 persons were killed from all causes, and 204 were injured more or less seriously—these figures including employees, passengers, and the general public. Of those killed only 7, and of those injured only 147, were killed or injured, respectively, by collision or while crossing tracks; other deaths and injuries being caused by leaving or boarding the cars while in motion, derailments, and other causes, or a total of 154 persons in all. It is impossible to escape the conclusion that the greater or less degree of injury sustained by 147 persons and the loss of 7 lives, within the period of

one year, while transporting 58,924,846 passengers on the 316 miles of track in this state (page 74) by the nine street railway corporations, constitutes the exact measure of danger to the public safety for one year which arises from the operation of all the street railway companies within the limits of the state.

Second. But the act is still further restricted in its application, in this: that it does not include all conductors and motormen generally, but applies to and includes only those who are employed in operating street railways. But there are others of these classes in the state who are not employed in operating street railways. In a recent hearing before the undersigned, it appeared from the testimony that the Providence, Warren & Bristol Railroad is now operated by the New York, New Haven & Hartford Railroad Company, a steam railroad company, by means of electricity supplied by the overhead trolley system, and it employs in its operation conductors and motormen whose duties are similar to the duties of the conductors and motormen engaged in operating street railways. But their cars run over their own roadbed, and not through the streets in the towns through which they pass; neither is the rate of speed of their cars subject to local regulation; that 98 trains are operated on that road in a day of 18 hours, carrying on an average about 8,000 passengers per day, or at the rate of nearly 3,000,000 per annum—the number carried on July 4, 1901, being 57,000, and on Labor Day, 1901, over 65,000. But this act does not apply to conductors or motormen, or protect the passengers, on that road. And, while the danger of collision is less than on a street railway, the high and unlimited rate of speed which is maintained and the dangers and consequences thereof are far greater. So that it is not amiss to inquire the reason for neglecting to extend these provisions for the health of employees and the safety of passengers to this road also.

It is also a matter of common and general knowledge and public record, to which it does not seem improper to refer, that the Bristol Branch of the Rhode Island Suburban Railroad Company operates a parallel electric street railway from a point a few rods distant from the latter road in Providence, through the highways in the towns of East Providence, Barrington, and Warren, to a point a few rods distant at its Bristol terminus, and this road is undoubtedly within the provisions of this act. But it is also a matter of common and general knowledge and of public record that the same Rhode Island Suburban Railroad Company has recently extended its operations by the electric trolley system upon the tracks and roadbed of the former Warwick & Oakland Beach Railroad Company, and is undoubtedly not a street railway as to such branch, and its motormen and conductors and the public generally are not in the least affected by the act under consideration. Thus this anomaly is presented: that the same

corporation is liable to the penalties prescribed in this act if it "exacts" more than 10 hours' daily service on its road in the town of Bristol, but is not so liable on its road in the town of Warwick. Substantially similar conditions exist on the Sea View Railroad, running to Narragansett Pier, which is also operated by electricity in the same manner, and employs conductors and motormen, but operates its cars on its own roadbed, and not upon the public highways, except at occasional intervals and for very short distances, and which, according to the same report (page 90), transported 433,315 passengers in 1901.

Having thus described the existing conditions attendant upon the operation of the act, we are now better prepared to consider the language of the act itself.

And here another exception appears, for the act does not include in its provisions even all those conductors and motormen who are engaged in operating street railways; since, by the express proviso to section 1, "nothing herein contained shall affect existing contracts." That is to say, if a motorman or conductor in the employ of a street railway company had a "written contract" with the company on June 1, 1902, for a greater number of hours of labor than 10 per day, it is still lawful for the company to "exact" more than 10 hours' labor per day from such persons; while in the case of a conductor or motorman operating on the same route, and it may be on the same car, but then having only an oral contract with the company, though made on the same day and calling for the same length of service, and made upon the same consideration, the company is liable to a fine of $500.

This act was passed on April 4, 1902, and it is of course not known to us how many "written contracts" with employees were thereafter made or were in existence on June 1, 1902, and it is therefore not within our knowledge how many of these classes of employees who were originally required to operate the 846 cars aforesaid are still exempt from its operation. But to exempt from the operation of the act solely because of having a written contract with the corporation is wholly indefensible and is purely an arbitrary classification, for no reason germane to the public safety or the health of the employees; for nothing is more clearly settled than that a valid exercise of the police power is not subject to the constitutional provision prohibiting legislation which impairs the obligation of contracts, since all contracts are made, as all property is held, subject to the paramount requirements of the police power of the state. The Supreme Court of the United States in New Orleans Gas Company v. Louisiana Light Company, 115 U. S. 672, 6 Sup. Ct. 264, 29 L. Ed. 516, says: "The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in

the execution of such contracts." So that the question here presented is not as to the scope of the police power in general, but is limited to an inquiry, in the first place, as to whether existing conditions are such as to justify its exercise at all because of some sufficient danger to the public safety; and, if that be so, in the next place to an inquiry whether it can be exercised in manner and form as expressed in the provisions of the penal statute before us; or, in other words, is the act intended to protect the public safety, and, then, do its provisions accomplish that intent? Unless both these inquiries can be answered in the affirmative, the act fails of justification; for even if the danger to the public safety is shown to be a real and substantial danger, nevertheless, if the means adopted for its removal do not accomplish its removal, the public safety still remains impaired, society is not protected, and the real and effective power of the police power has not been effectively applied. But in what manner is the public safety preserved or the health of the employees protected by these exceptions to the provisions of the act? Or will it be seriously contended that the obligation of the oral contract is not protected by the Constitution, while the obligation of a written contract is so protected?

Third. But these are not the only exceptions, since the act is periodically suspended in its application to even those motormen and conductors who have not been exempted from its terms by the exceptions already considered; for, in addition to cases of unexpected contingency which need not be further mentioned, it is provided "that on legal holidays * * * extra labor may be performed for extra compensation." Section 36 of chapter 809 of the Public Laws prescribes the legal holidays in this state, and includes, together with eight other days, "the first day of every week, commonly called Sunday," of which, of course, there are 52 in the year, thus leaving the act operative as to those motormen and conductors on only 305 days out of 365 days in the year. With the religious and moral issues involved in thus authorizing unlimited exactions of service to be made on that day we are not now concerned, for the legal question would be the same if the law were periodically inoperative by arbitrary enactment for one-sixth of the total number of weekdays in the year. But it is needless to say that neither the public safety nor the health of the employee is conserved thereby. And this is especially true when it is considered that the very days when the law does not apply are precisely those days when the largest crowds are upon the cars and upon the streets, and when the dangers of transportation and collision are at the maximum.

In Atchison, Topeka & Santa Fe Railroad v. Matthews, supra, the Supreme Court of the United States thus defines the limits of the police power: "It is also a maxim of constitutional law that a legislature is presumed to have acted within constitu-

tional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power. On the other hand, it is also true that the equal protection guarantied by the constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens or liabilities which are not cast upon others similarly situated. * * * Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even when the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed."

Says Mr. Justice Field in Butchers' Union Company v. Crescent City Company, 111 U. S. 757, 4 Sup. Ct. 661, 28 L. Ed. 585, citing with approval Adam Smith's Wealth of Nations, book 1, cap. 10: "It has been well said 'that the property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders one from working at what he thinks proper, so it hinders the others from employing whom they think proper.' "

Under the provisions of this act certain motormen and conductors, by virtue of the "written contracts" in existence on June 1, 1902, are permitted to contract without restriction for such hours of labor as they may see fit, while all others in the same class have unlimited freedom of contract in this behalf on only 60 days in the year, and are restricted for the remaining 305 days in the year.

In Carr v. Brown, 20 R. I. 215, 38 Atl. 9, 38 L. R. A. 294, 78 Am. St. Rep. 855, the court decided that a certain statute operated to deprive the plaintiff of property "contrary to the law of the land, or, as it is ordinarily said, without due process of law, and hence is in violation of article 1, § 10, of the Constitution of this state, and also of article 14 of the amendments to the Constitution of the United States." In Mitchell v. People's Saving Bank, 20 R. I. 507, 40 Atl. 505, the court construed the provisions of article 1, § 10, of the Constitution of this state, as follows: "That which the constitutional provision is intended to perpetuate is the substance of the individual right of property;" and to my mind this constitutional guaranty is directly broken by the act under consideration;

and see State v. Dalton, 22 R. I. 79, 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. Rep. 818.

Fourth. But the act not only restricts the hours of labor to 10 in a day of 24 hours, but it requires that those 10 hours of labor shall be performed within 12 consecutive hours. In the case of those cars which are operated at night, a motorman or conductor who begins his 10 hours of labor at 6 p. m. must therefore work all night until at the earliest 4 a. m., or at the latest until 6 a. m. In what way can it be said that the health of the employee is preserved by such a requirement, as against a schedule permitting the same employee to work for 5 hours from 6 p. m. to 11 p. m., and then resuming at 8 a. m., and working the remaining 5 hours until 1 p. m., thus affording 9 hours for sleep and morning meal, and ending in time for the midday meal? Or is the public safety in any wise conserved by thus requiring a motorman to be on what is practically continuous duty throughout the darkness of every night without opportunity for enjoyment of the natural hours for rest and sleep? But to "exact" of the motorman under this act the latter schedule is made a penal offense, and is punishable under the action in precisely the same manner as it is punishable to "exact" more than a total of 10 hours' labor in a day of 24 hours, to wit, by a fine of from $100 to $500. If it be urged that the latter schedule does not provide for the operation of the car during the whole night, as is provided in the former schedule, it may be replied that the maximum car service possible is continuous operation day and night for 24 hours; that, under a requirement limiting the hours of labor of any one employee to 10 hours within such 24, three reliefs or changes of employees are obviously required. After deducting the 10 hours during which the first motorman was employed, this leaves the 14 hours remaining from 11 p. m. to 8 a. m. and from 1 p. m. to 6 p. m. to be divided between the two who succeed him, either 7 hours to each, or in any other manner not exceeding 10 hours in all to either one, in such manner as must necessarily afford opportunity for rest and sleep at night to both, and without detriment to their health or to the public safety. But if the motorman who has this opportunity for sleep until 11 p. m., when he comes on duty, should work for 10 hours, he would work 9 of those hours until 8 a. m., when the first motorman returns, and his tenth hour would be after 1 p. m., when the first motorman ceases. But since the second motorman began labor at 11 p. m. the night before, his 10 hours of labor would not have been "exacted" within 12 consecutive hours, and the penalty of a fine of from $100 to $500 imposed in the act is a second time incurred. This would seem incredible if it were not literally true. To my mind such restrictions seem wholly arbitrary and unwarrantable by any considerations affecting the public safety or otherwise.

To restrict the right to labor to the 12 hours of day or night

next succeeding the commencement of such labor is, in effect, to prescribe arbitrarily by law the hours of the day or night in which a man may work and those in which he may not do the same work. Under this act he can only contract for 10 hours' labor in 24, and he is thus restricted and deprived of the right to labor on any day, if he will, for 14 hours of the 24, or for more than half of his whole lifetime. But this last restriction makes it a penal offense if, having entered upon his 10 hours of labor, he rests for more than 2 hours before he is required to complete his day's work.

Again, the same hours of day or night are not prescribed for all; nor does this statutory work period necessarily recur daily on the same hours for the same man. To apply the test to the motorman above supposed, this act prohibits the first, who begins labor at 6 p. m., from making a contract to labor after 6 a. m., and literally deprives him of the right to labor at his calling by day, and restricts his right to labor to the hours of the night; while his successor, who does not begin labor until 11 p. m., cannot labor after 11 a. m., and must labor partly by day and partly by night. Thus, under this act, it is clear that no valid contract can be made for even 10 hours' daily labor, unless those 10 hours are to fall within the period of 12 consecutive hours.

To impose restrictions such as these is clearly a deprivation both of liberty and of property, within the provisions of article 1, § 10, of the Constitution.

Fifth. But in the event that labor for the period supposed has been "exacted" of the street railway motorman in question, he not having a "written contract" with the company on June 1, 1902, and the labor is "exacted" on some day on which the law is in force, and not on Sunday or any other legal holiday, what is the penalty therefor provided by the act, and on whom does it fall?

Unquestionably this is a penal statute, and as such it must be construed strictly. It seeks to make a statutory offense out of an act not hitherto unlawful and not malum in se. It is elementary that statutory offenses are not to be enlarged by implication, and that, unless the terms of the statute specifically include the exact offense, there can be no violation of it.

The second clause of section 1 contains the only prohibition to be found in the act, and it is as follows: "No officer or agent of any corporation operating street cars of whatever motive power shall, on any day, exact from any of its employees more than the said ten hours' work within the twenty-four hours of the natural day, and within twelve consecutive hours. Provided," etc.

The expression "natural day," which is here used, is defined in Bouvier's Law Dict., sub nom., to be "the period of time elapsing between sunrise to sunset." Though the words are used in a penal statute, if it be assumed that they are intended to mean a period of 24 consecutive hours, whether

beginning at midnight, as in the civil day, at sunrise, at noon, or at any other time (although the crime of burglary cannot be committed in the hours of the "natural day" as above defined by the authority cited), then the officers and agents of these companies are forbidden to exact labor contrary to the provisions of the statute. "Exacting" labor, and "exacting" labor only, is that which is prohibited. But what is it to "exact" labor? In a sense, labor cannot be "exacted" of a free man. It at least and of necessity implies a demand and a compliance with that demand in some way, whether that demand be made lawfully or unlawfully, by virtue of the terms of an existing contract or by superior force. But can it be said that that which a man freely volunteers, or, it may be, even desires, is, in any criminal sense, "exacted" from him? But, without further consideration of this point, it may be assumed that there has been an "exaction" of labor in any manner or by any act which the statute makes an exaction. What, then, is the consequence?

The only penalty therefor is contained in section 3, which is as follows: "Any street railway corporation violating the provisions of the preceding sections of this act shall be fined not less than $100 nor more than $500, one-half thereof to the use of the complainant and the other half to the use of the state." Pub. Laws, c. 1004.

It will be observed, first, that there is no penalty for the employee who works longer than the specified term; and, second, that there is no penalty imposed upon the "officer or agent" who "exacts" the labor, the statute differing in this respect very materially from the Massachusetts statute (cap. 106, § 70, Rev. Laws 1902), on which the act in question is apparently modeled in part, and which is as follows: "Whoever violates a provision of this chapter for which no specific penalty is provided, shall be punished by a fine of not more than $100." And the New Jersey act of 1887, upon the same subject, from which other parts of the act under consideration are evidently drawn, provides, in section 2 thereof, "that it shall be a misdemeanor for any officer or agent of any such corporation to exact," etc. Laws 1887, p. 145, c. 112.

Unquestionably, under either of these acts, the officer or agent could be personally punished; but in this act, while the officer or agent is prohibited, there is no penalty provided for the punishment of the individual who so violates the act, but the penalty is visited upon the corporation only.

If it be replied that a corporation acts only through its officers and agents, and that their acts are the acts of the corporation, it may be rejoined that such is the case only when they are clothed with corporate power, and are acting within the sphere of their authority, and not otherwise, and that they are not presumed to so act when the statute prohibits such act to be done. But this statute always imposes a penalty upon the corporation, and never upon the individual

offender, whether he acts by, without, or against the corporate power and instruction. And this penalty is a fine which is to be paid by the corporation, and which, of course, deprives the stockholders therein of their property by that amount. In so far as this act thus visits a penalty upon the stockholders, it is unquestionably in contravention of article 1, § 10, of the Constitution. But inasmuch as no fine can, in any event, ever be imposed upon the agent or officer who violates the provisions of the act, the real offender always goes unpunished, and the real punishment always falls on the stockholders, even when the act has been violated in contravention of their express authority.

To the constitutionality of such legislation I cannot assent, whether it is sought to be justified as a valid exercise of the police power or as an exercise of the reserved right to alter and amend the charters of incorporation of the several companies affected thereby.

Section 2 of the act provides "that it is the true intent and purpose of this act to limit the usual hours of labor of the employees of street railway corporations, as aforesaid, to ten hours' actual work a day, to be performed within a period of twelve consecutive hours, as aforesaid, whether such employees be employed by the trip, the job, the hour, the day, the week, or any other manner." Pub. Laws, c. 1004.

If the hours of labor in any lawful calling may be thus limited by law to ten in each day, beyond the power of either party to increase, if not to diminish, them, it follows that they may be limited to eight or to twelve, or to any other number of hours, in like manner and with like effect; thus substituting for the constitutional right of individual liberty of contract the transient and fluctuating will of a legislative majority, which, both plutocrat and demagogue, will unceasingly strive to control, and against which the individual will be powerless to defend—alike helpless, whether the legislative spoliation of the employer or the industrial servitude of the employee shall for the hour prevail.

And if the foregoing observations shall seem to have been directed less to the limits of the legislative power over quasi public corporations than to the limits of the same power over the citizen, it is sufficient to reply that the latter is the graver and higher question by as much as the man is above the dollar.

For the reasons above set forth, I am of the opinion that the act in question is unconstitutional in the particulars enumerated, and is wholly void. It follows from the unconstitutionality of the act, and as a necessary conclusion, that a street railway conductor, gripman, or motorman may freely contract for such hours of labor with his company as may be agreed upon between them.

JOHN TAGGARD BLODGETT.

TEXAS & PACIFIC RAILWAY COMPANY, Plff. in Err., v. MICHAEL CARLIN.

(*Argued and Submitted March 20, 1903. Decided April 6, 1903.*)

[23 Sup. Ct. Rep. 585.]

Vice Principals—Foreman—Statute.

The neglect, by the foreman of a railway bridge gang, of his special duty to see that the workmen under him performed their duty to leave a clear track for an approaching train, is the neglect of a duty which he owes, not as a fellow servant with such workmen, but as a vice principal of the railroad company, under Sayles's (Tex.) Civ. Stat. 1897, art. 4560g, providing that railroad employees intrusted with the control or command of other employees, or with the authority to direct any other employee in the performance of his duty, are vice principals of the railway company, and not fellow servants with their coemployees.

Same—Same—Negligence—Question for Jury.

The question of the negligence of the foreman of a railway bridge gang in failing to discover a spike maul upon or near the bridge, immediately prior to the passage of a train, is for the jury in an action to recover damages from the railroad company for personal injuries received by a member of such gang, for which there is no other cause assignable than that the train in passing struck the maul and threw it against the workman, although the foreman testified that he looked for and did not discover any obstruction to the approaching train, where there was nothing to prevent its discovery if it was there and the glance of the foreman was anything more than a casual or formal one.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Northern District of Texas entered upon a verdict of a jury in favor of plaintiff in an action to recover damages from a railway company for personal injuries. Affirmed.

See same case below, 111 Fed. 777.

Statement by MR. JUSTICE PECKHAM:

The plaintiff in error brings this case here to review the judgment of the United States circuit court of appeals for the fifth circuit, affirming the judgment in the circuit court for the northern district of Texas, entered upon the verdict of a jury in favor of defendant in error on the trial of this action brought by him against the railway company to recover damages for personal injuries. On the trial it appeared that Carlin, the plaintiff below, was in the employment of the railway company in September, 1898, as a bridge carpenter. On that day he, with a number of others forming what is termed the bridge gang, of which George Welsh was foreman, was employed in making some repairs on a bridge near the Aledo water tank, not far from Weatherford, Texas. The bridge was over a creek, and was 60 to 65 feet long. The force got to work on the bridge about ten minutes after 8 o'clock in the morning under Welsh, the foreman. The surface of the bridge was plain; the ties were about 8 inches apart, and there was nothing on top of them except the rails and the guard rails, the rails being of ordinary size, and the guard

rails about 10 inches from the rails and parallel with them. The guard rails were 8 inches wide and stood 4 inches above the ties, being let down over the ties about 2 inches, and were of wood. Some time after the men had been working on the bridge a freight train was seen approaching at the rate of from 30 to 40 miles an hour. Within a very few minutes before the train was seen one of the workmen on the bridge had in his hand what is called a spike maul, used for the purpose of driving spike. The maul was of iron with a handle about 3 feet long, the hammer being 6, 8, or perhaps 10 inches in length, and the handle went into the middle of the head, which had a double face. Carver was the man who was using the maul a few minutes before the train came. The maul weighed about 10 pounds. At the time Carver was using the maul, he had it out on the bridge with him. A witness for the defendant stated that he had been using the maul on the south side of the bridge for putting up the staging or scaffolding, and when he finished he handed it to someone on the top of the bridge, who handed it to Carver on the north side of the bridge, to spike on a brace. It was used but ten or fifteen minutes before the passage of the train. Carver stated he did not remember where he had put the maul when he had finished using it, but he said he was always careful to put it out of the way so there would be no accident. He had nailed the last piece of timber on the bridge and got down on the ground and was about 10 feet from the plaintiff, and had not been there over three or four minutes when the train passed. The witness saw no other spike maul or hammer there that morning than the one which he used, which was the regular spike maul described by the witness, and which he found after the train passed.

The train coming from the west was seen some little distance before it reached the bridge, and the people on the bridge got out of its way, and, as the train passed over the bridge towards the east the plaintiff, who was standing a short distance from the east end of the bridge, was struck by the spike maul on the leg, and was so badly injured that amputation of the leg above the knee was necessary, and was performed. The train on its passage across the bridge struck the spike maul and threw it in the direction that the train was going with such force toward the plaintiff as to effect the injury mentioned, although the train was not seen to strike the maul, nor was the maul seen to strike the plaintiff. All that is known is that the train passed the bridge, and as it passed the maul struck the plaintiff, and the handle was broken close up to the head.

It was customary when workmen were engaged in repairing a bridge for the foreman to see that the bridge was cleared and unobstructed whenever a train was about to pass. It was the duty of the workmen to put their tools out of the way when a train was coming, but it was specially the duty of the

foreman to see that the bridge was clear, and "that was his business and that was what he was for." Welsh, the foreman of the bridge gang, testified that he had no recollection of seeing any one using the spike maul that morning; that he had been around all parts of the bridge, both on top and underneath it, before the train had passed. He says when he saw the train coming he looked up and down the track to see if everything was clear, and did not see anything, and stepped one side when the train was 300 or 400 yards from him. He said he had plenty of time if there had been anything on the bridge to have taken it off; that when a man was using tools and got through with them he was supposed to take care of them and put them out of the way; that the foreman was liable to be anywhere about the bridge at any time, and could not be depended upon to be at any particular place; but if there were men working on top of the bridge it would be their duty to be on the lookout always, as they must expect a train at any time. He also said that he was foreman, and that as bridge foreman he had employed Carlin and had supervision over him, and had power to employ and discharge him as well as the other bridge men who were working there that morning.

The evidence was not disputed that, although it was the business of each workman to see to it that his tools were not in the way of an approaching train, yet that it was particularly the duty of the foreman to see that the bridge was cleared from all obstacles when a train came.

This is in substance the evidence submitted to the jury upon the question of the negligence of the defendant.

The judge charged that the burden of proof was upon the plaintiff to show that the defendant was negligent, and that the plaintiff was injured thereby; that the defendant was bound to exercise ordinary care to furnish a reasonably safe place within which employees could perform their duties; that the foreman of the bridge gang was, under the evidence, the vice principal of the defendant company, and that the negligence of which the defendant was accused consisted in the failure on the part of the foreman of the bridge gang to use ordinary care to remove, or to see and remove, the spike maul before the arrival of the train at the bridge.

The court also charged that, if the jury believed from the evidence that the spike maul was left on the bridge by a fellow servant of the plaintiff, and that, at the time the train approached, the foreman of the bridge gang was the only person upon the bridge, and that he could, by the exercise of ordinary care have seen the spike maul and removed it from the track and from proximity thereto; and if they believed it was on the track or within proximity thereto; and if the jury believed that it was the duty of the foreman to use such care to see that the track was clear and no obstructions on it, or so near to it as to be struck by a passing train; and if the jury

believed that the foreman did not use that care, and that the spike maul was struck by the train and hurled against the plaintiff and caused the injuries; and if the jury believed it was the negligence of the foreman in failing to see and remove the spike maul; and if his negligence in that respect was the direct and proximate cause of the injuries sustained by the plaintiff,—then the court charged that the plaintiff was entitled to recover; but that, if the injury was caused by the negligence of a fellow servant, and the foreman in charge of the bridge gang was not guilty of negligence which directly and proximately contributed to the injury of the plaintiff, then the verdict should be for the defendant.

The court further charged that the defendant should not be held responsible for the consequences of an act of negligence which could not reasonably be foreseen, and that it was not actionable negligence to fail to do an act when it would not have been anticipated by a man of ordinary care and prudence that such failure to perform the act would result in injury to any one.

Various requests to charge were made by counsel for the defendant and refused by the court, not necessary to be here specifically mentioned.

The jury, as stated, found a verdict for the plaintiff.

Messrs. David D. Duncan, John F. Dillon, and Winslow S. Pierce, for plaintiff in error.

Messrs. F. E. Albright, E. C. Orrick, and J. C. Terrell, Jr., for defendant in error.

MR. JUSTICE PECKHAM, after making the foregoing statement of facts, delivered the opinion of the court:

Two grounds have been urged upon the court for reversing this judgment and granting a new trial: One was that the negligence of the railway company, if any, was that of a fellow servant, for which it was not liable; and (2) that there was no evidence of the negligence of the foreman, in failing to discover the maul or hammer upon the bridge, sufficient to warrant the jury in finding a verdict for the plaintiff.

The right to maintain this action is founded upon a statute of Texas, the material sections of which read as follows:

"Art. 4560g. All persons engaged in the service of any person, receiver, or corporation controlling or operating a railroad or street railway, the lines of which shall be situated in whole or in part in this state, who are intrusted by such person, receiver, or corporation with the authority of superintendence, control, or command of other servants or employees of such person, receiver, or corporation, or with the authority to direct any other employee in the performance of any duty of such employee, are vice principals of such person, receiver, or corporation, and are not fellows servants with their coemployees.

"Art. 4560h. All persons who are engaged in the common

service of such person, receiver, or corporation controlling or operating a railroad or street railway, and who while so employed are in the same grade of employment, and are doing the same character of work or service, and are working together at the same time and place and at the same piece of work and to a common purpose, are fellow servants with each other. Employees who do not come within the provisions of this article shall not be considered fellow servants." Sayles's Civil Stat. (Tex.) 1897.

With reference to this statute, counsel for the defendant requested the court to charge the jury that—

"Although Welsh, the bridge foreman, may have been, in law, the representative of the company, yet, if they find that the act of examining the track, as the train might be approaching, for the purpose of ascertaining whether or not any obstruction was upon or near it, was a duty that may be expected to be performed by any one of the men, irrespective of his grade or rank; that is to say, by the foreman and men alike as occasion and circumstances may require,—then, in any such event, the act or duty of Welsh in this respect was one which existed between fellow servants, and defendant would not be liable for the negligent acts of Welsh in this respect, if any there were."

This charge was refused, and counsel for defendant excepted.

The court did charge that the foreman of the bridge gang was, under the evidence, the vice principal of the defendant company. This charge was duly excepted to by defendant's counsel.

Defendant contends that if the negligence which caused the accident was the failure of the foreman to see the maul or hammer upon the bridge and to remove it, it was not the failure to perform a duty peculiar to him, the foreman, and specially imposed upon him as such foreman within the meaning of article 4560g, because it was a duty resting equally upon all the members of the bridge gang. The testimony in regard to this question leaves no doubt as to the duty of the foreman, although it also appeared that when a man was using tools and got through with them he was supposed to put them out of the way where a train would not strike them, and it was his business to do so. The evidence showed, in addition, that it was the special business of the foreman to see that the track was unobstructed on the bridge when a train was about to cross, and that, although the men were supposed to see that the track was clear, it was the foreman's business to supervise them and see that the men left a clear track as the train came on. This was his duty as foreman, and not as fellow workman; and the duty of care on the part of the workmen under him to keep the tools off the track when the train came on the bridge in no degree lessened the duty of the foreman to see that the men under him did as they

ought, and that a free and unobstructed track was left for the train. In other words, it was the special duty of the foreman, as such, to see that the men performed their duty.

The negligent act of the foreman did not arise in the performance of the duty of a mere servant, although each servant was under an obligation to be careful, but it was the negligent act of the vice principal in the performance of his duty as such. As it was the special duty of the foreman to see that the men performed their duty, his neglect so to do was the neglect of a duty which he owed, not as fellow servant, but as vice principal within the statute above cited.

Upon the second ground, we are of opinion that there was evidence sufficient to go to the jury upon the question of the negligence of the foreman in failing to discover the maul upon the bridge immediately prior to the passage of the train. The foreman himself swears that he did look along the track just prior to the coming of the train, and that he did not see any obstruction on the track, and did not see the spike maul in question. Whether he looked or not is, under the evidence, one of the material facts in the case. He says that he did, but we are of opinion that other facts proved in the case were of such a character as to make it proper to submit the question to the jury. The foreman's evidence was that of a somewhat interested witness. If the foreman did in fact neglect to perform his duty by looking over the track just prior to the coming of the train for the purpose of seeing that the bridge was clear of obstructions, it might be quite a serious matter for him in his future relations with the company. At any rate, no man is an absolutely disinterested witness where his testimony relates to the question of the performance or nonperformance of a duty which he owed on account of the position which he occupied. It was, therefore, a question for the jury as to what measure of credence should be given to his testimony. Of course, the mere absence of evidence that the foreman did his duty would not be equivalent to evidence, direct or circumstantial, that he did not, and it rested with the plaintiff to show negligence of the foreman for which the defendant would be liable.

But there are certain facts proved in this case which we think rendered it necessary to submit the question of negligence to the jury, notwithstanding the testimony of the foreman. We have here a bridge not more than 60 or 65 feet long,—an open top bridge, the surface of which was plain. The ties for the rails were the usual distance apart, and there was nothing on top of them except the rails themselves. The guard rails were 10 inches from the track and parallel with it, and they stood up about 4 inches above the ties. There was, therefore, nothing to obstruct or prevent the view of the length of the bridge by anyone at either end, and nothing to prevent the discovery of the maul if the glance of the individual were anything more than casual or formal.

The maul could not have been hidden between the track and the guard rails so as not to be above the track, for if the maul were lower than the track, the train could not have hit it, as it is perfectly clear that anything lower than the surface of the track could not be struck by the train. So it would seem quite obvious that if anyone in the position of the foreman had looked, it would have been possible for him to have discovered this maul if it were there. Was it there? Workmen had been using the maul on the bridge during the morning and a few moments, not more than ten or fifteen minutes, prior to the crossing of the train. The maul was struck by it and hurled with great force, sufficient to break the handle, against the plaintiff, who was standing near the east end of the bridge. The man who was known to have used the maul a few minutes before the arrival of the train says himself that he has no recollection of what he did with it. Now, whether the maul were left exactly on the bridge, or just off the bridge, and so near the track as to be struck by the passing train, it is not necessary to determine, because if it had been left in a position just off the bridge, and yet so near the track as to be struck by the train, the failure of the foreman to see it and have it removed was the same as if it had been on the bridge. The maul being left so that it was struck by the train and hurled against the plaintiff, the failure of the foreman to see it might have been found by the jury to be a negligent failure, and, it being his duty to see that the track was kept clear for the passage of trains, that failure was a neglect which was the proximate cause of the injury. To be sure, it was negligence on the part of the servant who left the tool there in the first place, but after such negligence had occurred the duty of the foreman arose, and he had plenty of time in which to perform it, to overlook the bridge where the track was and see that there was no obstruction for the passing train, and his failure to look, or, looking, to discover the obstruction, thus became the immediate and proximate cause of the injury which followed.

There is no other cause assignable for this injury than the fact that the train did strike the maul, and that fact is proved from the fact that it was thrown in the direction in which the train was going. Counsel for the defendant admits that the evidence shows that fact, but he avers that it does not appear that the maul was in such a position as to convict the foreman of negligence in not discovering it, and as to that fact counsel insists that the negligence of the foreman is disproved by the uncontradicted testimony.

The facts already stated rendered it necessary, in our judgment, to submit the question to the jury as to the negligence of the foreman, even although he testified that he looked and did not discover any obstacle on the bridge.

These two are the propositions particularly argued before

us. We do not see in them any ground for disturbing the verdict of the jury.

We have looked at the other exceptions taken in the course of the trial, and are of opinion that they do not show any error requiring a reversal of the judgment, and it is therefore affirmed.

GULF, C. & S. F. RY. CO. v. SHELTON.

(*Supreme Court of Texas, March 2, 1903.*)

[72 S. W. Rep. 165.]

Assignments of Error.

On appeal to the Court of Civil Appeals the assignments of error were that the trial court erred in charging that defendant had the burden of proving plaintiff's contributory negligence, and in refusing to charge that, if it appeared from plaintiff's own testimony that he did not exercise reasonable care, the jury should find for defendant. The assignment in the Supreme Court was that the instruction as to the burden of proving contributory negligence was calculated to lead the jury to consider only the evidence offered by defendant: *held*, that the assignments presented to the Court of Civil Appeals were different from the assignment presented to the Supreme Court, and that the action of the former court could not be reviewed.

Master and Servant—Existence of Relationship.

Where a switching crew, employed to do yardwork for one railroad, and paid by it, performed similar services at a connecting point for defendant, who paid the other company one-half the cost, and there was no evidence of the terms of the contract between the two companies concerning their joint business at that point, the crew were equally the servants of both companies, and defendant was liable for their acts to the same extent as if it had employed them.

Error from Court of Civil Appeals of Third Supreme Judicial District.

Action by J. W. Shelton against the Gulf, Colorado & Santa Fe Railway Company. Judgment in the Court of Civil Appeals (69 S. W. 653, 70 S. W. 359) affirming a judgment for plaintiff, and defendant brings error. Affirmed.

Alexander & Thompson and J. W. Terry, for plaintiff in error.

Finley, Etheridge & Knight, for defendant in error.

BROWN, J. On the 30th of March, 1900, Shelton purchased from the agent of the railroad company at Gainesville, Tex., a ticket to Los Angeles, Cal., over that road to Purcell, Ind. T., thence over the Atchison, Topeka & Santa Fe Railroad by way of Newton, Kan. At Purcell two of the cars belonging to the plaintiff in error were set out of the train, in one of which Shelton was seated. Upon arriving at Purcell, the station was properly announced, and the passengers left this car, except Shelton and another man. The switching crew employed by the Atchison, Topeka & Santa Fe Railway Company took charge of the train upon its arrival, and started to take it into the yards for the purpose of dropping out the two cars. Upon discovering Shelton and the other man in

the car, one of the crew who had charge of the train told them to get off the train, or they would be left. The night was dark, and the platform was poorly lighted, and when Shelton stepped off the train he fell, and received his injuries. The switching crew that took charge of the train were employed by the Atchison, Topeka & Santa Fe Railway Company to do the work for both companies in the yards at the place of connection, and did perform that work for both companies, being paid by the latter company. The defendant railroad pleaded contributory negligence on the part of Shelton, and the court, among other things, charged the jury as follows: "The burden of proving that plaintiff was guilty of contributory negligence devolves upon the defendant." The railroad company asked the court to give the following charge: "You are instructed, at the request of the defendant, that, while the burden is on the defendant to prove its defense of contributory negligence, that if it appears from the plaintiff's own evidence that in going back to sleep after being awakened and notified that Purcell was the next station, or that in jumping from the moving train in the dark, when he could not see where he was jumping, he did not exercise the care and prudence that a person of ordinary and reasonable care would exercise under like circumstances; you will return a verdict for the defendant." Judgment was entered against the railroad company, from which it appealed, and presented the following assignments of error:

"(10) The court erred in charging the jury as follows: 'The burden of proving that plaintiff was guilty of contributory negligence devolves upon the defendant.'"

"(16) The court erred in refusing to give to the jury defendant's ninth special instruction, which properly instructed the jury with respect to the burden of proof on the question of contributory negligence."

"Proposition: Plaintiff's own evidence disclosed his contributory negligence, and the burden of proof should properly have been fixed by the trial court upon the plaintiff."

The application for writ of error presented the question in the following form: "The honorable Court of Civil Appeals erred in overruling the tenth and sixteenth assignments of error, which complained of the charge of the trial court, 'burden of proving contributory negligence devolves upon the defendant,' and of the refusal to give defendant's special charge No. 9, because appellee's own testimony tended strongly to show—if it did not completely establish—his contributory negligence as being the proximate cause of the injury; and on this state of the evidence the burden of proof was improperly placed upon the defendant by the trial court, as such charge was calculated to cause the jury to believe that in considering this issue they were not entitled to consider the evidence offered by plaintiff, and herein the Court of

Civil Appeals erred in holding that appellant's charge 9 was properly refused."

We have stated only such facts as are necessary to understand the questions decided by this court.

A writ of error was granted, because this court was of opinion under the facts that the trial court erred in charging the jury that the burden of proving contributory negligence on the part of the plaintiff rested upon the railroad company. In this court the proposition is presented that the charge was calculated to lead the jury to consider only the evidence offered by the defendant on the subject of contributory negligence, while in the Court of Civil Appeals (69 S. W. 653) the proposition was that the error consisted in misdirecting the jury as to the burden of proof. The defendant in error objects to the consideration of the assignment as here presented, because it was not assigned and presented to the Court of Civil Appeals.

We are of opinion there is a marked difference in the question presented to the Court of Civil Appeals and that presented to this court. The object in requiring assignments to be made accompanied by propositions of law is to direct the mind of the appellate court to the very point upon which it is claimed the trial court committed the error; and when a party has thus presented his case, and specified his objections to the ruling of the trial court, he thereby waives any other objection which might have been presented under that assignment of error. H. & T. C. Ry. Co. v. Rutherford, 94 Tex. 518, 62 S. W. 1056. In the case cited this court said: "As specific objections were made to the instruction in the brief, those not so specified were waived, and this court can only review the action of the Court of Civil Appeals upon the point properly presented to it." The Court of Civil Appeals could not have understood that the plaintiff in error was, by the proposition contained in its brief, attempting to raise the same question that is presented in the application. We therefore conclude that we cannot review the action of the Court of Civil Appeals under the assignments presented in the application.

It is contended by the plaintiff in error that the persons who had charge of the train at the time Shelton was injured were the servants of the Atchison, Topeka & Santa Fe Railway Company, for whose acts plaintiff in error is not liable. The facts show without dispute that the switching crew which had charge of the train, one member of which gave the direction to the plaintiff to leave the car, were employed by the Atchison, Topeka & Santa Fe Railway Company; that they performed the yard work for both companies at the point of connection at Purcell, and were paid by the company which employed them, the plaintiff in error paying to the other company one-half of the cost. There was no evidence of the terms of the contract between the two railroads concerning

their joint business at that station. Under this state of facts the men of the switching crew were equally the servants of both companies, and the plaintiff in error was liable for their acts to the same extent as if they had been employed by it. G., C. & S. F. Ry. Co. v. Dorsey, 66 Tex. 148, 18 S. W. 444.

We have examined all of the assignments of error presented in the application, and find no error which requires a reversal of the judgment. It is therefore ordered that the judgment of the district court and of the Court of Civil Appeals be in all things affirmed.

RANDOLPH v. NEW YORK CENT. & H. R. R. CO.

(*Court of Errors and Appeals of New Jersey, June 15, 1903.*)

[55 Atl. Rep. 240.]

Injury to Servant—Duty of Master.*

The duty of the master to inspect apparatus and appliances is a duty to exercise reasonable care, only, in making the inspection, and requires only the making of such tests and examinations as are reasonably practicable.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Ernest S. Randolph against the New York Central & Hudson River Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Vredenburgh, Wall & Van Winkle, for plaintiff in error.
Horace Allen and Warren Dixon, for defendant in error.

SWAYZE, J. The plaintiff's action is brought to recover damage caused by the sudden stopping of a freight train upon which he was employed as a brakeman. The sudden stopping was due to the bursting of a piece of hose connecting the air brakes between the cars. The train started from Weehawken, and the accident happened about 50 miles away. The train had made four stops, at each of which the air brakes had been successfully applied. The negligence complained of was the failure of the company to make a proper inspection of the hose. It appeared that the inspector at Weehawken had made the usual inspection before the train left, except, perhaps, a failure to handle the hose couplings between the cars. This inspection consisted in passing along the train to see that it was equipped with air brakes and that nothing was broken, and, after the air was turned into the train line, opening the relief valves on each car, to learn if the air was passing through and if each car was being charged; then opening the angle cock at the rear end, and

*As to the care due an employee, see foot-note appended to Atchison, T. & S. F. Ry. Co. v. Kingscott (Kan.), 4 R. R. R. 528, 27 Am. & Eng. R. Cas., N. S., 528.

blowing the air through; then passing back to the head end of the train, and having the engineer apply the air, to see that the brakes were working, at the same time listening and watching for leaks, to see if any hose showed signs of weakness. We are satisfied by the testimony of Colson that this train was inspected in this manner before leaving Weehawken. His testimony was criticised as testimony not of the facts of the case, but of his general custom as required by the rules of the company, but we think such is not a fair construction of the language used by the witness. This method of inspection was the ordinary method used by the railroads having their termini in Jersey City, except that the chief car inspector of the Central Railroad testified that the inspector on that railroad takes hold of the hose before he couples it. It does not appear in the case that the actual handling of the hose would have disclosed the defect which caused the accident, and we think this difference is immaterial. The only evidence upon the part of the plaintiff that any other inspection was necessary, or that the defect in the hose could have been discovered by inspection, was the testimony of the witness Olsen, a mechanical engineer and a professional tester of materials. He admitted that he could not speak with authority as to the inspection made by railway companies. He testified that an examination would show, to a person who understood how to examine, and was thoroughly familiar with the subject, whether a hose would be likely to break or not; and, when asked what kind of an examination would show that, he answered, "By means of a glass [evidently meaning a magnifying glass], by means of water, by means of pressure;" and his testimony indicates that the pressure to which he refers is a pressure of several hundred pounds. The ordinary train pressure is 70 pounds. The hose itself in this case was a standard hose, made by manufacturers of good repute, and was their best brand. It was made originally in October, 1898, apparently for the Baltimore & Ohio Railroad Company. The ordinary life of a hose of this character is shown to have been from three to four years. The accident happened May 14, 1901.

The duty of the employer is to exercise reasonable care and skill in making inspections and tests at proper intervals. Steamship Co. v. Ingebregsten, 57 N. J. Law, 400, 31 Atl. 619; Atz v. Manufacturing Co., 59 N. J. Law, 41, 34 Atl. 980, approved in Baldwin v. Atlantic City R. Co., 64 N. J. Law, 232, 45 Atl. 810. This duty is satisfied if the master uses "such reasonable precaution as a man of ordinary prudence would use for the safety of himself and his workmen under the circumstances." The master is not bound to exercise extraordinary care or the highest diligence. We think this duty is satisfied if the master exercises the same care that is ordinarily exercised in the same matter, and that one engaged in practical operations is not bound to make either the

inspections or the tests which may be possible in a laboratory, or upon a small scale, and outside of the practical conduct of affairs. The evidence leads us to the conclusion that the ordinary and reasonable inspection did not require the examination with a glass or by means of water suggested by Olsen, nor do we think that it required that the hose be subjected to the extraordinary pressure which he suggested. It is only when the hose appears doubtful that the test of extraordinary pressure is applied in actual practice. Olsen examined the hose at the trial with a glass which magnified three or four hundred times, and discovered cracks in the outer coating of the hose, which indicated to him that the hose had become of so doubtful a character that it ought to have been further tested by subjecting it to great pressure; but there is no proof that the ordinary practice of railroads requires the use of a magnifying glass to discover cracks in the hose. Such a test seems to us too stringent to expect in actual practice. This hose was subjected to the highest pressure expected to be applied to it in ordinary use, and no better practical test is suggested than the actual application of the train pressure to the hose. It would be manifestly impracticable on each occasion to subject the hose to the test suggested by Olsen as likely to lead to the discovery of the particular defect existing in this hose. Moreover, the accident to the hose which happened in this case was one which was liable to happen unexpectedly; and, to guard against such accidents, it was the duty of the trainmen themselves, of whom the plaintiff was one, to make inspections as often as possible during the trip. For the purpose of replacing hose which might become defective during the trip, extra pieces were supplied, and kept in the caboose at the end of the train. If the defect was discovered by reasonable inspection with the naked eye, then the trainmen ought to have discovered it at one of the several stops before the accident, and to have replaced the hose with one of the extra pieces from the caboose. The failure to do so was the negligence of a fellow servant, for which the defendant is not responsible to the plaintiff. If, however, the defect was not discoverable by reasonable inspection with the naked eye, then there is a failure to establish negligence in the inspector at Weehawken. In either view, the plaintiff cannot recover.

The judgment is reversed, with costs, and the record must be remitted for a new trial.

MILLER v. CENTRAL R. CO. OF NEW JERSEY.

(Court of Errors and Appeals of New Jersey, June 15, 1903.)

[55 Atl. Rep. 245.]

Injury to Employee—Negligence of Fellow Servant.

Where a flagman of a stalled railway train, whose duty it is to signal

an approaching train, fails to perform that duty, the railway company is not responsible to a fellow servant of the flagman for such neglect.

Fellow Servants.*

A flagman of one train and the engineer of another train of the same company are engaged in a common employment, and are fellow servants, within the rule exempting the master from liability.

Syllabus by the Court.

Error to Supreme Court.

Action by Elizabeth Miller, executrix of William Miller, deceased, against the Central Railroad Company of New Jersey. Judgment for defendant, and plaintiff brings error. Affirmed.

Irwin W. Schlich, for plaintiff in error.

George M. Shipman, for defendant in error.

STAYZE, J. This is an action by the executrix of William Miller to recover damages for his death. The decedent was the engineer of a passenger train upon the Central Railroad, and was injured by a collision with the rear end of a coal train. The collision occurred about 6 a. m. December 3, 1900, near Stocker's Crossing, about three miles from Phillipsburg. The coal train had been running very slowly, apparently on account of a wet and slippery rail. It had taken over an hour to travel the three miles between Phillipsburg and the point of collision. There was testimony to show that it was going at the rate of about two miles an hour when the collision took place. Just before the collision the engineer gave the signal for the flagman, who was riding on the pusher engine of the coal train, to go back for the purpose of flagging the approaching train, and this signal was repeated. The flagman did not respond promptly to the signal, and the conductor of the coal train found him, after the second signal had been given, in the tank of the engine, and, in the witness' own language, "chased him back." He had gone some 7 or 8 rail lengths—the estimates of distance vary from 100 to 160 feet—when Miller's train came in sight. It was then too late to avoid the collision. It appeared that the train dispatcher of the company at Jersey City had been anxious about the coal train, and had inquired frequently, just prior to the accident, of the telegraph operator at Bloomsbury, where the coal train was to run on a siding, if the coal train had been seen.

The trial judge ordered a nonsuit, holding that the proximate cause of the accident was the negligence of the flagman to signal Miller's train, and that the flagman was a fellow servant. We agree with the trial judge. It can make no difference in the case to what cause the stalling of the coal train is attributable. Such stalling was an ordinary occurrence. It was to provide against such accidents as happened

*As to whether trainmen of different trains are fellow servants, see foot-note appended to Pittsburg, etc., Ry. Co. v. Gipe (Ind.), 6 R. R. R., 383, 29 Am. & Eng. R. Cas., N. S., 383.

in this case that the flagman was required to go back, to signal an approaching train.

The counsel for the plaintiff in error argued that the company was negligent. (1) because it failed to have a sufficient number of officers at its managing head quarters in Jersey City to conduct its business; (2) because it failed to notify the decedent when he left Phillipsburg that the coal train had not reached Bloomsbury, 12 miles distant, so that he might run around the coal train or look out for it; and (3) because the flagman was an ordinary brakeman, only.

As to the first allegation of negligence, it is enough to say that there is no evidence to show that the company did not have the ordinary force necessary for the conduct of its business. The train dispatcher at Jersey City is shown to have been alert, and to have made frequent inquiries for the location of the coal train.

As to the second allegation of negligence, we think it would be impossible to sustain a verdict based upon the idea that reasonable care on the part of the railroad company required it to notify the decedent before he left Phillipsburg that the coal train had not yet reached Bloomsbury. The system of warning signals which had been adopted by the railroad company seems, from the evidence, to have been known, and must necessarily have been known, to the decedent. That system made no provision for signals at the early hour in the morning at which this accident happened, between Phillipsburg and the first telegraph station east, at Bloomsbury, other than the ordinary system of warning by sending back a flagman from the train in advance a sufficient distance to warn the engineer of the approaching train. It was argued that this flagman was not bound to go back if his own train was moving even at as slow a rate as two miles an hour, but the evidence shows clearly that it not only was his duty to go back, but that he disregarded the repeated signal for that purpose from the engineer, and finally was "chased back" by the conductor. The evidence leaves no room for doubt that, if he had performed his plain duty, the accident would not have happened.

While it is the duty of the railroad company to exercise reasonable care in providing a system of signals, the duty to carry out the system by giving the signals is the duty of the employee, incident to his employment, and for the failure of the employee to perform that duty the employer cannot be held responsible by another employee engaged in the common employment.

The weight of authority in other jurisdictions holds that the employees of a railroad company on different trains are engaged in a common employment. Northern Pacific Railroad Co. v. Charless, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999; Oakes v. Mase, 165 U. S. 363, 17 Sup. Ct. 345, 41 L. Ed. 746; Martin v. Atchison, Topeka & Santa Fe R. Co.,

166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051; Northern Pacific Railroad Co. v. Poirier, 167 U. S. 48, 17 Sup. Ct. 741, 42 L. Ed. 72; Peaslee v. Fitchburg Railroad Co., 152 Mass. 155, 25 N. E. 71; Healy v. N. Y., N. H. & H. R. R. Co. (R. I.) 37 Atl. 676. We think this is a correct application of the general rule exempting the master from liability for the negligence of a fellow servant.

It is urged that the railroad company was negligent in employing an incompetent flagman, or in imposing the duties of a flagman upon a rear brakeman. The answer is that there is no evidence in this case that the flagman was incompetent, except this single act of negligence, and there is nothing to show that it was improper to intrust the rear brakeman with the duty of the flagman. On the contrary, the evidence shows that that was the ordinary course of business. The duty of a flagman required fidelity, only, and not special skill.

The judgment should be affirmed.

BRANZ v. OMAHA & C. B. RY. & BRIDGE CO.

(Supreme Court of Iowa, May 15, 1903.)

[94 N. W. Rep. 906.]

Injury to Inexperienced Employee—Assumption of Risk—Coupling Cars.

An ordinary laborer for a railroad, working with other laborers of the same class, who had never had any occasion to make a coupling, nor any reason to suppose that he would be required to do so, did not assume the risk of defects in a car or a drawhead of which he had no reason to know and had never observed, when suddenly called by a foreman to make such coupling.

Question for Jury.

In an action for servant's injuries caused by a defective coupling, where the evidence was conflicting as to whether the usual safe method of making such couplings was by going between the cars or not, the question as to what was the usual safe method was for the jury.

Appeal from District Court, Pottawattamie County; A. B. Thornell, Judge.

Action to recover damages for personal injuries received by plaintiff while in the employ of defendant. Verdict for plaintiff, and from judgment thereon defendant appeals. Affirmed.

Wright & Baldwin, for appellant.
F. W. Miller, for appellee.

McCLAIN, J. Plaintiff was injured while coupling an electric motor car to a flat car. The employee in charge of the motor car, which was standing separated a short distance from the flat car to which it was to be coupled, started the motor car back towards the flat car with a sudden jerk after the plaintiff, who was trying to make the coupling, had stepped between the cars for the purpose. The momentum of

the motor car was such that, although plaintiff successfully made the coupling, the cars came so close together before he could retreat that he was injured.

No complaint is made of rulings on the introduction of testimony, nor as to the rules of law stated in the instructions to the jury, but counsel for appellant urge that there was no evidence to support the allegations of negligence, and that without conflict in the evidence it appeared that plaintiff was guilty of contributory negligence. They contend that the case should not have been submitted, at least as to some of the allegations of negligence, and that, after the verdict was returned for plaintiff, it should have been set aside on motion for new trial as without support. The negligence alleged was in using a defective motor car, which would not start at all until sufficient power was applied to make it start quickly, and with a jump, the claim of plaintiff being that the coupling of the motor car to the flat car was rendered peculiarly hazardous by reason of this fact; also that the drawhead attached to the motor car, by means of which it was to be coupled to the flat car, was defective by reason of a brake on one side in the surrounding collar, so that, when the coupling was made, the drawbars, instead of forming a stiff connection, preventing the motor from coming so near to the flat car as to injure plaintiff, standing between them, gave way towards the plaintiff, and allowed the motor and car to come so close together as to crush him. There was evidence tending to support each of these allegations. Witnesses testified that the motor car was out of order in the respect alleged, and had been in bad condition in this respect for some time before the accident, and while a witness for the defendant, who himself said that the car was in bad condition on the morning preceding the accident, testified that he had put it in good condition, his testimony was so far in conflict with that of the other witnesses as to what he did that the jury may well have found that the bad condition of the car was not remedied. As to the defective drawhead, the question whether the defect had any connection with the accident seemed to depend, under the evidence, on whether a gooseneck link was used in making the coupling. There is certainly some evidence tending to show the use of such link, and that, if that kind of a link was used, the defect in the drawhead would lead to just the kind of accident which happened. The defect in the drawhead was shown to have existed for such length of time that defendant ought to have been aware thereof; and, indeed, it appears that its employee whose duty it was to keep the cars in order was aware of it, and allowed the car to be used without remedying the defect.

It is argued for appellant that plaintiff assumed the risk of the defective car and the defective drawhead. But plaintiff was not engaged especially in the business of coupling cars. He was an ordinary laborer, working with other laborers of

the same character. He had never before had occasion to make a coupling, nor had he any reason to suppose that he would be required to do so. In this particular instance he was asked by the foreman to make the coupling because he was nearer to the place where it was to be made than any of the other employees. He had no reason to know of defects in the car or the drawhead which were of any importance to him in his employment, and it does not appear that he had ever observed either of them. At the very time the coupling was made he had not a chance to know, before the danger arose, either that the motor was defective or that the drawhead was broken. Certainly, under these circumstances, there could be no assumption of risk.

As to the contributory negligence of plaintiff, there is evidence tending to show that he attempted to make the coupling in a reasonably safe manner, and in the manner in which such couplings were usually made. A witness for defendant testified that the coupling might have been made by plaintiff without going between the cars, and that such was the proper method. But there is evidence to the contrary as to the usual and safe method of making such couplings, and the question was for the jury. The same witness for defendant further testified that a proper method of making such coupling was to wait until the motor and flat car were near enough together to enable the coupling to be made and the motor had come to a stop. But here again the testimony was not at all conclusive. While counsel for defendant attempted to show that plaintiff had been instructed as to the proper method of making such coupling, and had been warned against the method which he employed, it is by no means shown beyond controversy that any such instruction or warning ever reached plaintiff. As above suggested, the making of couplings was not a part of his ordinary employment, and he had no occasion to seek instruction, as he had no reason to expect that he would be called upon to render such service.

After a careful reading of the entire record, we are satisfied that there was evidence tending to sustain the contention of plaintiff under the issues on which the case was submitted, and that there was no error in refusing to grant a new trial.

Affirmed.

BROWN v. PONTIAC, O. & N. R. CO.

(*Supreme Court of Michigan, May 29, 1903.*)

[94 N. W. Rep. 1050]

Carriers of Live Stock—Injury to Shipper Unloading Car—Delivery of Car—Question for Jury.

Where a shipper of live stock agrees with the company's agent that when the car reaches its destination it shall be backed down to a cattle chute, which is in fact done, it is a question for the jury whether the

shipper, injured while unloading the car, had the right to assume that the car had been delivered to him.

Same—Delivery of Car to Shipper.

Where a shipper of live stock agrees with the company's agent that on reaching its destination the car shall be backed down to a cattle chute, which is in fact done, for the purpose of delivery, it constitutes a delivery, though there is no formal turning over of the car by the conductor to the shipper.

Same—Same.

Where a car containing live stock, on reaching its destination, is backed down to a cattle chute, which was the only place where the stock could be unloaded, and detached from the train, it is a question for the jury whether a delivery to the shipper, injured while unloading the car, was intended.

Contributory Negligence—Question for Jury.

Evidence in an action by shipper for injuries received while unloading the car examined, and *held* to warrant submitting to the jury the question of plaintiff's contributory negligence in failing to observe the approach of the train which caused the injury.

Error to Circuit Court, Tuscola County; Watson Beach, Judge.

Suit by Frank Brown against the Pontiac, Oxford & Northern Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

D. S. McClure and C. F. Gates, for appellant.

John H. Patterson, for appellee.

MONTGOMERY, J. This is an action for negligent injury. The plaintiff received the injuries cf which he complains while attempting to unload from a car on the defendant's side track at Kingston two head of cattle and one calf, which, with household goods of plaintiff's, constituted the shipment in said car, which had on the day in question been shipped from Leonard to Kingston. While plaintiff was so engaged in unloading the car, the defendant's train backed up against it, was coupled to it, moved forward, and caused the injuries which plaintiff sustained. Plaintiff's testimony tended to show that, in the position in which he was at the time the train was backed against the car which he was unloading, it was impossible to extricate himself until the forward movement of the car threw him to the ground and caused the injuries complained of.

The circuit judge, at the conclusion of the plaintiff's case, directed a verdict for the defendant. We are therefore to consider the case as made by the plaintiff's testimony, placing the most favorable construction upon the same, as we are bound to do. It appears by this testimony, in addition to the circumstances of the injury itself, as above detailed, that on the day in question the plaintiff shipped this car load of household goods and live stock from Leonard to Kingston. During the day, and while the car was in transit, the plaintiff called upon the station agent at Kingston, and arranged with the agent that the company should place the car, on its arrival, at the point where the injury occurred;

that after the car was so placed the plaintiff should unload the live stock, and should then move the car back further south, and remove from it the balance of the property. When the train reached Kingston it was backed up to the cattle chute—the place designated by the agent in the arrangement made in advance—the brakeman observing from the opposite side of the car and looking underneath it that the door of the car was opposite the chute; and, replying to plaintiff's inquiry as to whether it was all right that it was, he cut off the car, left it there, and pulled the train forward. It was after this had occurred that the plaintiff attempted to unload the car. The circuit judge's direction proceeded upon the view that, as the control of the train was with the conductor, there had been no delivery of this car; that no one having authority had said to plaintiff, in substance or effect: "Here is the car. We deliver it to you." The fault in this view is that it takes no account whatever of the previous arrangement with the station agent. It was not so much a question of who had control of the train while in operation. The fact appeared to be that the car had been located at the point previously agreed upon between the plaintiff and the station agent having control of the business at that point, and we think it was a question for the jury as to whether the plaintiff, in view of this previous talk, had the right to assume that this car was so placed with the purpose of delivering it to him. If it were, it was certainly a delivery.

But even apart from this previous arrangement, we think it would be a question for the jury as to whether the backing of this car down to the cattle chute, locating it there, detaching the train from it, and leaving it in position, was not intended as a delivery, in view of the fact that the car contained live stock, which it must have been known to the conductor should be unloaded at this station, and could be unloaded at no other point than the cattle chute. The inference would not be open that this car was not so located at the initiative of the brakeman who happened to be present at that part of the train, and who placed it. On the contrary, the fair inference would be that the master of the train had directed this to be done.

In the brief of defendant's counsel the claim is made that the plaintiff was guilty of contributory negligence; it being contended that, standing on the east side of the car, where plaintiff was located, the car could be seen coming from the north. But the plaintiff's testimony shows that from the point where he was standing on the gang plank, and close up to the car door, an approaching car could not have been seen. We think the question of plaintiff's contributory negligence was, at the most, a question for the jury.

Judgment will be reversed, and a new trial ordered. The other Justices concurred.

SCOTT *v.* EASTERN RY. CO. OF MINNESOTA.

(*Supreme Court of Minnesota, July 3, 1903.*)

[95 N. W. Rep. 892.]

Injury to Employee—Rules of Company—Reasonableness—Questions of Law and Fact.

All rules which impose the duty of car inspection upon conductors and brakemen must be reasonable, and must be reasonably construed. Whether they are reasonable is not for a jury, ordinarily, but is to be determined by the court as a question of law.

Same—Same—Same—Inspection of Car Steps.

A rule which obliges brakemen to examine and know for themselves that steps of the cars in their trains are in proper condition, and which requires conductors to see that brakemen perform the duty of necessary inspection of such steps—ample time being given to inspect and to see that there is such inspection—is a reasonable rule, as a matter of law.

Same—Contributory Negligence—Violation of Rules.

If an employee of a railway company, of ordinary intelligence, is injured by reason of his disregard or disobedience of a reasonable rule issued by the company, of which he has been properly notified, ample time and opportunity being given to observe and obey, he cannot recover, as against the company, for an injury received, when his violation of the rule is the proximate cause thereof. He will, as a matter of law, be deemed guilty of contributory negligence.

Master and Servant—Rules—Public Policy.

A rule of the character above considered is not contrary to public policy, nor can it be held to be obnoxious to the principle of law which requires the master, in the exercise of reasonable care, to furnish and maintain safe and proper appliances and instrumentalities for the use of his servants in the work assigned to them.

Case at Bar.

Held, in the case at bar, that plaintiff, a freight conductor, cannot recover in this action for injuries received while in defendant's employ; his violation and disregard of a reasonable rule being the proximate cause of the injury.

(Syllabus by the Court.)

Appeal from District Court, Ramsey County; Olin B. Lewis, Judge.

Action by Michael E. Scott against the Eastern Railway Company of Minnesota. Verdict ordered for defendant. From an order denying a new trial, plaintiff appeals. Affirmed.

Samuel A. Anderson (Percy D. Godfrey, of counsel), for appellant.

W. E. Dodge, J. A. Murphy, and Heber McHugh, for respondent.

COLLINS, J. Plaintiff, at the time he received his injuries —May 22, 1902—was in the employ of defendant company as a freight conductor. He had held this position for about one year, and for about three years prior thereto had worked for defendant as a brakeman. At the time of the accident he had charge of a work train at Hughson station, some 25 miles west of the West Superior terminal. With his crew he made

his headquarters at the terminal; running out to Hughson with the locomotive and a caboose car in the morning, and returning to the yard at night. On the 20th of May he discovered that the steps upon the car then in use were in bad order, and notified his superior officer. When reporting for duty on the morning of the 21st, he was notified by the yardmaster to take another specified car, which he did; having the right to assume that it had been inspected while at the terminal. The locomotive and car then proceeded to Hughson, where the latter was sidetracked, and at the end of the day plaintiff and his crew returned with it to Superior. The next morning they again went to Hughson, and, on reaching there, plaintiff left the car, and proceeded to the depot for orders. Meantime the locomotive, with the car attached, went westerly a short distance, for the work train. As it returned, plaintiff signaled the engineer, the train slowed down, and then, in attempting to board the car while it was running about five or six miles an hour, he lost his footing, and was thrown under the wheels. The immediate cause of the accident is admitted to have been a step in bad order, and there was an abundance of testimony to justify a finding that the defect existed when plaintiff was directed to take the car, on the morning of the 21st. Its bad condition had been overlooked by the general inspector. Because of this failure to inspect, defendant's negligence must be conceded. But it was claimed that, according to his own admissions, plaintiff was guilty of gross contributory negligence which would prevent a recovery by him in this action. At the conclusion of the trial in the court below, a verdict was ordered and returned for defendant, evidently upon this ground. The appeal is from an order denying plaintiff's motion for a new trial. The negligence attributed to plaintiff, and relied upon, is an admitted disregard of rules well known to him, and promulgated by defendant company for the government of its employees. As a conductor, plaintiff had full charge and absolute control of his train, and under the rules the brakemen were subject to his direction and orders. On the morning the car was assigned to him, and again on the morning he was injured, he reported for duty after daylight, and, in accordance with the rules, 30 minutes before train time, presumably that he might make proper preparations. He personally tried the brakes upon the car on both mornings before starting, and found them to be in good order, according to his testimony. He was familiar with all of the rules, including a special rule or notice furnished to and read by him, and returned with his written acknowledgment, in January, 1901. He admitted at the trial that he knew and fully understood every one of them. He made no inspection of the car on either morning, except as we have stated; and he did not ascertain in any manner whether or not the two brakemen under his immediate control had examined the steps

upon the car, or had performed any other act of inspection. It was daylight when he was injured, and he testified that he did not look to see where he was stepping when he attempted to jump on the car, because he was watching his hands. The only reason assigned by him at the trial for failing to obey the rules, which required him to make an examination of his car, and also to ascertain whether or not his brakemen had inspected it, was that he did not consider it necessary so to do. By defendant's rule 152, conductors were made responsible for the safety, prompt movement, and proper care of their trains, and for the conduct of the men employed thereon. By rule 153, they were required to be familiar with the duties of all employees upon the trains, including brakemen, to enforce the rules applicable to them, and to report any insubordination, neglect of duty, or misconduct. By rule 162, they were required to know that their cars had been inspected by trainmen. Any omission on the part of the inspectors was to be regarded as a danger to the train, to be reported at once to the superintendent. By rule 164, they were required to "examine the brakes, couplings, safety chains, signal cords, etc., so as to know, as far as practicable, that everything is in order before starting," and were directed to require brakemen to aid in examining trains. By rule 202, the latter, while on trains, were under the direction of their conductor. By rule 203, brakemen were required to examine and know for themselves "that brake shafts and attachments, ladders, running boards, steps, handholds, and other parts and mechanical appliances, which they are to use, are in proper condition, and if not, to report them to the proper parties that they may be put in order before using." On January 29, 1901, the special rule or notice before mentioned was printed and forwarded to every operative upon the road, reading as follows, in so far as is important here: "Every employee of this company is hereby warned that before exposing himself, or his fellow employees, to danger, it will be his duty to examine the condition of all machinery, tools, cars, engines, trucks, tracks or appliances that he is required to use in the performance of his duties, satisfying himself so far as he reasonably can, that they are in safe working order. * * * It is the right and duty of every employee to take sufficient time to make such examinations, and to refuse to obey any order which exposes himself or his employees to danger. N. B. This notice is additional to the book of rules, bulletins and other instructions, and does not rescind, cancel or modify the same."

Attention is now called to a few of the salient features of this case: (a) That when the accident happened the plaintiff had worked upon defendant's trains three years as a brakeman, and one year as a conductor, under the rules. (b) That in compliance with a rule he had reported for work on the morning of the 21st, when he first received this car, and

again on the morning of the 22d, a half hour before train time, presumably that he might have ample time in which to prepare for his trips; that he had but 25 miles to run to Hughson; and that no haste was required of him in the performance of any of his duties. (c) That the special rule or notice expressly provided that it was his right and duty to take sufficient time to make all necessary examinations and inspections of each car in his train. (d) That he had but one car to inspect until he reached Hughson, and at this point a very small work train was placed in his charge. (e) That all work was done and that the accident happened in broad daylight, after plaintiff had used the car more than 24 hours. (f) That the defect in question was easily seen—a casual glance would have discovered it—and that car steps are designed for the use of persons whose business it is to get on and off the train, and that the good order of each step is of the greatest importance, not only to employees, but to the traveling public.

The position of defendant's counsel is that plaintiff, as a conductor, was under obligation to discover for himself the bad condition of the step, or to see that his brakemen made an inspection which would have disclosed the defect, and that his failure to comply with the rules well known to him wholly relieved their client from liability on account of plaintiff's injuries. They concede the rule of law which requires the master to exercise reasonable care to furnish and maintain safe and proper appliances and instrumentalities to his servants for use in the work assigned to them, and also that a master cannot by any agreement compel a servant to assume all risks of employment, or to release him from liability in case the servant is injured by dangerous defects in appliances and instrumentalities, which could have been discovered by proper examination or inspection. But counsel for plaintiff rely wholly upon this principle; taking the ground that a master cannot impose any rule upon his servant which will directly or indirectly militate against the liability arising out of their relation, or which will contravene or encroach upon the doctrine that a servant may assume, and may safely act upon the assumption, that a proper examination and inspection has been made by or in behalf of the master. They contend that there has been a well-settled distinction made in the cases, and a classification of rules relating to the subject, which supports their claim that the rules relied upon in this case were designed to relieve the defendant company from its common-law liability, and for that reason such rules are prohibited and forbidden to the same extent as would be a direct contract with the servant. A careful examination of the cases cited in support of this claim fails to convince us that there has been any such classification or distinction in respect to rules, or that, upon principle, any should be made.

It is settled by the adjudicated cases that it is the right

and duty of a master engaged in a hazardous business, such as railroading, to promulgate rules for its orderly and safe management, and thus to not only protect the traveling public, but to reduce the risks assumed or encountered by all employees. All rules which impose duties (such as car inspection) upon servants must be reasonable, and must be reasonably construed. Whether they are reasonable is not for a jury, ordinarily, but is to be determined by the court as a question of law. Bailey, Per. Inj. § 3325. Some of the authorities go so far as to hold that servants cannot be permitted to dispute the reasonableness of rules and regulations prescribed for their conduct by the master, but must implicitly obey. It is further and almost universally held that disobedience by a servant of reasonable rules and regulations, of which he has notice, will defeat recovery in case he is injured because of such disobedience. In this state we have recognized this doctrine to its full extent in Green v. Railroad Co., 85 Minn. 318, 88 N. W. 974, and very recently in Nordquist v. Railway Co., 95 N. W. 322. At the time of this accident it was the duty of the conductor, under defendant's rules, to examine the car, or to cause it to be examined by his brakemen, and to reject it if, in his judgment, it was unsafe; and it was his right and duty, under the special rule of 1901, to take ample time to see that examination and inspection were made. While the company required other inspection, by men especially employed for that purpose at the terminals, it imposed the additional duty upon trainmen, thus to further secure safety and immunity from injury not only to men upon whom this duty devolved by reason of the rules, but for the benefit of other employees and the traveling public. The effect of such rules as these was to notify conductors and brakemen that, to some degree, they must be on their guard against injury from the occasional negligence of other servants specially charged with the performance of the duty of inspection in the master's behalf. One of these rules called special attention to car steps; to the fact that they might be out of repair, that the work of examination might not be faithfully performed by regular inspectors, and that, by its terms, further and other inspection was required of servants who had occasion to use the same while at work. We cannot conceive of a more reasonable rule than one which requires every trainman to see that car steps which are hastily and constantly used by him, and by every traveler, in going in or out of the cars, are in good order, or of a more salutary and needed rule than one which compels all conductors to see that this work of inspection is performed by their subordinates. It is because such a rule is reasonable and just that it has been held, almost without exception, that a failure to examine and inspect steps and other parts and adjuncts of the cars will prevent recovery in case a servant is injured by reason of his own neglect to obey and observe;

the servant, of course, having been properly notified of the rule. So the universally established doctrine is that if an employee, of ordinary intelligence, is injured by reason of his disobedience or disregard of reasonable rules and orders issued by the master, and brought to his attention in ample time, and opportunity being given in which to obey, he cannot recover, as against the master, for an injury received, when a violation of a rule is the proximate cause of his injury. He will, as a matter of law, be deemed guilty of contributory negligence. Nor do the cases relied upon by counsel for the plaintiff support a contrary view. In fact, the doctrine above stated is affirmed in several of the cited cases, where similar rules were under consideration. For instance, Railway Co. v. Orr, 91 Ala. 548, 8 South. 360—a case arising out of the failure of a freight brakeman to properly fasten an end gate of a gondola car. He had disregarded and disobeyed a rule of inspection. The gate was unfastened, and fell down as he attempted to step upon it when boarding the train, causing his death. It was stated in the opinion that it was the duty of the master to furnish and maintain suitable material and appliances for the prosecution of its business, and, in the absence of notice to the contrary, a servant had the right to presume that his employer had complied with his duty in this respect, unless the character of the employment was such as to devolve upon the servant the duty of examination of the material and appliances. But, said the court, "if such was the duty of the employee, and he assumed that they were in proper condition when they were not, and the injury arose from his own failure in this respect, he would be guilty of contributory negligence." Another case cited is Railroad Co. v. Graham, 94 Ala. 545, 10 South. 283—a coupling case; a freight conductor being killed on account of a broken drawhead. This is a much stronger expression against the contention of plaintiff's counsel, for it was expressly held, when speaking of a rule similar to defendant's No. 164, that, "so far as rule 140 imposes the duty upon employees to examine for their own safety the condition of the car, engines, and machinery, etc., before using them or exposing themselves on or with the same, so as to ascertain, as far as reasonably can be done, their condition and soundness, it is reasonable and proper." And also: "It cannot be expected of car conductors or brakemen to make the same careful examination, and to be able to discover defects to the same extent, as that expected and required of the master, or person intrusted generally with this duty for the public safety or safety to employees; but the character of the general duties to be performed by conductors and brakemen is such that they necessarily become more or less familiar with the appliances and machinery constantly in their use and under their supervision, and know, to some extent, when they are not in proper condition for safe use. To the extent of their information, and the opportunities

afforded to make such examination, consistent with their other duties and the circumstances attending, they should observe and obey the rule." The gist of the decision was that, if disregard of a reasonable regulation requiring inspection by a conductor resulted in injury to him because of his disobedience, no recovery of damages could be had. In another case (Railroad Company v. Fry, 131 Ind. 319, 28 N. E. 989) a question of the sufficiency of the reply was involved. It appeared from this pleading that the servant, a brakeman, had neither the appliances nor the opportunity to make the inspection required by the rules, and the court held that for these reasons he was relieved of the duty of obedience. The citation is inapplicable. Another case cited by counsel is O'Malley v. Railway Co., 67 Hun, 130, 22 N. Y. Supp. 48, affirmed in 142 N. Y. 665, 37 N. E. 570. The opinion therein expressly recognizes the doctrine that if ample time and opportunity is offered for the examination and inspection of cars, required by the rules, it must be made, and the consequences of a failure so to do must rest upon the servant who is negligent, in case he is injured. We might cite a large number of authorities in support of the proposition that the test is as to the reasonableness of the rules prescribed by the master, and that if they are reasonable the obligation created thereby is assumed by the servant, but particular attention is called to Karrer v. Railway Co., 76 Mich. 400, 43 N. W. 370; Ill. Cent. R. Co. v. Jewell, 46 Ill. 99, 92 Am. Dec. 240; Chicago & N. W. Ry. Co. v. Jackson, 55 Ill. 492, 8 Am. Rep. 661; Chicago & A. R. Co. v. Bragonier, 119 Ill. 51, 7 N. E. 688; Beall v. Railway Co., 38 W. Va. 525, 18 S. E. 729; Cameron v. Railway Co., 8 N. D. 618, 80 N. W. 885; Pa. Ry. Co. v. Whitcomb, 111 Ind. 212, 12 N. E. 380; La Croy v. Railway Co., 132 N. Y. 570, 30 N. E. 391. Many of these cases, and others, are collected in a note to the text in 20 Amer. & Eng. Ency. Law (2d Ed.) 105. See, also, note to Nolan v. Railway Co., 43 L. R. A. 305.

When it is determined, as a question of law, that rules 152, 162, 164, 202, 203, in so far as they apply to the facts now appearing, were and are reasonable, and that nothing improper or unreasonable was demanded of plaintiff when he was required to either himself inspect the steps of the car, or to see that it was done—being commanded by the special rule to take sufficient time to make such inspection—this appeal is disposed of. Such a requirement is not contrary to public policy, but, upon the contrary, is in aid of it. It establishes a system of investigation and inspection devised and well calculated to serve as a check and a supervision upon and over regular inspectors, thus to further protect train servants, and to add greatly to the safety of travelers. The inspection of the steps required by these rules demanded no particular skill, no examination of an expert character, and no appliances. A glance in the direction of the steps, at one

corner of the car, would have brought them into notice and have disclosed their unsafe condition. It is difficult to understand how plaintiff, a conductor in charge of the train, could have used the car, have gone in and out as occasion demanded, and have passed the step while at work, as he did, without seeing that it had in some way been bent back underneath the car, and was in a dangerous condition. Any person having the power of ordinary observation should have seen the defect in question during the time plaintiff had charge of the car. His disobedience in respect to a reasonable rule precludes recovery for the injuries received.

Order affirmed.

NOE v. RAPID RY. CO.

(Supreme Court of Michigan, May 12, 1903.)

[94 N. W. Rep. 743.]

Injury to Employee—Fellow-Servant Rule.

An employee of an electric railway company, who was injured while returning from work on one of its cars, which was running on time, at the ordinary rate of speed, and within orders, by the wrecking of the car on a switch thrown open by one not in the company's employ, was not precluded from recovery by the fact that the car was in charge of a fellow servant, where the negligence alleged and proved, if any, was not that of such fellow servant.

Same—Assumption of Risk—Defective Appliances.

An employee of an electric railway company, who was furnished with transportation on the company's cars in going to and returning from work, did not assume the risk of defective appliances in connection with the track over which he rode, as his work was performed at a distance therefrom, and he had no duty calling his attention thereto.

Hooker, C. J., and Grant, J., dissenting.

Error to Circuit Court, Macomb County; Eugene F. Law, Judge.

Action by Frank Noe against the Rapid Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

B. R. Erskine (Gray & Gray, of counsel), for appellant.

Clark, Durfee & Allor, for appellee.

MONTGOMERY, J. The plaintiff, who was an employee of the defendant company, recovered judgment against it in the Macomb circuit court for injuries received by him on January 7, 1900, by reason of a car on which he was being transported running into a switch which had been opened by the act of a third person. The defendant has brought error to this court, claiming that, from the undisputed testimony, a verdict should have been directed in its favor.

The defendant is organized under the general street railway law of this state, and owns and operates a street railway along the Gratiot road between Detroit and Mt. Clemens, which railway is 15¼ miles in length. At the time of the ac-

cident, defendant's power house and barn were located in the township of Erin, Macomb county, about 7½ miles south of Mt. Clemens, and about 50 feet from the main track. Cars were operated in and out of this structure on switches connecting with the main line. At this time the defendant company had been constructing an addition to its power house and barn, and the plaintiff and several other laborers were engaged in the work. Plaintiff received 40 cents an hour for his services, and, in addition thereto, was transported to and from his work; his home being in Mt. Clemens; he riding on one of the company's regular employee passes. On January 9, 1900, plaintiff and his colaborers had completed their work on the building. They had been accustomed to take the car leaving the power house at 4:50 p. m., but on the night in question, in order to finish up, they worked later, and took the next car, which left Detroit at 4:30, and arrived at the power house at 5:20 p. m. This car was on time. These cars were run according to a printed schedule, and were under the control of a train dispatcher, whose office was in Mt. Clemens. Regular meeting points were established along the line, and booths were constructed at these and other points, which were in telephonic communication with the dispatcher, who kept a daily record of the movements of the several cars. The cars going in opposite directions, when on time, would pass at regular meeting points, designated on the time-table. When late they reported to the dispatcher, who designated the meeting point. The car which plaintiff took at the power house proceeded toward Mt. Clemens. It met the south-bound car at switch No. 4, the regular meeting point, located some 2½ miles from the power house. It was delayed at this switch only about half a minute, and then proceeded on toward Mt. Clemens at the usual rate of speed. About half a mile from switch No. 4, and towards Mt. Clemens, was the gravel-pit switch—so called because originally a spur had been constructed from this point to a gravel pit about a mile east of the main track. When the gravel pit had been exhausted, the spur track had been moved, except a stretch about 200 feet long, which could be used as a switch, or siding for the passing of cars if for any reason a car was late and could not make the regular meeting point. To enter this spur switch, it had to be approached from the south. If a south-bound car desired to run into the switch, it would be necessary to run south of the switch points, throw the switch, change the trolley onto the switch overhead wire, which was independent, throw the current onto this wire, which was controlled by a switch on a post, and then back up. On the evening in question the south-bound car had passed over this switch about 1½ minutes before it met plaintiff' car at switch No. 4. At the time the gravel-pit switch was properly set for the main line. About 3 minutes thereafter, plaintiff's car, going north at the usual rate of speed, was wrecked at this

switch; the same having been thrown open during this short interval. While sufficient was not obtainable to justify apprehending any one, the fact that the switch was thrown open by human agency is not contradicted. It is an open question whether the act of throwing this switch was that of a malicious person or the act of children. The switch was not locked, nor was it provided with a light or target. The negligence charged is failure to have a light or target at the switch, failure to keep the switch locked, and failure to provide for slowing up the car at this point. Plaintiff recovered, and defendant brings error. Error is assigned simply upon the ground that the verdict should have been directed for defendant.

It is contended that the plaintiff was a fellow servant of the motorman. If this be conceded, the result is not necessarily nonliability. True, the plaintiff would in such case be held to have assumed the risk of negligence of co-employees; but, according to plaintiff's theory, and upon the proofs, it cannot be said that the motorman's negligence was the cause of the injury. The fault, if any, was in not providing a safe system in running the cars, as the motorman was quite within his orders in running the train at full speed in disregard of this switch. The fault, then, if there was a fault, was the fault of the master—the company.

It is said the plaintiff also assumed the risk of these appliances, and the case of Ragon v. Railway Company, 97 Mich. 265, 56 N. W. 612, 37 Am. St. Rep. 336, is cited in support of this contention. In the present case, however, the plaintiff had no duty which would bring to his attention the defects complained of. His work was performed at a distance from this switch, and no notice of the defects would come to him through his work, as his duties had no relation to the track. He simply rode over the track, as did any other passenger.

Defendant's counsel further contend that the testimony shows that target lights and locks are not used in street or electric railway lines, and that, if the defendant has shown that the company observed the same care that other electric railways have exercised, this must be held to be due care. If we assume that it is not negligent to conduct a business in the usual manner (as to which, see Railway Company v. Judson, 34 Mich. 507), it remains to consider what shall furnish the standard. Can the defendant company neglect precautions which are taken by steam railroads against the same character of disaster as the defendant is called upon to guard against? We think not. It can make no difference whether the force which propels a car freighted with human beings, and going at a rate of 35 or 40 miles an hour, is propelled by one power or another. A misplaced switch is assure to result in serious damage in one case as in the other. The question, more properly, is, what has human foresight provided as a safeguard against such a disaster? And com-

mon prudence would suggest an investigation into the methods of such business as involved such contingencies as confront the operating company.

It is further contended that the failure to provide lights or locks cannot be said to be the proximate cause of the injury to plaintiff. We are not able to distinguish this case, as respects this question, from the case of Town v. Railway Company, 84 Mich. 214, 47 N. W. 665. See, also, Ry. Co. v. Allen, 99 Ala. 359, 13 South, 8, 20 L. R. A. 457.

Finding, as we do, that there was a case for the jury, the judgment is affirmed.

MOORE, J., concurred with MONTGOMERY, J.

CARPENTER, J. (concurring). I doubt the right of the jury to find that a street railway company is under an obligation to place a target or light, which may possibly be an obstruction to travel, in the public highway. I agree, however, that the judgment should be affirmed, for the other reasons stated in the opinion of JUSTICE MONTGOMERY.

HOOKER, C. J. (dissenting). The defendant is a suburban railway company, and its road is a trolley road constructed along a highway. The plaintiff, a mason, was employed in constructing an addition to its power house, for which he received, as compensation, 40 cents an hour for the time that he worked, and free transportation by defendant's cars to and from his home, some miles away from the place where he worked. He was injured by reason of the derailment of a car near a switch, and recovered a judgment, upon which the defendant has brought error.

The plaintiff's claim is that his car was derailed, by reason of a misplaced switch, but a few minutes after a car had crossed the switch, when it was properly set. It appears to be conceded that it was changed by human agency, and was the work of a trespasser—possibly children. Defendant claims that it was done by an adult, who did it from malicious motives, with an intent to wreck a car. This is not clearly proved. The switch was operated by a bar (heavily weighted) made to lie flat upon the ground, thereby offering no obstruction in the highway. It was an improved device, in common use upon such railways, and there is no proof indicating that a better or safer switch is in common use by roads of this character. It was not locked, nor was there any provision for switch lights. And it is manifest that there could not be lights without having something in the nature of an obstruction in the highway. There was no evidence that locks or lights upon switches or targets were in use by any street trolley road in the country.

The negligence complained of is: (1) Not keeping gravel-pit switch closed; (2) not having it locked or securely fastened; (3) not keeping a light or signal at the switch, such as would have indicated to a motorman whether the switch was

open or closed; (4) not running its car more slowly and with greater caution when approaching the switch.

The first three grounds may be considered together, and the question is reduced to the proposition that the railroad company may be found guilty of negligence in these particulars nowithstanding its adoption of appliances in general use. The defendant cannot be said to be guilty of negligence for any of these supposed omissions. The only theories upon which it can be said, broadly, that it was negligent in not keeping its switch closed, are (1) that it was an insurer; and (2) that it omitted some duty in the way of measures which would have prevented its being opened. It cannot be claimed that it was an insurer, and counsel do not point out what measures it should have taken, except locking the switch—and this is speculative—as against a trespass. But the duty of locking the switch, like that of maintaining a switch light or a target, is one which depends on good railroading, which is a question of custom, and not one of opinion. In the case of Michigan Central R. Co. v. Coleman, 28 Mich. 449, it was said: "The language used would fairly permit the jury to find anything to be negligence which could by any possibility be avoided. But negligence is neither more nor less than a failure of duty. All railroad companies are held to the duty of being prudent railroad companies, and bound to conduct their business with such precautions as prudence has usually found necessary. As compared with the care needed in business involving no possible human risk, the care to be used may be properly enough called extraordinary; but, as compared with each other, all such companies have the same duty." In Grand Rapids & Indiana Railroad Co. v. Huntley, 38 Mich. 546, 31 Am. Rep. 321: "If they exercise their functions in the same way with prudent railway companies generally, and furnish their road and run it in the customary manner which is generally found and believed to be safe and prudent, they do all that is incumbent upon them." Again, in Werbowlsky v. Ry. Co., 86 Mich. 238, 48 N. W. 1097, 24 Am. St. Rep. 120, it was said: "The use of appliances which are in universal and common use for the same purpose cannot be said to be negligent."

There is no doubt of the efficacy of the switch used, under ordinary circumstances and conditions. The plaintiff's theory is that provision should be made for extraordinary ones; e. g., he says that, had the switch been locked, it would not have been so easily misplaced, and, had the switch been a different one, provided with lights, the danger might have been discovered by the motorman in season for him to have stopped the car or reduced its speed. There is some truth in these claims, but it is easy for courts and juries to say, after an accident, that this or that might have prevented it. But courts and juries cannot prescribe methods. They can only apply the legal test to those in operation, and that is the test

of experience and custom. It is suggested (though this is not proved) that steam roads usually lock their switches, and use switch lights and targets, and we are asked to say that the duties of electric road companies should be measured by the methods of the steam road companies. It is undoubtedly true that the danger to be apprehended from the derailment of an electric car may be substantially the same as that from the derailment of a steam car running at the same rate of speed, but does it follow that a court or jury can say that the methods of the steam road must be taken as the standard of the electric road? There are other factors in the problem. A steam road is on a private right of way. Electric roads are frequently built in highways where they must be driven over by persons using ordinary road conveyances and horses. Whether an upright switch, with a light upon it, would be practicable, may be doubtful; and this cannot be determined to be practicable by courts and juries, as against the settled practice of such roads. In this connection, see Bennett v. L. I. R. R., 163 N. Y. 1, 57 N. E. 79.

Another question relates to the rate of speed. It is contended that it was the duty of this motorman to diminish the speed as he approached this switch. If this is so, it must be for the reason that he should have guarded against the danger of a misplaced switch, for the evidence is undisputed that the switch itself offered no impediment to ordinary speed, or additional hazard, if not misplaced. There is evidence in the case that the motorman was directed not to check his speed at switches. In other words, he was required not to have his car so under control that he could certainly avoid accident if the switch should be misplaced. This testimony places upon the defendant the responsibility, if the testimony is believed; and the case is brought to the narrow point whether, with such appliances as are ordinarily used, the defendant was in duty bound to anticipate misplaced switches, and slow down its cars sufficiently to prevent accidents from such causes. We cannot say, as a matter of law, that every railway train or car—steam or electric—must, on approaching a switch, be brought down to a rate of speed which will enable the driver to stop in time to avoid accident if it shall be found to be misplaced; nor can a jury be permitted to so find, when it is undisputed that such is not the prevailing practice. The testimony shows that this car was running at the ordinary speed, and that it was entirely safe to cross the switch at that rate of speed, and there is no testimony showing that it is not customary to depend upon unlocked switches, or that they have proven unsafe.

In this case it is claimed, though not proved, that there was danger to the car if run at an ordinary rate of speed around that particular curve; but the same rule that would make it a duty to slow up, lest, through a misplaced switch, the car should run on a dangerous track, would impose the same duty

on approaching any switch, lest there be a car upon it with which there would be danger of a collision, should the switch prove to be misplaced, and the same rule would apply to every steam road in the country, thus putting an end to rapid transit. The steam roads have their appliances and methods. They may be, in a given case, negligent, but not where they are up to the standard of good railroading. It is contended, if not admitted, that this switch was misplaced by a trespasser, and, on the other hand, it is said that there are concurring causes, viz., the absence of the lock and light, and the failure to check the car. We have no inclination to minimize the rule that requires a carrier of passengers to do all that human care, vigilance, and foresight can do under the circumstances, considering the character and mode of conveyance, to prevent accident to passengers. This rule has its limitations, and, as said by the Supreme Court of Maine in Libby v. M. C. R. Co., 20 L. R. A. 812, 58 Am. & Eng. R. Cas. 81, "it must be understood that the rule does not require such a degree of vigilance as will be wholly inconsistent with the mode of conveyance adopted, and render it impracticable. Nor does it require the utmost degree of care which the human mind is capable of imagining." "The test of liability is not whether the company used such particular foresight as is evident, after the accident happened, might have averted it, had the danger been known, but whether it used that degree of care and prudence which a very cautious and prudent person would have used, under apparent circumstances of the case, to prevent the accident, without reasonable knowledge that it was likely to occur. In such a case it is always a question whether the mischief could have been reasonably foreseen. Nothing is so easy as to be wise after the event." See, also, Fox v. Mayor, 70 Hun, 182, 24 N. Y. Supp. 43; Bowen v. N. Y. Cent. R. Co., 18 N. Y. 408, 72 Am. Dec. 529; Stierle v. Ry., 156 N. Y. 684, 50 N. E. 834; Ayers v. Ry., 156 N. Y. 104, 50 N. E. 960; Jones v. G. T. R. Co., 45 U. C. Q. B. 193. A railroad need not anticipate a crime, nor a trespass, unless there is something in the circumstances surrounding the transaction which should have directed the attention of its officers to the probability of such a danger. Harris v. U. P. R. Co. (C. C.) 13 Fed. 591; Worth v. C., M. & St. P. Ry. Co. (C. C.) 51 Fed. 171; Keeley v. Erie Ry. Co., 47 How. Prac. 260; Latch v. R. R. Co., 3 H. & N. 930; Deyo v. N. Y. C. R. R., 34 N. Y. 1, 18, 88 Am. Dec. 418; Fredericks v. N. Cent. R. R., 157 Pa. 103, 27 Atl. 689, 58 Am. & Eng. R. Cas. 91, 22 L. R. A. 310; Curtis v. R. R., 18 N. Y. 534, 75 Am. Dec. 258; Bennett v. L. I. R. R., 163 N. Y. 1, 57 N. E. 79; Whipple v. Mich. Cent. R. Co., 90 N. W. 287, 2 R. R. R. 774, 25 Am. & Eng. R. Cas., N. S., 774. The record shows an absence of negligence, and prima facie that the accident was due to a malicious trespass, which defendants had no reason to apprehend.

Counsel for the plaintiff rely upon Town v. Railroad, 84

Mich. 221, 47 N. W. 665, as a case practically like the case before us. It differs in several respects. There the defendant was a steam road. Its settled practice was to use switch lights. It discontinued the use of a switch, and so notified the plaintiff. Afterwards it resumed using it, but neither notified the plaintiff, nor restored the light. Had notice been given, and no light been seen upon the switch, we may assume that the plaintiff (the engineer) would have stopped his train. Had the light been in place, it would have shown danger. As it was, he supposed the switch spiked, and acted accordingly. In this case there not only had never been lights and locks upon the switches, but it was shown not to be usual upon such roads.

The question of proximate cause is involved in this case, as will be seen from several of the cases cited. Upon this point see, also, Davis v. C., M. & St. P. Ry. (Wis.) 6 N. W. 16, 33 L. R. A. 654, 57 Am. St. Rep. 935; Smethurst v. Church, 2 L. R. A. 695, 696, and note, 12 Am. St. Rep. 550; Read v. Nichols, 7 L. R. A. 131, note; Smith v. Co. Ct., 8 L. R. A. 83, 84, notes; Smithwick v. Hall, 12 L. R. A. 280, and note; Beall v. Athens Tp., 81 Mich. 536, 45 N. W. 1014; St. Clair Min. Sprgs. Co. v. City, 96 Mich. 463, 56 N. W. 18; Bleil v. Ry., 98 Mich. 228, 57 N. W. 117; Lambeck v. Railroad Co., 106 Mich. 512, 64 N. W. 479; Murphy v. M. C. R. Co., 107 Mich. 627, 65 N. W. 753; La Motte v. Boyce, 105 Mich. 547, 63 N. W. 517; Borck v. M. B. & N. Works, 111 Mich. 129, 69 N. W. 254; Kingsley v. Bloomingdale Tp., 109 Mich. 340, 67 N. W. 333; White v. Riley Tp., 113 Mich. 299, 71 N. W. 502; Smith v. Walker Tp., 117 Mich. 15, 75 N. W. 141; Doak v. Saginaw Tp., 119 Mich. 680, 78 N. W. 883; White v. Riley Tp., 121 Mich. 413, 80 N. W. 124; Bell v. Wayne, 82 N. W. 215.

The court should have directed a verdict for the defendant. The judgment should be reversed, and a new trial ordered.

GRANT, J., concurred with HOOKER, C. J.

CHAPMAN v. PERE MARQUETTE R. CO.

(Supreme Court of Michigan, May 29, 1903.)

[94 N. W. Rep. 1049.]

Servant—Injuries—Safe Appliances—Contributory Negligence—Direction of Verdict.*

A railroad brakeman was injured while operating a lever used in connection with a semaphore signal. It was a cold night. He had a lantern in his left hand. He stooped over, and with his right hand drew the pin which held the lever down. When the pin was pulled, the lever flew up, and struck him on the head. If he had put his foot or hand

*As to the care required of a railroad company, as an employee, in furnishing appliances, see foot-note appended to Atchison, T. & S. F. Ry. Co. v. Kingscott (Kan.), 4 R. R. R. 528, 27 Am. & Eng. R. Cas., N. S., 528.

on the lever, the accident would not have happened: *held* error to refuse to direct a verdict for defendant, the appliance being reasonably safe, and the brakeman not having used proper care.

Error to Circuit Court, Saginaw County; Emmet L. Beach, Judge.

Action by Claude H. Chapman against the Pere Marquette Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Frederick W. Stevens (Charles McPherson, of counsel), for appellant.

James H. Davitt, for appellee.

MOORE, J. Plaintiff was a brakeman on the Pere Marquette Railroad, and a verdict was rendered in his favor for injuries received while operating a lever used in connection with a semaphore signal in the Saginaw yards. The case is brought here by writ of error by the defendant. Its claim is the court should have directed a verdict in its favor.

At the south end of the Saginaw yards of the Pere Marquette Railroad is a semaphore signal for the purpose of preventing collisions between the trains and switch engines which pass that point and operate in that vicinity. No train can pass into the Saginaw yards from the south except when this semaphore signal shows a clear main track. No train can pass from the switching yard to the main line without the semaphore signal being so set as to warn other trains. The movement of a train from the main line to the side tracks also requires the movement of the signal. The semaphore signal is operated by a lever situated on the ground in the yard about 1,200 feet from the signal, the two being connected by two wires running along the tracks. One of the wires pulls the semaphore to "clear" and the other pulls it to the semaphore post. At the lever the wires are attached to a chain, which passes over a wheel to which the lever is attached. The lever moves in a half circle drawing on one wire, while the other at the same time is slackened. When down, it is held in place by an iron pin passing through two jaws on each side of the lever, in holes just above the lever. This pin must be removed before the lever is operated. Photographs of the lever aid in understanding its operation and construction. The lever not only operates the semaphore signal about 1,200 feet away, but its operation also locks or unlocks the switch near it. A rod from the lever runs to and locks the switch, thus preventing a brakeman from opening the switch until he has first changed the semaphore by the use of this lever, thus warning other trains that the main line is not clear. The head brakeman (on a train entering Saginaw from the south, and desiring to pass from the main line to the yard tracks) goes to this lever, removes the pin which holds it down, turns the lever clear over, thereby setting the semaphore signal, and by the same movement unlocking the switch close by the lever. He then turns the switch, his train passes in, and

when it has entirely passed the rear brakeman closes the switch, and, with the lever, resets the semaphore signal to "clear." Plaintiff was head brakeman on a freight train from Port Huron to Saginaw, which entered the Saginaw yards about 3 a. m. on March 6, 1901. It became his duty to change the lever so as to shift the signal and turn the switch, to enable his train to cross over from the main track to the yard. It was a cold night. He had his lantern in his left hand. He stooped over, and with his right hand drew the pin which held the lever down. He did not put his hand or his foot on the lever to prevent it from flying up. When the pin was pulled, the lever flew up, struck the plaintiff on the side of the head, and hurt him severely. He had not operated this lever before. It is the claim of the plaintiff that the upper wire was drawn unnecessarily taut, making it dangerous to operate the lever, and he gave testimony tending to show that two or three other levers of a similar character, one of which was in the same yard, did not fly up when operated in the way he operated this one. It was the claim of defendant that the operation of the semaphore required there should not be too much slack in the wires running to it; that the other levers were differently situated from this one; that the way to operate the lever was to grasp the end of it with the hand, and then release the pin; and that, if the plaintiff had properly operated it, he would not have been hurt. The testimony and the photographs show the mechanism was a simple one. The lever was held in place by a pin. When the pin was withdrawn, the lever was moved by the hand nearly half way around the arc circle, and held in place by a pin put over it. All the testimony, including that of plaintiff, discloses that, if plaintiff had put his foot or his knee or his hand upon the top of the lever before withdrawing the pin, the accident would not have happened. We think it clear the appliance was reasonably safe, and that, if plaintiff had exercised such care as is due from an employee to his employer, the injury would not have occurred. See Brewer v. Railway Co., 56 Mich. 620, 23 N. W. 440; Lamotte v. Boyce, 105 Mich. 545, 63 N. W. 517, and cases cited therein. Under the facts disclosed by the record, a verdict should have been directed in favor of defendant.

Judgment is reversed, and new trial ordered. The other Justices concurred.

ELMORE v. SEABOARD AIR LINE RY. CO.

(*Supreme Court of North Carolina, June 10, 1903.*)

[44 S. E. Rep. 620.]

Rehearing.

A petition to rehear will not be entertained unless some material point was overlooked, or some controlling authority escaped the attention of the court, or some other weighty consideration requires it.

Injury to Brakeman—Contributory Negligence.

In an action by a brakeman for damages for personal injuries, there

can be no recovery where the injury was caused, not by a defective coupler, but because plaintiff negligently used his foot to push the bumper in place.

Same—Failure to Furnish Self-Couplers—Negligence Per Se—Contributory Negligence.*

The failure of a railroad company to have self-coupling devices on their freight cars is a continuing negligence, per se; and, to an action for an injury resulting therefrom, contributory negligence is not a defense.

Same—Waiver of Statutory Requirement.

The fact that an employee remains in the service of a railroad company, knowing that its freight cars are not equipped with self-couplers, does not excuse the railroad from liability to such employee, if injured while coupling its cars by hand.

Same—Failure to Keep in Repair.

The neglectful failure on the part of a railroad company to keep automatic couplers in proper condition and repair is negligence, as much as if the cars had never been equipped with such couplers.

Same—Contributory Negligence—Ordered into Danger—Instruction.

In an action for a servant's injuries, a charge that if a coupler was out of order, so that it was necessary to go between the cars to make the coupling, and plaintiff was directed by the conductor, whom he was under duty to obey, to couple the cars, and he was compelled to go between the cars to couple, and it was dangerous, and more probable that it could not be safely done than that it could, plaintiff would be guilty of contributory negligence, was sufficiently favorable to defendant.

Same—Same—Going between Cars to Couple Them—Defective Coupler—Instruction.

In an action for a servant's injuries, an instruction that if plaintiff knew that the coupler was out of order, and that it was too dangerous to go between the cars to couple, and that plaintiff used his foot to make the coupling, and that by reason of his position he acted foolishly and without prudence with reference to the character of the work, and that this act was carelessness, the chances of safety being less in favor of him than against him, he would be guilty of contributory negligence, even if defendant knew of the defective condition of the coupler, was sufficiently favorable to defendant.

Montgomery, J., dissenting.

Petition for rehearing. Granted.

For former opinions, see 41 S. E. 786; 42 S. E. 989.

I. F. Dortch, W. T. Dortch, and W. E. Munroe, for plaintiff.

Day & Bell, Shepherd & Shepherd, and T. B. Womack, for defendant.

CONNOR, J. This cause is before us upon a second petition to rehear. We have given the case a very careful consideration, recognizing the well-settled principle, by which this court has always been governed, that a petition to rehear

*For decisions containing similar statutes on this point, see Southern Ry. Co. v. Harbin (Ga.), 18 Am. & Eng. R. Cas., N. S., 692, and note, 696; Winkler v. Philadelphia & R. Ry. Co. (Del.), 6 R. R. R. 361, 29 Am. & Eng. R. Cas., N. S., 361; Kilpatrick v. Grand Trunk Ry. Co. (Vt.), 4 R. R. R. 945, 27 Am. & Eng. R. Cas., N. S., 945; Indianapolis St. Ry. Co. v. Robinson (Ind.), 23 Am. & Eng. R. Cas., N. S., 628; Louisville, N. A. & C. Ry. Co. v. Wagner (Ind.), 14 Am. & Eng. R. Cas., N. S., 706; Pittsburg, C., C. & St. L. Ry. Co. v. Moore (Ind.), 14 Am. & Eng. R. Cas., N. S., 678.

will not be entertained unless it appears that some material point was overlooked, or some controlling authority escaped the attention of the court, or some other weighty consideration requires it. Hannon v. Grizzard, 99 N. C. 161, 6 S. E. 93; Fisher v. Mining Co., 97 N. C. 95, 4 S. E. 772.

This cause was heard at the February term, 1902, upon an appeal from the judgment of the superior court of Wayne county in favor of the plaintiff. The judgment was affirmed by a majority of the court, two of the justices dissenting. Clark, J., said: "This case is simply a repetition of Greenlee v. R. R., 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734, Troxler v. R. R., 124 N. C. 191, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580, and of several cases affirming the doctrine therein laid down. It was in evidence that the defendant's cars were equipped with automatic couplers, but, when plaintiff was injured in making a coupling, there was evidence that the automatic coupler had been out of repair five months or more, to the knowledge of the defendant." The opinion concludes: "It is the duty of the defendant to use automatic couplers, and if, on failure so to do, injury occurs to an employee, which would not have happened if there had been a coupler, this is continuing negligence on the part of the employer, which cuts off the defense of contributory negligence, such failure being the causa causans. If the automatic coupler was out of repair for a length of time reasonably sufficient to have it repaired, and this was not done, it was the same thing as failure to have the automatic coupler on that car." Cooke, J., dissented upon the ground that, in his opinion, the court should have instructed the jury that, upon the whole evidence, they should answer the second issue, to wit, "Did the plaintiff by his own negligence contribute to his injury?" in the affirmative. Mr. Justice Montgomery concurred in the dissenting opinion. The cause was reheard at the August term, 1902 (131 N. C. 569, 42 S. E. 989), and the opinion of the majority of the court was adverse to the plaintiff; Clark, J., and Douglas, J., writing dissenting opinions.

We are now called upon to re-examine the record in the light of the several opinions and dissenting opinions theretofore filed. The syllabus of the report of the case at the last term states the conclusion arrived at by the majority of the court as follows: "In an action by a brakeman for damages for personal injuries, the injury being caused, not by a defective coupler, but because the plaintiff negligently used his foot to push the bumper in place while doing the coupling, he cannot recover." We unhesitatingly adopt this as a correct proposition of law. The fact put in issue by the pleadings, and in respect to which testimony was introduced by the plaintiff and defendant, is whether there was a defective coupler, and whether the plaintiff was injured by reason of such defect, and whether he was at the time in the discharge

of his duty: that is, whether he was ordered by the conductor to make the coupling. Of course, if he was not injured by a defective coupler, or if he was not in the discharge of his duty, or if he recklessly or carelessly went between the cars, he could not recover. This brings us to an examination of the testimony and his honor's charge.

The allegation is that the plaintiff, being in the employment of the defendant as a flagman on September 17, 1900, was ordered by the conductor in charge of said train, whose orders plaintiff was bound to obey, to remain near the cars on the main track, below the side track, for the purpose of coupling the cars to the cars upon the side track, which order the said conductor well knew could not be performed without going between such cars, on account of the condition of the coupler; and the said cars upon the side track were put in motion by the defendant, and were negligently permitted to roll very rapidly, by means of what is known as "kicking cars," along said side track and on the main track, and while in the discharge of such duty was injured by reason of the defective condition of the coupler. These allegations are denied. It was also denied that it was any part of the plaintiff's duty to couple the cars, or that he was ordered to do so by the conductor; and it is alleged that his act in doing so was voluntary and officious, and that he negligently and carelessly undertook to use his foot to kick over the drawhead, instead of his hands, and that in so doing his foot slipped, and was caught between the drawheads and was crushed, and that he was injured by his own gross negligence. Upon these allegations, appropriate issues were submitted to the jury. Without reviewing the testimony, it is sufficient to say, and it is not denied, that there was testimony in behalf of the plaintiff to the effect that the cars were supplied with automatic couplers, but that at the time of the injury they were not in proper condition; that they had been in a defective condition for several months; and that the conductor knew of it. There was also evidence that the plaintiff knew of the defective condition of the couplers. There was evidence that plaintiff was ordered by the conductor to make the coupling, and that it was the duty of the conductor to report persons engaged in the service under him for disobedience of orders, and that upon such report they would be discharged. There was testimony in behalf of the defendant contradicting much of this testimony. The plaintiff was asked the question: "If the coupler had been in perfect condition, would you have been able to couple without putting your foot between there?" He answered: "Yes, sir; I would have been able to fix it without my foot." Upon cross-examination he was asked: "Why did you go between those cars, when you knew that it was against the rules of the company to do so, and when you were ordered to do a dangerous thing by the conductor?" To which

he answered: "I obeyed him, sir." He was asked: "Did you know that he could not discharge you?". He answered: "I knew if he reported me that he could have me discharged if I disobeyed him." He was asked the question upon cross-examination: "If the link had been in perfect condition, would you have had to kick it?" To which he answered: "No, sir. Did you not know that it was carelessness to use your foot to do such a thing? I had seen other people use their feet. I was instructed to couple, and I tried to do so." He was asked if he knew the rule prohibiting employees from going in between the cars while they are coupled to the engine, or being so coupled, for the purpose of coupling or uncoupling cars, or to set pins or links, or for any other purpose, while the train is in motion, and providing that one who did so was acting at his own risk and against the rules of the company, and would be subject to discharge from the service. He answered that he had never read it, and had never heard it read. He had heard of it. That he violated the rule because he was instructed by the conductor. That he knew that the coupler was out of repair. Heard the conductor say so. There was much other testimony from the plaintiff along the same line. The defendant introduced the conductor and several other witnesses, who contradicted the plaintiff in many material respects. The testimony was conflicting and contradictory. Upon the close of the evidence, defendant moved the court to nonsuit the plaintiff, which motion was refused. The court charged the jury as follows:

"It was the duty of the defendant to furnish the train of cars spoken of in evidence with the automatic couplers, and it is admitted that they had automatic couplers, and it was further its duty to inspect, from time to time, these couplers, for the purpose of seeing if they were in repair, and if they failed in this respect, and if said couplers became out of repair, it was guilty of negligence; [but if the jury shall find from the evidence that the part of the coupler on the end of the caboose car was not quite in line with the corresponding part on the end of the car coming toward it, and to which it was to be coupled, and if the plaintiff, to get it in line, kicked the part on the end of the caboose, and if the jury further find that the standard automatic coupler on said cars had some play in its socket, allowing it to move to the right and left on account of curves in the track, and that this was necessary for the movement of the train, and if the jury shall find that this was the proper way for such couplers to be, and if the jury shall further find that this was the natural result from its proper construction and use, and that the coupler was not otherwise out of repair, then the defendant was not negligent in failing to provide these couplers as prescribed by law."] To this part of the charge inclosed in brackets, the defendant excepted.

["If the jury further find from the evidence that the

train of cars spoken of in evidence had automatic couplers, which would have made it unnecessary for the plaintiff, coupling the cars, to go between them and to use his hand or foot, and they further find that those couplers had become out of repair for such a length of time that the defendant knew or ought to have known that they were out of repair, and for such a length of time that defendant could have had them repaired, and that the defendant failed to repair said couplers, and if the jury further find that the plaintiff would not have been injured but for the condition of the couplers, and that, in the condition in which the couplers were, that it was necessary, in order to couple, to use the hand or foot, and they further find that the plaintiff was a flagman on said train, and under the direction of the conductor, and that the conductor directed him to couple the cars, and in doing so he was injured, and if the jury further find that the plaintiff would not have been injured but for the condition of the couplers, then it would be the duty of the jury to answer the first issue 'Yes.' "] To so much of the charge inclosed in brackets, the defendant excepted.

["If the jury find from the evidence that the train of cars had automatic couplers, which would have made it unnecessary for the plaintiff, coupling the cars, to go between them, and it is admitted that they had standard automatic couplers, and if they further find from the evidence that these couplers were in repair, so that it was unnecessary for the plaintiff, coupling the cars, to go between them, and that the plaintiff was a flagman on said train, and under the direction of the conductor, and the conductor directed him to couple the cars, and in so doing he did go between them unnecessarily, and was injured, then it is the duty of the jury to answer the first issue 'No.' "] To so much of charge in brackets, the defendant excepted.

"If you answer the first issue 'No,' you need go no further, but return your verdict; but, if you answer the first issue 'Yes,' then you proceed to answer the second issue. The second issue, you will understand, is this: 'Did the plaintiff by his own negligence contribute to the injury complained of?'

["Now, coming to the consideration of the second issue, if you should reach that issue, if the jury find from the evidence that the couplers were out of repair, and had been for such a length of time that the defendant knew, or by the exercise of reasonable care could have known, that they were out of repair, and for such a length of time that the defendant, by the exercise of reasonable diligence, could have had them repaired, and that the plaintiff coupled the cars under the direction of the conductor, and that it was his duty to obey the conductor, and that he would not have been injured but for the condition of the couplers, then it would be the duty of the jury to answer the second issue 'No.' "] To that part of the charge in brackets, the defendant excepted.

["And if the jury further find from the evidence that the plaintiff undertook to couple the cars under the direction of the conductor, and that it was his duty to obey the conductor, and, but for the condition of the couplers, he would not have been injured, this would be a continuing negligence on the part of the defendant, and would continue up to the time of the injury, and would be a negligence subsequent to any negligence of the plaintiff, if such existed, and the negligence of the plaintiff under these circumstances would not be the proximate cause of the injury, and would not be contributory negligence; and in that event it would be the duty of the jury to answer the second issue 'No.' "] To that part of the charge inclosed in brackets, the defendant excepted.

["But this instruction is given subject to an instruction which I will give you further on, and this will be so although they may further find from the evidence that the plaintiff undertook to couple the cars in disobedience of the rule of the company, and although they may further find from the evidence that the coupling was dangerous, and that he knew it was dangerous, and although they may believe that he was negligent in coupling the cars, and did not exercise due care on his part. This is given subject to an instruction I will now give you, which is the one alluded to in the previous instruction."] To that part of the charge inclosed in brackets, the defendant excepted.

"In case of the use of couplers by railroads, they are required to use improved couplers, to prevent going between the cars to couple, and automatic couplers are such; and it is admitted that the defendant did use automatic couplers at the time of the plaintiff's injury, but it is contended that the one in use at the time of the injury was out of repair, and that it was known to be so by the defendant, or had been so for such a length of time that the defendant should have known it, and this is denied by the defendant, so that is a matter of contention.

["In this case, if the jury find by the greater weight of evidence that this particular coupler was out of order, so that it was necessary to go between the cars to couple, and the plaintiff was directed by the conductor to couple the cars, and that it was his duty to obey the conductor, and that he was compelled to go between the cars to couple, and that if the jury shall further find that it was dangerous, and that the probability that it could not safely be done was greater against his chances of doing it safely than in favor of it, then it would be a case of contributory negligence, and the answer to the second issue, would be 'Yes.' "] To that part of the charge inclosed in brackets, the defendant excepted.

["This is the instruction I said I would give you, to which a previous instruction was subject: If the jury find from the evidence that the coupler was out of order, and that the plaintiff

knew it was such, and that it was too dangerous, under the rule I have just given, to go between the cars to couple, and if the jury find further that the plaintiff stood on the ground and used his foot to make the coupling, and that by reason of his position he acted foolishly, recklessly, and without prudence with reference to the character of the work, and that this act was carelessness, and that the chances of his safety were less in favor of him than against him, then it would be contributory negligence on his part, and even if the defendant knew of the defective condition of the coupling; and in that event it would be the duty of the jury to answer the second issue 'Yes.' "] To that part of the charge inclosed in brackets the defendant excepted.

["If the plaintiff acted recklessly and without care, if the jury have previously found the defendant guilty of negligence, the plaintiff could not recover. Now, it is important for you to get that distinction, under the matters in controversy. If you find that the plaintiff was injured by reason of the negligence of the defendant in not having these couplers in proper condition, but when, if you answer the first issue 'Yes,' and in considering the second issue, you should find that the plaintiff, acting under the direction of the conductor, and being subject to his orders, if you find he was so, went in between the cars to couple them, when the conditions were such that it was so dangerous that the chances were greater against his safety than in favor of it, then it would be such recklessness as would make him guilty of contributory negligence, or if, after he went in there, he acted with such carelessness as made his chances greater against his safety than in his favor, he would be guilty of contributory negligence; and in case of either of these findings it would be the duty of the jury to answer the second issue 'Yes.' Now, if you answer the second issue, then you would proceed no further with your verdict."] To that part of the charge inclosed in brackets, the defendant excepted.

This court has decided in Greenlee v. Railroad, 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734, that the failure to have self-coupling devices on their cars was negligence per se; that it was a continuing negligence, and the question of contributory negligence did not arise when an employee was injured by reason of the failure to have automatic couplers in proper condition; that the fact that plaintiff remained in the service of the railroad company, knowing that its freight cars were not equipped with self-couplers, did not excuse the railroad from liability to such employee, if injured while coupling its cars by hand. The doctrine of assumption of risk has no application where the law requires the use of new appliances to secure the safety of employees. This doctrine is approved in Troxler v. Railroad, 122 N. C. 902, 30 S. E. 117. Mr. Justice Montgomery, in the opinion in this case (131 N. C. 573, 42 S. E. 990), says: "We are not

disposed to modify in the least the decision made in Greenlee v. Railroad, 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734, in which we decided that the railroad companies in this state should equip both their passenger and freight cars with self-couplers, and we are of the opinion that a neglectful failure to keep the couplers in proper condition and repair would be as culpable as if the cars had never been so equipped. In Fleming v. Railroad, 131 N. C. 476, 42 S. E. 905, Mr. Justice Montgomery says: "It has been decided by this court that 'the failure of a railroad company to equip its cars with automatic couplers is a continuing negligence, and where the negligence of the defendant is a continuing negligence, as the failure to furnish safe appliances in general use, when the use of such appliances would have prevented the possibility of the injury, there can be no contributory negligence which will discharge the master's liability.' Troxler v. R. Co., 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580. There can be no contributory negligence of the plaintiff available to the defendant as a defense in this action, because the plaintiff attempted to make the coupling in discharge of his duty, and because the continuing negligence of the defendant up to the moment of the injury was subsequent to the plaintiff's negligence, if there was any, and is the proximate cause of the injury." Chief Justice Furches, in his opinion, says: "While I agree to the doctrine in the Greenlee and in the Troxler Cases, as I understand them, I cannot agree that they apply to the facts in this case." We must accept the doctrine laid down by this court in the Greenlee and Troxler Cases as the law of this case. His honor clearly followed the law, as thus laid down, in charging the jury in regard to the first issue, and could not, in the light of those cases, have charged the jury, as a matter of law, to answer the second issue "Yes." He did charge the jury that if they found, by the greater weight of evidence, that this particular coupler was out of order, so that it was necessary to go between the cars to couple, and the plaintiff was directed by the conductor to couple the cars, and that it was his duty to obey the conductor, and that he was compelled to go between the cars to couple, and that it was dangerous, and the probability that it could not be safely done was greater against the chances of doing it safely than in favor of it, then it would be a case of contributory negligence, and the answer to the second issue would be "Yes." The defendant excepted to this charge. It seems to us that it was as favorable as the defendant could have asked for or was entitled to. His honor further charged the jury, upon the second issue, that if the plaintiff knew that the coupler was out of order, and that it was too dangerous to go between the cars to couple, and if the jury further find that plaintiff stood on the ground and used his foot to make the coupling, and that by reason of his

position he acted foolishly, recklessly, and without prudence with reference to the character of the work, and that this act was carelessness, and that the chances of his safety were less in favor of him than against him, then it would be contributory negligence on his part, and even if the defendant knew of the defective condition of the coupler, and in that event it would be the duty of the jury to answer the second issue "Yes." The defendant excepted to this instruction. We think it as favorable as could have been asked by the defendant. His honor repeated to the jury that, if the plaintiff acted recklessly and without care, plaintiff could not recover.

We have examined the instructions with care, and have held the case under advisement for a long time. We are unable to see any reversible error in his honor's instruction. The contentions were clearly and fairly stated to the jury, and we think his honor's charge, upon the whole, correct. Whether the verdict of the jury is in accordance with the weight of the testimony, in view of the many contradictions therein, we have not considered, and it would not be proper for us to do so.

The case of Voelker v. Chicago, M. & St. P. Ry. Co. (C. C.) 116 Fed. 867, is very similar to the facts in this case, the court saying: "The statutory requirement with respect to equipping cars with automatic couplers [referring to the act of Congress] was enacted in order to protect railway employees, as far as possible, from the risk incurred when engaged in coupling and uncoupling cars. If a railway uses in its business cars which do not conform to the statutory requirements, either because they never were equipped with automatic couplers, or because the company, through negligence, has permitted the couplers, originally sufficient, to become worn out and inoperative, then the company is certainly not performing the duty and obligation imposed upon it by the statute, and is clearly, therefore, chargeable with negligence in thus using an improperly equipped car; and the company is bound to know that if it calls upon one of its employees to make a coupling with a coupler so defective and inoperative that it will not couple by impact, and that, to make the coupling, the employee must subject himself to all the risk and dangers that inhered in the old and dangerous link and pin method of coupling, it is subjecting such employee to the very risk and danger which it is the purpose of the statute to protect him against, so far as that is reasonably possible. Subjecting an employee to risk to life and limb by calling upon him to use appliances which have become defective and inoperative through the failure to use proper care on part of the master is certainly negligence which will become actionable if injury results therefrom to the employee." This court has held in Mason v. Railroad, 111 N. C. 482, 16 S. E. 698, 18 L. R. A. 845, 32 Am. St. Rep. 814, that an employee, "when acting under the order of the conductor, but contrary

to a rule of the railroad company to which he has assented, was injured in coupling defective cars, of which he had no notice until it was too late to escape, it was error to withdraw the case from the jury on the ground that plaintiff, upon such facts, could not recover." The relation existing between the conductor and brakeman, with their relative rights and duties, and in respect to giving and obeying orders, is clearly set forth by Mr. Justice Field in Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 391, 5 Sup. Ct. 184, 28 L. Ed. 787, and the subject is fully and ably discussed by Mr. Justice Avery in Mason v. Railroad, supra.

Much of the argument in this cause before us was directed to the contention that the accident could not have occurred in the manner testified to by the plaintiff. The decision of this question was peculiarly the province of the jury, and its verdict, read in the light of the testimony and the instructions given, establishes the contention made by the plaintiff. The only portion of this record which we can review is the instruction of his honor. This we have done carefully, and find no reversible error therein. We are of the opinion that the judgment of this court at the February term, 1902, should be affirmed. This will be certified to the superior court of Wayne county, to the end that the judgment below be affirmed.

Petition allowed.

MONTGOMERY, J. (dissenting). I cannot concur in the disposition of the petition to rehear this case. The evidence in the case was stated correctly, as I think, in the opinion of the court (131 N. C. 569, 42 S. E. 989); and my views of the law, as in that opinion written, have undergone no change.

It would serve no good purpose to repeat here what was written in the reported case above referred to.

MCFARLAND v. CONSOLIDATED TRACTION CO.

(Supreme Court of Pennsylvania, Jan. 5, 1903.)

[54 Atl. Rep. 308.]

Street Railways—Right of Public to Use Track.*

Though a street car company has a superior right to use its tracks, it does not forbid their use by the public so as to render a person placing himself or his horse and vehicle on the tracks for any legitimate use of the street a trespasser.

Same—Accident on Track—Sufficiency of Evidence.

Plaintiff was unloading a piano from a wagon, and waited for two street cars to pass, and then backed his wagon against the curb with the horse standing on the tracks. He sent a man down the street to signal any car that might approach. One came, without giving any warning,

*See foot-note appended to North Jersey St. Ry. Co. v. Schwartz (N. J.), 22 Am. & Eng. R. Cas., N. S., 620.

at an unusual rate of speed; and although the motorman had an unobstructed view for three or four squares, and was given a notice to stop, he struck the horse and wagon, injuring plaintiff: *held*, that a verdict for plaintiff would be sustained.

Appeal from Court of Common Pleas, Allegheny County; McClung, Judge.

Action by W. T. McFarland against the Consolidated Traction Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

James C. Gray and Clarence Burleigh, for appellant.

L. K. Porter and S. G. Porter, for appellee.

MESTREZAT, J. This is an action to recover damages for personal injuries which the plaintiff alleges he sustained by reason of the negligence of the defendant company. On the evening of March 29, 1900, the plaintiff was engaged with a one-horse transfer wagon in removing a piano, weighing about 1,200 pounds, to the residence of Mrs. Eschallier, 157 Larimer avenue, East End, Pittsburg. He drove to the avenue, in the vicinity of the place he was to deliver the piano, and, having waited for two street cars to pass, he backed the wagon against the curb, its rear standing at right angles with and against the curb, with the horse standing diagonally across the street car track with its head in the direction of Everett street. With the assistance of three other men the plaintiff began to remove the piano from the wagon, and when it was "half way off" a car of the defendant company coming from the east on an ascending grade struck the horse and shaft and caused the wagon to move, throwing the piano on the plaintiff and severely injuring him. Larimer avenue is 25 feet between curbs, and there is an ascending grade from Everett street to the place of the collision, a distance of about 120 feet. There is a single car track on the avenue, 9 feet 10 inches from the curb, on which the defendant company runs its cars in a westerly direction.

On the trial of the cause in the court below the learned judge, in a charge clear and adequate, submitted the question of the defendant's and plaintiff's negligence to the jury. The verdict was in favor of the plaintiff, and from the judgment entered thereon the defendant has taken this appeal. The principal and important error assigned is that the court erred in not affirming the defendant's point "that under all the evidence the verdict should be for the defendant."

If the testimony of the plaintiff was worthy of credence, the jury was justified in finding that the defendant's motorman was guilty of negligence which occasioned the plaintiff's injuries. At the time of the accident it was light, and he had an unobstructed view of the horse and wagon for three or four squares. When the car was approaching the place of colli-

sion, and distant therefrom at least 110 feet, the motorman, who could, and presumably did, see the horse on the track, disregarded a notice to stop which he heard, although, according to his own testimony, he could have stopped his car within 30 feet. At the time of the accident the car was running at twice its usual or ordinary speed, and no warning of its approach was given. We agree with the learned trial judge that if these were the facts "there would be little difficulty in determining that this was the grossest kind of negligence." The verdict of the jury has established the facts as presented by the plaintiff.

In their printed brief of argument the learned counsel for the defendant attempted to show that the plaintiff's witnesses were not credible, and that his testimony was unworthy of belief. We must remind them of what they well know, that their argument should have been, and doubtless was, presented in another forum, and that the verdict of the jury, whose province it was, has settled the question against their contention.

It is argued very strenuously that the plaintiff was clearly guilty of contributory negligence, and hence the learned trial judge should have directed a verdict for the defendant company. The determination of this question requires a brief reference to the material facts as found by the jury. After the plaintiff arrived in the avenue near the Eschallier residence, and before he began to discharge his load, he waited until two cars had passed and no other car was in sight. He looked and could see "as far as the eye would carry" in the direction in which a car must come, and in order to protect his horse and wagon from a possible collision he sent a man in that direction to signal any car that might approach. Having taken these precautions, and knowing that the motorman if running his car at the usual speed could see the horse and stop without danger of a collision, the plaintiff placed the rear of his wagon against and at right angles with the curb, the horse necessarily on the car track and standing diagonally across it. The piano, the object to be removed from the wagon, was heavy, and it was dangerous to undertake to remove it by lifting it over the side of the wagon while it was standing parallel with the curb. It was the universal custom, under these circumstances, to unload pianos from the rear of the wagon as it stood against the curb.

These facts did not warrant the court in declaring the plaintiff guilty of negligence and directing a verdict for the defendant company. On the contrary, they fully justified the jury in the conclusion that he had performed his duty and had exercised proper care under the circumstances. The size of the piano and safety in its removal required it to be unloaded from the rear end of the wagon. The position of the wagon necessarily placed the horse on the cars tracks.

The plaintiff, therefore, had the right to occupy the tracks while unloading the piano, provided he did so with no unnecessary delay, and with proper precautions to prevent a collision with an approaching car. That he exercised care while occupying the track is apparent from all the facts, especially from the fact that he had the motorman signaled to stop at a point sufficiently distant to stop the car in time to avoid the accident. Had the motorman heeded the signal thus given him, the collision would not have occurred. Nor was the plaintiff, under the circumstances, regardless of notice to stop, required to anticipate that a car might strike his horse, and hence to keep him clear of the track when discharging his load. It was yet light, and the motorman had a clear, unobstructed view of the horse and wagon for at least three or four squares. The plaintiff had a right to assume that the motorman would be on the lookout for objects in front of him, as it was his duty to do, and have his car under proper control so that he could stop it to prevent a collision with a person or an object properly in use of the track. Under these circumstances, the plaintiff was justified in using the car tracks temporarily without incurring the charge of negligence. A contrary view of the right of the plaintiff would make him a trespasser, and deny to the public a right which it indubitably possesses in common with a street railway company.

A street car company has not the exclusive right to the use of a street on which it operates its road, nor has it such right to its own tracks. The streets of the municipalities of the state are for the use of the traveling public, and the right of the street railway company to use them is in common with the public. The street railway company and the public are alike liable for the negligent use of the street; each must exercise its rights thereon with care and a due regard for the rights of the other. While, for reasons which are apparent, a street car company must have a superior right to use its tracks in the operation of its road, yet this does not forbid their use by the public, but only requires that in their use the right of the public, under certain circumstances, shall be subordinate to that of the railway company. By placing himself or his horse and vehicle on the tracks of a street railway for any legitimate use of the street, the traveler does not become a trespasser, and will not become such unless he unreasonably and unnecessarily obstructs the company in the use of the tracks. These principles are well settled and have been recognized in the decisions of this court, among them being the very recent case of Fenner v. Wilkes-Barre, etc., Traction Company, 202 Pa. 365, 51 Atl. 1034, 2 R. R. R. 617, 25 Am. & Eng. R. Cas., N. S., 617.

The assignments of error are overruled, and the judgment is affirmed.

PETITION OF PHILADELPHIA, M. & S. ST. RY. CO.

(*Supreme Court of Pennsylvania, Oct. 13, 1902.*)

[53 Atl. Rep. 191.]

Street Railways —Use of Tracks of Another Company—Appeal—Final Order.

An appeal will lie from an order of court on a petition of a street railway company appointing viewers to assess damages, and approving bonds of the petitioner, seeking to complete its circuit by the use of tracks of another railway company, though no assessment of damages has been made.

Same—Same—Constitutional Law.

Act May 14, 1889 (P. L. 216, § 14), as amended by Act May 21, 1895 (P. L. 93), giving a street railway a right to use 2,500 feet of the tracks of another street railway company on payment of damages, is unconstitutional, as an exercise of the right of eminent domain; the object being not the benefit of the general public, but to aid a new corporation in taking possession of the franchises of the property of the old one for its own benefit.

Same—Same—Same—Estoppel.

A street railway company organized under the act of May 14, 1889 (P. L. 211), is not estopped to deny the constitutionality of section 14 of the act, as amended by the act of May 21, 1895 (P. L. 93), giving a street railway company the right to use the tracks of another, inasmuch as such section may be eliminated from the act, leaving all other provisions to stand in full force.

Appeal from court of common pleas, Delaware county.

Petition by the Philadelphia, Morton & Swarthmore Street Railway Company for appointment of viewers and for leave to file bond. From an order granting the same, the Chester, Darby & Philadelphia Railway Company appeals. Reversed.

W. B. Broomall, for appellant.

D. M. Wallerstein and E. A. Howell, for appellee.

DEAN, J. The appellant is the owner of an electric street railway running from Chester to Darby on the Chester and Darby Telford road. Appellee is the owner of another street railway extending west, from a point where Parker avenue of Collingdale borough intersects the Chester and Darby Telford road. This point is about 800 feet west of Darby. On June 4, 1900, the appellee presented a petition to the court of common pleas, setting forth that it had constructed its railway over its chartered route as far as the Parker avenue intersection with the Telford road, but that, to complete the circuit and connect with other of its tracks, it was necessary to use the tracks, poles, wires, etc., of appellant company from the Parker avenue intersection eastwardly to the intersection of Main street with the same Telford road a distance of about 800 feet. Therefore, the court was prayed to appoint five persons as viewers to assess damages as provided by law. To this petition three separate answers were filed by appellant, denying the right of the petitioner to use its tracks, poles, and wires, and consequently the authority of the court to appoint viewers. We notice only the third, for it substantially em-

braces all the objections made by appellant. It avers, in substance: (1) That no notice of the presentation of the petition for viewers was given it. (2) That, the route along the Chester and Darby turnpike road, specified in the petition, is no part of the chartered route of petitioner's road, but a mere extension adopted by petitioner. That section 14 of the act of May 14, 1889, as well as the amendment of May 21, 1895, upon which legislation the petition is founded, are unconstitutional, and do not warrant the appointment of viewers, or other proceedings at law for the condemnation of its tracks and the assessment of damages. (3) There is no legal authority for the condemnation of appellant's tracks for the purpose of construction of a branch of its main road. (4) That by reason of a contract made by appellant with the Chester & Darby Telford Road Company, it obtained the exclusive right to the use of the turnpike before the passage of the act of 1895, and therefore the legislature could not constitutionally confer upon another company a right to not exceeding 2,500 feet of the same turnpike. The court appointed viewers as asked by the petitioner, the latter filing with the approval of the court a bond conditioned for the payment of any damages. The appellee also filed a bill in equity to restrain the appellant by injunction from preventing appellee taking possession of its tracks as attempted under the act of 1895; the court enjoined appellant from any resistance to such possession. Appellant then appealed from the decree appointing the viewers and approving the bond, as also from the decree awarding the injunction to this court, and we have now the issue before us.

This is in no proper sense of the term an appeal from an interlocutory decree or order. The appointment of viewers to assess damages, as well as the issuing of the injunction, were based on section 14 of the act of 1889, as amended by the act of May 21, 1895, which gives the petitioner at once the possession of the tracks, leaving the older corporation but the single remedy of compensation at the end of the proceedings to assess damages; the amount of damages, if appeal be made the common pleas and this court, being only ascertainable on final judgment; but the petitioner is at once put in possession of appellant's tracks, poles, and wires, long before its right to take such possession is finally judicially determined. If the question were only one involving the amount of damages, it would be an interlocutory decree. But it strikes deeper. The right to possession at all is denied by appellant. This denial the court, in effect, overrules, and in spite of it gives possession at once, with all the grave consequences incident to such possession, to an antagonistic claimant. Nor would it be any sufficient answer to say that if, at final judgment, the question should be decided against it, it could be turned out, for in the meantime, while litigation was proceeding for months, perhaps years, to

determine the amount of damages, it would have been wrongfully in possession of appellant's property. And on what basis is the demand to be assessed? It is not like the appropriation of land by a railroad, where the right to enter has been long settled by judicial decision, and the amount of damages is the sole question in dispute. Here the damages is a subordinate question. The predominant and controlling one is the right to enter. The right of a younger franchise to take possession of and appropriate the franchise and property of an older one, under the facts here presented, is now for the first time before us. The decree, in effect, either assumes or establishes the right of the younger one, and is practically, as to possession, a final decree. It therefore can be properly appealed from, even though proceedings for assessment of damages are still undetermined.

The second and third objections to the proceedings in the court, as heretofore noticed, which same objections are now, under the assignments of error, raised on this appeal, aver that section 14 of the act of 1889, with its amendment in the act of 1895, is unconstitutional. That the point raised may fully appear, we quote section 14 of the first act. "Sec. 14. Any passenger railway incorporated under this act shall have the right to use such portion of the track of any other company, already laid down, as may be necessary to construct a circuit upon its own road at the end thereof. The length of the track to be used, which shall be used only with the consent of the local authorities of the city, borough or township, in no event shall exceed 500 feet in length of single track. Before any such use occurs, compensation shall be paid to the corporation owning the track laid. In case of disagreement, the court of common pleas of the proper county, upon the petition of the corporation seeking the privilege, shall appoint five persons to view and assess the damages, and report thereof make to the court, with the right of appeal now secured under section 8 of article 16 of the constitution, and of an act for the further regulation of appeals from assessment of damages to owners of property taken for public use, passed June 13th, one thousand eight hundred and seventy-four. If an appeal shall be taken, it shall be competent to pay into court the amount of said award, upon which payment the right to use said track shall vest and said sum shall await the final judgment on said appeal." The only material change made by the amendment in the act of 1889 is in the words, "The length of track to be used, * * * in no event shall exceed 500 feet in length of single track." In the amendment this reads, "in no event shall exceed 2,500 feet of street or highway." Both companies were incorporated under the act of 1889, but the appellant company was organized before the amendment of May 21, 1895; the appellee company, subsequently. Both have their being under the act of 1889. The fourteenth section of that act gives the company organ-

ized under it the right to use 500 feet in length of single track of another company. As amended by the act of 1895, the right is given to any company organized after its passage to use 2,500 feet of the street or highway on which the tracks of the older company are laid, without regard to the number of tracks.

The constitutionality of section 14, with its amendment, is denied. Can its constitutionality, under the settled law, be sustained? For whatever might be our opinion of the justice or wisdom of such legislation, we would not strike down an act of the legislature, a co-ordinate branch of the government, who are as much bound to obey the fundamental law as we, unless the act palpably violates that instrument. We are in no doubt as to just what power the legislature intended to confer by these acts. It was a clear grant of a right to the younger to enter upon the easement of the older company, and take possession of 2,500 feet of its tracks, poles, and wires, thereafter to use them for its corporate purposes. It is not material that this posesssion was not to be exclusive. In whatever light it is viewed, it was an authority to appropriate to a certain extent the franchise and property of the older company. In our earlier judicial history it was sometimes doubted whether the property of a corporation, used under its franchise for its own profit and the convenience of the public, could, under the right of eminent domain, be again appropriated by the state, or by a second corporation which had been granted the right of eminent domain; but it has long since been settled that all private property may be taken for public use; that all property not purely public is private, whether it belongs to an individual or a corporation aggregate or sole; that while a corporation aggregate may be created for public purposes, and be granted rights and immunities only because it serves the public, yet the purpose of the members is private profit to be realized by serving the public, and in that sense the franchise and property it acquires, whereby the individual profit accrues to each member of the corporation, are private property, and may be appropriated to another public use by the state. The substance of all the authorities (and they are many) is as stated by Chancellor Walworth, 3 Paige, 73: "Notwithstanding the grant to individuals, the eminent domain, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity; and they have a right to resume the possession of the property in the manner directed by the constitution and laws of the state whenever the public interest requires it." But in addition to the power resting on the state's inherent right of sovereignty, section 3, art. 16, of our constitution, declares: "The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the general assembly from taking the property

and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals."

Therefore the authority of the legislature to confer on a corporation the right to take the franchise and property of an older corporation for public use cannot be questioned. Whether it be expedient or wise for the legislature to exercise the authority to take property for public use is purely a political question, and one solely for the legislature. But whether the use to which it is sought to appropriate the property authorized to be taken as a public use is a judicial question, for the determination of the courts. Bridge Co. v. Dix, 6 How. 507, 12 L. Ed. 535; City of Pittsburg v. Scott, 1 Pa. 309; Jessup v. Loucks, 55 Pa. 350; Appeal of Stewart, 56 Pa. 413; Appeal of Philadelphia, N. & N. Y. R. Co., 120 Pa. 90; Appeal of Edgewood R. Co., 79 Pa. 257; Com. v. Pennsylvania Canal Co., 66 Pa. 41, 5 Am. Rep. 329. In all these cases the court decided whether the appropriation of the franchise of the older under the right of eminent domain was a new and enlarged use for the benefit of the public, and therefore such a "public use" as brought it within the meaning of the constitution. The first case cited (Bridge Co. v. Dix) went to the supreme court of the United States on a writ of error to the supreme court of Vermont, the plaintiff in error averring that a statute of Vermont was in conflict with the federal constitution. The bridge company in 1795 had been invested by the legislature with the exclusive privilege of building a bridge over West river within four miles of its month, with the right to collect tolls from those passing over it; the franchise to continue for 100 years. The corporation, under its franchise, constructed its bridge and enjoyed its profit until the year 1839, when another act was passed, authorizing the state courts, whenever in their judgment the public good so required, to take any real estate easement or franchise of any turnpike or other corporation for the purposes of a public highway,—to observe, however, the same rules in making compensation as provided by law in other cases where property was taken for public uses. Upon the petition of Dix et al., proceedings were instituted for the construction of a public road or highway between certain terminals; the road passing upon and over the bridge, thus converting it into a free highway for all the public. Damages were assessed in favor of the bridge company, and paid into court. The company denied the right of the legislature to appropriate its franchise and property on the ground that such appropriation impaired its contracts with the state as implied by its charter, and therefore contravened the constitution of the United States. The Vermont courts decided against the company, and their judgment was affirmed by the federal court. Three opinions were filed in the United States supreme court, concurring in this judgment

against the bridge company. It was held that the franchise and the property of the company were subject to the right of eminent domain, and could be taken for public use by the state without impairment of the contract relation with the state, if the second use to which the property was devoted was another and more beneficial to the public than the old one; that the use for which it was taken, although practically of the same kind as that made of the bridge before, was a public use, in that thereafter it became free to all the public, whereas before it was limited to those who could pay or were willing to pay tolls; that the use was enlarged and more beneficial to the general public when free from tolls. The case was ably argued by Mr. Webster for plaintiff in error, and by Mr. Phelps, contra. The opinions by the three justices, Daniel, McLean, and Woodbury, are very full and elaborate. Nearly all the questions raised are discussed, and the cases in the different states bearing on them cited. It will be noticed from an examination of the report that counsel for the defendant in error concedes, and the court assumes, that the franchise could not have been taken from one corporation for profit under the right of eminent domain in the state, and vested in another private corporation of the same kind for profit. The public use is made to depend on the fact that thereafter it was to be free. It was therefore not a transfer of the franchise and property of one corporation for profit to another of like character, but a taking for a purely public use. In the constitutions of nearly all the states, their bills of rights and eminent domain articles are substantially the same as ours. In all their courts, on questions such as the one before us, Bridge Co. v. Dix, supra, has generally been cited and approved. It has been cited with approval in our own court in the cases already noted. In re Towanda Bridge Co., 91 Pa. 216, is an exactly similar case in its essential facts. It in effect decides that the growing necessities of a progressive age must be met by the exercise of the state's power of eminent domain. The public road appropriates the bridle path; the turnpike road, the public road; the electric railway, the turnpike road; the steam railroad, the canal bed. And so this court held, so recently as Harrisburg, C. & C. Turnpike Road Co. v. Harrisburg & M. Electric Ry. Co., 177 Pa. 585, 35 Atl. 850, 34 L. R. A. 600, where the railway company appropriated a small part of the roadbed of the turnpike company under this same act of 1889, that the exercise of domain in that case was, without doubt, constitutional. The use was changed and greatly enlarged for the benefit of the public by the younger corporation. But in no case have I been able to find in any of the states a judicial judgment upholding the right of one corporation for profit to appropriate the property of another to exactly the same uses merely for the convenience and profit of the younger corporation.

Take the case before us: Both these corporations were

chartered under the act of 1889, with precisely the same character of organization, the same privileges and immunities; for the same purpose, the carrying of passengers; the same motive power, electricity; the same restricted right of domain, the highway or turnpike. Both are corporations for profit to be made from the patronage of the public for the same service. Where is the public use enlarged or where is the public benefit enhanced by the younger corporation taking possession of the rails, poles, and wires of the elder? It may be conceded that the new corporation is benefited by the immediate possession of a roadway ready for traffic, without the delay and vexation incident to building for itself; and the 2,500 feet may be the most remunerative part of the older franchise. A traffic may have been attracted to it by years of enterprise and business tact. Under such circumstances, it is called upon to give possession of its property to the new corporation, not for a real public use, but for the advantage and profit of the new. It cannot be argued that the public will have increased service. No more cars can be run by two companies on two rails than by one company. If the necessities of the public demand additional cars, it is to the profit of the old company to supply them to the extent of its rail capacity. The effect, the only effect, of this fourteenth section and the amendment is to transfer the property of one private corporation to a new one for the same public use, both being transporters of passengers for profit. The transaction is not, in substance, different from the transfer of one farmer's land to his neighbor under an assumed right of eminent domain, which has not the shadow of warrant in the constitution. To illustrate, let us suppose another case, which, if this claim be sustained, might easily become a real one: The Pennsylvania, Philadelphia & Reading, and Baltimore & Ohio are all steam railroads for passenger and freight traffic entering the city of Philadelphia, with terminal stations near its center. For five miles and more each has, at immense expense, through years of enterprise, built up a very large and probably remunerative traffic on the few miles of road next their terminal stations. Suppose another road or roads organized, as they may and can easily be, under the general railroad law of 1868, with an eastern terminal at Philadelphia. They can approach to within a few miles of the city without serious difficulty, but the cost of entering, by reason of the very great value of property, would necessarily be very large. Would the legislature, under the assumed right of eminent domain, pass an amendment to the act of 1868 authorizing the new company to take possession jointly with the old company of five miles of the older company's tracks, that it might, for the benefit of the public, secure an entrance into the city? Of course, there would have to be some proceeding adopted for assessing and paying the damage to the older company, but how estimate the damage? The old companies run all

the cars they can on their tracks now. The new company's cars would merely crowd the old ones, or part of them, off their own road. The public would in no sense be benefited by this, unless traveling to the same point over the same road in cars owned by another company would be a benefit. It is obvious that such an amendment would not be founded on any necessity of, or even convenience to, the general public, but on the desire of and the temptation to the new company, from a business point of view, to take possession of the franchise and property of the old one,—a desire which could only be attained by the assumed exercise of the power of eminent domain in favor of the new corporation by the state. It would be a perversion of, or a tyrannical exercise of, the power of eminent domain by the sovereign, not for a public use, but for the private and corporate gain of the new corporation. It would not be sustained under the fundamental law of any of our states. It could not be sustained under ours. Yet I am unable to discover wherein the supposed case materially differs in its controlling facts from the one before us.

If it be argued that by the progress in methods of transportation, and the increasing wants of the people, an imperative necessity for increased means of rapid communication for both business and social purposes has arisen, we grant it; but how is the necessity to be met? Not, certainly, by a violation of the rights of property guarantied by the constitution, but by reasonable and long-exercised lawful power of eminent domain. Surely, there are other streets and highways besides the narrow strip already occupied by appellant; other land wide enough on which appellee can lay its rails and erect its poles. If it be said that under the act of 1889 the domain of the street railway is restricted to the highway, that is no answer. The same power which restricts can enlarge. The same assumed power which gives the right to take property already appropriated under a prior grant can lawfully confer domain without restriction on property not so appropriated. In fact, there is no serious obstacle in the way of multiplying and constructing electric railways to meet every reasonable public demand for them. If the necessary cost of construction be an insuperable obstacle, unless property rights of like corporations be disregarded, then there is not that public use to be met which, within the meaning of the constitution, warrants the granting of eminent domain. A reasonable expectation of public patronage will always tempt investment of capital. If, however, under the law, the investment can be put in constant peril by the demands of newer corporations for the property of the older, it may well be doubted whether, in the end, the public would not suffer from the refusal of capital to invest in improvements for public use. Capitalists will take the risk that in the indefinite future their franchise and property may be taken to answer the public necessities and demands for a newer and more improved method

of travel and communication. It is doubtful whether they would readily take the risk of the appropriation of their franchise and property by every organization instituted for precisely the same purpose under the general act of 1889; for there would then be no limit to the extent of the appropriation, except the cupidity of the new company and the will of the legislature. It was first 500 feet; then 2,500, or nearly half a mile; next it may be a mile or more. Nor is there any limit to the number of railway companies organized subsequently which under the pretense of public use may take possession of the property of the older one. As many as choose to organize under the act can claim the same right.

What we have said disposes of appellant's third objection in the court below, and the eighth assignment of error here.

The second assignment of error avers that section 14 of the act is unconstitutional because it provides no adequate security for damages to the appellant for the taking of its property. This part of the section was declared unconstitutional in Harrisburg, C. & C. Turnpike Road Co. v. Harrisburg & M. Electric Ry. Co., supra, for the same reason set out in this assignment of error. It would not, therefore, be necessary to notice this, were it not that the able counsel for appellee, in effect, undertake to reargue that case, and intimate that it was hastily, and, as a consequence, erroneously, decided. This is a mistake. The case was fully argued and deliberately considered. The citation of authorities was not so full, especially as to those from other states with constitutional provisions like unto ours in section 8, art. 16: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction." It was held in that case that the provision directing that the right to use the tracks should vest in the petitioning company on the payment of the preliminary award of viewers into court was unconstitutional, because it did not meet the requirements of section 8, art. 16, and this point was sustained. The opinion is by the late Justice Williams, and was concurred in by all of the members of the court who sat at the argument. It was held that the payment into court of the amount awarded by the viewers, which amount might be doubled or trebled by a common pleas jury, was not the security demanded by the constitution, especially as such payment in effect vested immediate possession of the property taken in the petitioner. Most of the cases in this state bearing on the question were cited by one side or the other. Those now presented by appellee's counsel from other states were not cited, nor, if they had been, do we think they would have produced a different result. The provision in the constitution of New Jersey, as quoted,

is nearly the same as ours; but, assuming them to be substantially the same, we adhere to our construction of this provision as announced in Harrisburg, C. & C. Turnpike Road Co. v. Harrisburg & M. Electric Ry. Co., supra. A constitution, unlike a statute, is not to receive a technical construction, but that which we may infer was given by the people who by vote approved it. Cronise v. Cronise, 54 Pa. 255. By this act "just compensation" is to be fixed by a preliminary board of viewers. This may fall far short of what is just, as determined by a common pleas jury. The payment of the amount into court at this stage of the proceedings may not be half just. Our own judicial observation, therefore, impelled us to such interpretation of section 8 as announced in the case cited. The experience of other judges of courts of other states may not have led them to the same conclusion, but their conclusions in no way change our experience, or the conclusions derived therefrom, in the interpretation of this section.

The suggestion that, as appellant owes its corporate existence to the act of 1889, it cannot now deny the constitutionality of section 14, with its amendment, is without force. This section, both in its purpose and effect, is a distinct legislative enactment. If it be completely eliminated, all the other provisions stand in full force; and such is the scope of our decisions in Lockhart v. Railway Co., 139 Pa. 419, 21 Atl. 26, and Homestead St. Ry. Co. v. Pittsburg & H. Electric St. Ry. Co., 166 Pa. 162, 30 Atl. 950, 27 L. R. A. 383. In neither of those cases, however, were the objections now passed upon raised to the fourteenth section. Leaving out this section, the act stands as a whole complete in its parts. Many organizations have been had under it since the decision in Harrisburg, C. & C. Turnpike Road Co. v. Harrisburg & M. Electric Ry. Co., announced in 1896. Neither the incorporators nor the courts have doubted the lawfulness of their organization because of the invalidity of that part of this section passed upon; nor are they, nor any other railway companies under the act, affected by that decision or this, except in so far as they are barred from taking possession of another company's tracks, poles, and wires by right of eminent domain. Appellant owes its existence to the act of 1889, so far as that act itself had life. It derives no being in whole or part from a dead section of it. It neither affirmed nor denied the validity of it when it took out its charter under the lawful enactments of the general act.

Appellee claims possession of 800 feet of the tracks, poles, and wires of appellant's railway under the amendment of May 21, 1895. It must stand on this act, or it has no standing at all to assert its claims to 800 feet. At the date of appellant's organization the act of 1895 had no existence. So this point has no place in this issue. We do not intimate an opinion upon it. But this is very clear,—that, when appellant organ-

ized under the act of 1889, it did not thereby impliedly consent to an unconstitutional condition not imposed by the legislature until years afterwards.

The decree of the court below in appointing the viewers, as well as all the other proceedings on the petition, is reversed and set aside at costs of appellee.

STATE *ex rel.* BOARD OF COM'RS OF RAMSEY COUNTY *v.* MINNEAPOLIS, ST. P. & S. S. M. RY. CO.

(*Supreme Court of Minnesota, June 26, 1903.*)

[95 N. W. Rep. 581.]

Railroads—Undergrade Crossing—Action to Compel—Evidence.

In an action to compel the defendant to build an undergrade highway crossing, it is held that it was error to receive in evidence proposals for the building of such a crossing made by the defendant before the action was commenced.

(Syllabus by the Court.)

Appeal from District Court, Ramsey County; Wm. Louis Kelly, Judge.

Application by the state, on the relation of the board of county commissioners of Ramsey county, for writ of mandamus to the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. From a judgment awarding the writ, respondent appeals. Reversed.

Alfred H. Bright and Munn & Thygeson, for appellant.
T. R. Kane and O. H. O'Neill, for respondent.

START, C. J. This is an appeal from the judgment of the district court of the county of Ramsey adjudging that a peremptory writ of mandamus issue, directing the defendant to build an underground crossing under its railway tracks at Vadnais Park, where they cross a county highway known as "Rice Street." The petition herein alleges, in effect, that the present surface crossing at grade, by reason of the steep grade of the highway, extending for several hundred feet on each side of the railway crossing, and the obstruction, by reason of embankments, of the view of travelers approaching it along the highway, is so dangerous and unsafe for public travel that an underground crossing is necessary at the point of the intersection of the highway and the railway tracks. The answer of the defendant denies these allegations of the petition, and alleges, in substance, that the crossing is no more dangerous than other grade crossings of the state, and that the construction of the proposed undergrade crossing is not necessary, and, further, that the relator on March 31, 1900, made a written demand upon the defendant to repair the surface crossing, and to grade the approaches thereto, in accordance with plans and specifications prepared and submitted by the county surveyor, and the parties hereto

practically reached an agreement for so improving the crossing, at an expense of $551.50, which the defendant agreed to pay, but the relator abandoned such plans, for some reason unexplained, not connected with any public necessity, and demanded of the defendant that it should construct an underground crossing, which would entail upon it an expense of from fifteen to twenty thousand dollars; that the plans for improving the grade crossing, approved by the county surveyor, were fairly reasonable, and would make the crossing sufficient and safe; that the defendant is ready and willing to conform to the prior reasonable request of the relator, and make the improvements of the grade crossing according to the plans of the county surveyor, or to pay the price agreed upon between the parties, provided the relator will cause the work to be done. The trial court found all of the allegations of the petition true, and that the plans for the improvement of the grade crossing, and the grading of the approaches thereto, referred to in the answer, would not, if executed, make the crossing reasonably safe, and, as a conclusion of law, that the writ issue as prayed for. The defendant moved the court to amend its findings of fact so as to find, in effect, that the allegations of the petition are not sustained by the evidence, and that the proposed plans for the improvement of the grade crossing, if executed, would make the crossing reasonably safe, and to amend its conclusions of law accordingly. The motion was denied, and judgment entered awarding the writ.

The defendant assigns as error the rulings of the trial court as to the admission of evidence, its denial of the motion to amend the findings and conclusion of law, and that the findings of fact are not sustained by the evidence. If the original findings are sustained by the evidence, the motion to amend the findings was properly denied; hence the record presents for review only the alleged erroneous rulings as to the admission of evidence, and the sufficiency of the evidence to sustain the findings.

There is no controversy between the parties as to the law governing the construction of streets and highway crossings by railroad companies. Surface railway crossings are legally permissible, and the public authorities are not authorized to order overgrade or undergrade crossings to be constructed simply because they are safer and more convenient than surface crossings. It is only where the danger and inconvenience incident to a particular grade crossing are exceptional, for any reason, that railway companies may be required to construct the street or highway over or under their tracks. The answer in this case impliedly, if not directly, admits that the surface crossing in question is not a safe one, but alleges that, if the plans proposed by the county surveyor for its improvement were executed, it would then be a reasonably safe and sufficient crossing. If the finding of the trial court

that the crossing is not and would not be reasonably safe, even if so reconstructed, is sustained by the evidence, it would follow that the proposed undergrade crossing is a practical necessity. The rulings of the court as to the admission of evidence, which are assigned as error, must be considered with reference to these suggestions. The relator, as a part of its case in chief, offered in evidence certain letters and proposals of the defendant's chief engineer and attorney, for the construction by it of an undergrade crossing, upon certain conditions to be agreed to by the relator. The defendant objected to the admission of this evidence. The court's rulings were to the effect that the evidence had no bearing as a contract, but was admissible as an admission that there was some necessity for some sort of an improvement of the crossing, and as relevant to the question whether or not the crossing was a safe one. The objection was overruled, and evidence received, the defendant excepting to the rulings. It appears from the record that the proposals for an undergrade crossing were made before any demand was ever made upon the defendant for the construction of an undergrade crossing, and also that they were made for the reason that the defendant's general manager was of the opinion that it would be better to put in such a crossing, and get rid of demands for annual repairs, provided the relator would share the expense of making the change. The conditions of the proposals were not agreed to by the relator. It is quite obvious that the rulings of the court in receiving the evidence were erroneous. The proposals were made for the purpose of securing by negotiation the building of an undergrade crossing upon such terms as to division of the expenses thereof as the defendant deemed to be equitable, and thereby terminate the friction between the parties as to the crossing. Besides, there was no substantial controversy on the trial as to the necessity for "some sort of improvement" of the crossing to make it safe, which was the ground upon which the evidence was admitted. The real controversy was whether the improvement proposed by the defendant would make the crossing reasonably safe. The evidence falls within the rule that offers of settlement of a controversy are not admissible against the party making them. Melby v. Osborne & Co., 35 Minn. 387, 29 N. W. 58. It does not appear from the record that the error in admitting the evidence was not prejudicial; hence it was reversible error. Lowry v. Harris, 12 Minn. 255 (Gil. 166); Farmers' Elevator Co. v. Ins. Co., 40 Minn. 153, 41 N. W. 547. It is quite evident that the trial court must have given controlling importance to the incompetent evidence, for the underground crossing which it directed the defendant to build is to be constructed substantially in accordance with its proposals; leaving the relator to do at its own expense the rest of the necessary work to complete the grade of the approaches to the crossing. Again, if the incom-

petent evidence be eliminated from the record, it is at least doubtful if there would remain evidence sufficient to sustain the findings of fact upon which the judgment must rest. It follows that it is not necessary to decide the question whether the evidence sustains the findings of fact, and that the judgment must be reversed and a new trial granted for the error indicated.

So ordered.

SWICE'S ADM'X v. MAYSVILLE & B. S. R. CO. *et al.*

(*Court of Appeals of Kentucky, June 20, 1903.*)

[75 S. W. Rep. 278.]

Railroads—Lease of Lines—Liabilities of Lessor—Servant's Injuries.*

Where a railroad company, under valid legislative authority, leases its lines to another road, it is not liable as an employer for injuries caused to employees of the lessee through the lessee's negligence.

"To be officially reported."

On rehearing. Rehearing granted, judgment affirmed, and former opinion withdrawn.

For former opinion, see 70 S. W. 1117.

HOBSON, J. Appellant filed this suit against the Maysville & Big Sandy Railroad Company, a Kentucky corporation, and the Chesapeake & Ohio Railway Company, a Virginia corporation, to recover for the death of her intestate. The Chesapeake & Ohio Railway Company filed its petition to remove the case to the Circuit Court of the United States for the Eastern District of Kentucky. The court ordered the removal, and the plaintiff appeals.

The Chesapeake & Ohio Railway Company is the lessee of the Maysville & Big Sandy Railroad Company. The intestate was a laborer in the service of the Chesapeake & Ohio Railway Company on a coal dock in a coal yard near the city of Maysville, and while walking on a narrow elevated platform, adjoining the coal dock, he fell therefrom, by reason, as alleged, of its not being sufficiently secured. The order of the circuit court removing the case rests on the idea that no cause of action was stated against the Maysville & Big Sandy Railroad Company, and the fact that it was made a defendant to the petition did not affect the right of the real defendant to a removal of the case. The lease made by the Maysville & Big Sandy Railroad Company to the Chesapeake & Ohio Railway Company, and the authority under which it was made, are set out in the case of McCabe's Adm'x v. Maysville & Big Sandy Railroad Co., 66 S. W. 1054. It was there held that the lessor company continued liable to the public for the discharge of the obligation imposed on it by

*See generally, foot-note appended to McCabe's Adm'x v. Maysville & B. S. R. Co. (Ky.), 1 R. R. R. 940, 24 Am. & Eng. R. Cas., N. S., 940.

law; but whether it would be liable to the servants of the lessee for injuries received by reason of its negligence was a question not decided. The cases holding that the lessor is not liable for injuries to the servants of the lessee from its negligence are referred to in the opinion, and distinguished from the case before the court. The case now presented requires a determination of this question, as Swice was in the employment of the lessee, and was injured, as alleged, by reason of its negligence.

In Lee v. Southern Pacific Railroad Co., 116 Cal. 97, 47 Pac. 932, 38 L. R. A. 71, 58 Am. St. Rep. 140, the court, in passing on the question, said: "In all cases where a valid lease is found (or, as in this discussion, where it is assumed), the lessor company owes no duty whatsoever as an employer to the operatives of the lessee company. The claim of the relationship of employer and employee under such circumstances is a false claim and quantity. It does not exist. The responsibility of the lessor company, when it attaches, does not spring from this relationship, but arises from a failure of the lessor company to perform its duty to the public, of which public the employee of the operating company may be regarded as one. Thus, in those cases where the injury has resulted to an employee of the operating company by reason of the negligence of a fellow servant, or want of skill and care in the lessor company in managing the road, or in negligence in furnishing suitable appliances, these and kindred matters being entirely and exclusively within the control of the lessee company, for injury which may result the lessor is in no way responsible." In a note to this case in 58 Am. St. Rep. 155, after a review of many cases, it is said: "As to employees of a lessee corporation, the weight of authority, whether the lease is authorized or not, is to the effect that they cannot recover for injuries received through the negligence of such lessee or its servants or agents. Virginia, etc., Ry. Co. v. Washington, 86 Va. 629 [10 S. E. 927, 7 L. R. A. 344]; Hukill v. Maysville, etc., R. R. Co. (C. C.) 72 Fed. 745. The duties which are owed by a railroad company to its servant are not duties owed to him in common with the public, but grow out of the contract of service. He assumes the relation of servant to his employer voluntarily, and out of it arises the reciprocal obligations from one to the other. It seems to us that the relation of the servant of the company operating the road to the owner is very different from his relation to his employer, and that the relation of the owner of the road to him is different from its relation to the general public. His contract is not with the company owning the road; and it may be asked, does the latter owe him the duty of a master to his servant, or guaranty that the master with whom he has voluntarily contracted will perform its obligation to him? It may be that if the injury had occurred by reason of a defect in the roadbed or track, and not by rea-

son of a defect in the engine, the company charged with the duty of keeping up the road would be liable. But if it were true that the injury was caused entirely by another company operating the owner's roadbed, and was inflicted upon one of its own employees by reason of a defect in machinery entirely under its control, it is difficult to see upon what principle of policy or justice the lessor would be held liable merely because it owned the road. East Line, etc., Ry. Co. v. Culberson, 72 Tex. 375 [10 S. W. 706, 3 L. R. A. 567], 13 Am. St. Rep. 805."

When the Legislature authorized the Maysville & Big Sandy Railroad Company to lease its road, it necessarily contemplated that the lessee should have servants to run it; for the lessee could not otherwise operate it. And to hold the lessor responsible to these servants would not be to give fair effect to the legislative action. The question is fully discussed, also, in Virginia Midland Railroad Co. v. Washington, 86 Va. 629, 10 S. E. 927, 7 L. R. A. 344, and in that opinion other authorities are collected. It seems to us that the distinction made is sound, and there seems to be little or no conflict of authority on the subject.

The other questions discussed were disposed of in Davis' Adm'r v. Chesapeake & Ohio Ry. Co. (decided at this term) 75 S. W. 275.

The former opinion herein (see Swice's Adm'x v. Maysville & Big Sandy Railroad Co., 70 S. W. 1117) is withdrawn, and the judgment appealed from is affirmed.

EAST & W. I. RY. CO. *v.* MILLER *et ux.*

(*Supreme Court of Illinois, Feb. 18, 1903.*)

[66 N. E. Rep. 275.]

Eminent Domain—Damages—Review.

Damages awarded by a jury in a condemnation proceeding will not be disturbed where the evidence is conflicting, and the jury viewed the premises.

Same—Speculative or Remote Damages.

On condemnation of land, remote or speculative damages to the land not taken are not allowable.

Appeal from Jackson county court; Robt. McElvaine, Judge.

Condemnation proceedings by the East & West Illinois Railway Company against Isom Miller and wife. From a judgment for defendants, petitioner appeals. Affirmed.

Forman & Browning, for appellant.
William A. Schwartz, for appellees.

MAGRUDER, C. J. This is a condemnation proceeding, begun by the filing of a petition for condemnation by the appellant company on May 23, 1902, in the county court of

Jackson county. The petitioner alleges that it is a railroad company, incorporated under the laws of Illinois, and that Isom Miller and his wife, the appellees herein, are the owners of the lands sought to be condemned, to wit, a strip 100 feet wide, being 50 feet in width on each side of the located line of said railway, across the S. W. ¼ of the S. E. ¼ of section 17, township 8 S., range 1 W., in Jackson county, containing 2.20 acres; also that part of the S. W. ¼ of the S. E. ¼ lying south of the above-described strip, containing 3.42 acres; the last-mentioned land being necessary for filling and constructing said railroad. The total amount of land sought to be condemned was 5.62 acres. Miller and wife filed a cross-petition for damages on June 4, 1902, claiming damages to the S. W. ¼ of the S. E. ¼ and the S. E. ¼ of the S. W. ¼ of said section 17 by reason of the building and operating of said road; the total amount of land claimed to be so damaged being 80 acres.

The cause was tried before the court and a jury. Evidence was introduced by both sides as to the value of the land taken, and also as to the amount of damages done to the land not taken. By order of court, the jury went upon the premises and viewed the same. The jury returned a verdict awarding to appellee Isom Miller, as the just compensation for the land taken, the sum of $687.50, and, as damages to the land not taken, the sum of $894, the total amount awarded being $1,581.50. After overruling a motion for new trial, the court rendered judgment on the verdict in favor of defendants, and for costs of suit. The present appeal is prosecuted from such judgment.

No errors are pointed out to us by counsel for appellant as having been committed by the trial court, either in the giving or refusal of instructions, or in the admission or exclusion of evidence. Indeed, no instructions were asked by or given for the appellees upon the trial below. All the instructions asked by the appellant, petitioner in the court below, were given.

The only ground upon which the judgment below is here attacked is that the verdict was excessive, both as to the amount allowed as compensation for land taken, and as to the amount of damages allowed for land not taken. Upon looking into the evidence, we find that quite a number of witnesses state that the land taken, to wit, 5.62 acres, was worth some $200 an acre, or more than $1,000. Other witnesses put the value of the land taken at a lower figure than $200 per acre. But the large preponderance of the evidence is in favor of the amount allowed by the jury as compensation for the land taken, to wit, $687.50. The evidence also largely preponderates in favor of a greater sum for damages to the land not taken than that which was found by the jury, to wit, $894. We do not regard the judgment, to wit, $1,581.50, as being excessive, under the evidence in the rec-

ord. In connection with the evidence introduced for their consideration, the jury were allowed to view the premises; and it is well settled that the damages awarded by a jury in a condemnation proceeding will not be disturbed where the evidence is conflicting, and the jury viewed the premises. Rock Island & Peoria Railway Co. v. Leisy Brewing Co., 174 Ill. 547, 51 N. E. 572; Lanquist v. City of Chicago, 200 Ill. 69, 65 N. E. 681. In the instructions, given by the court for the appellant, the jury were cautioned not to allow any damages to the land not taken which should be remote or speculative in character. They were told to allow only such actual damages as might be apparent from the evidence, and from their inspection of the premises. All the instructions given by the court for the appellant at its own request laid down correct rules as to the compensation to be allowed for land taken, and as to the damages to be given for injury to land not taken.

We perceive no error in the record. Accordingly the judgment of the county court is affirmed. Judgment affirmed.

LOUISVILLE & N. R. CO. v. JONES.

(*Supreme Court of Florida, Division A., Feb. 3, 1903.*)

[34 So. Rep. 246.]

Negligence—Pleading.

The rule established in negligence cases is that it is not necessary for the declaration to set out the facts constituting the negligence, but an allegation of sufficient acts causing the injury, coupled with an averment that they were negligently and carelessly done, will be sufficient; and, where the negligence is alleged in general terms, and not confined to any specific acts of negligence, any acts of negligence contributory to the injury may be shown in proof.

Death by Wrongful Act—Right of Action—Common Law.

At common law no one had any right to recover for the negligent or wrongful death of another. The right to recover in such cases is due entirely to the statute giving such right, and it exists only in such persons as the statute gives it to.

Same—Same—Statute.

Section 2 of chapter 3439, Laws 1883, brought forward as section 2343, Rev. St., gives the right to recover for deaths by wrongful or negligent act (1) to the widow or husband of the deceased, as the case may be; if there is neither widow nor husband, then (2) to the minor child or children of the deceased; and, where there is neither widow nor husband nor minor child, then (3) to any person or persons dependent on the person killed for a support; and, where there is neither of the above classes, then (4) to the executor or administrator of the person killed. The existence of the right of action in any of these named classes of persons, commencing with the second class above, is wholly dependent upon the fact whether there is any person in esse belonging to any of the classes who are given by the statute the precedent right over him to maintain the action.

Same—Same—Same—Defenses.

In suits for recovery for death by wrongful or negligent act the defendant may show, in bar of the plaintiff's right to recover, that there is in esse a person who is given by the statute the precedent right of action over the plaintiff.

Same—Same—Dependence for Support.

In actions for damages for death by wrongful or negligent act, when the question is in issue as to whether a person is a "dependent upon the deceased for support," and as such entitled to sue, such status can be shown by proofs establishing the following facts: That such person, regardless of any ties of relationship to the deceased, or of strict legal right to such support, was, either from the disability of age or nonage, physical or mental incapacity, coupled with the lack of property means, dependent in fact upon the deceased for a support, and that he or she, from the fact of continued past support by the deceased, and not necessarily from any strict legal right thereto, had a reasonable expectancy of a continuation of such support from the deceased had he lived. Such reasonable expectancy, coupled with the other named facts establishing dependency, entitles such party to recover as a dependent for support.
(Syllabus by the Court.)

Error to Circuit Court, Escambia County; Evelyn C. Maxwell, Judge.

Action by Edward Jones, administrator of Joseph Jones, deceased, against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

The defendant in error, as plaintiff below, sued the plaintiff in error, as defendant below, in the circuit court of Escambia county, the trial resulting in a verdict for $1,000 in favor of the plaintiff, upon which judgment was entered, and from this judgment writ of error is taken to this court.

The declaration was, in substance, as follows:

"The plaintiff sues the defendant because that on the 4th day of July, A. D. 1897, the said defendant was possessed of, using, and operating a certain railroad, a portion of which extended from Cantonment to Muscogee, in Escambia county, state of Florida; that on said day plaintiff's intestate, the said Joseph Jones, deceased, a minor, the son of plaintiff, was in the employ of said defendant as a brakeman on a freight train, which on said day the defendant was possessed of, used, and operated as a carrier of freight from Cantonment to Muscogee, aforesaid, and in the line of his duty and employment as such brakeman was engaged in performing such work in connection with the running and operation of said train as is usually required of brakemen of freight trains upon said railroad, and while he was employed and engaged as aforesaid the said defendant, through and by its servants, so carelessly and negligently conducted itself in using, operating, and managing said train, to wit, in running said train at a fast and dangerous rate of speed around a sharp curve and through a deep cut on the line of said railroad from Cantonment to Muscogee, that the said train ran into and collided with a hand car on said railroad track at said cut, and was thereby thrown from the track and wrecked, thereby injuring the said Joseph Jones, who thereafter, on the 5th day of July, 1897, died of the injury so caused."

"Second Count. And the plaintiff sues the defendant further for that on the 4th day of July, A. D. 1897, the said defend-

ant, as a common carrier of freight, was possessed of, used, and operated a certain railroad, a portion of which extended from Cantonment to Muscogee, in Escambia county, state of Florida; that on said day plaintiff's intestate, Joseph Jones, a minor, the son of the plaintiff, was in the employment of said defendant as a brakeman on a freight train of defendant which on said day was run and operated by the defendant on that portion of said railroad extending from Cantonment to Muscogee, and in the line of his duty and employment as such brakeman was engaged in performing such work in connection with the running of said train as is usually required of brakemen of freight trains upon said railroad, and while he was engaged in the line of his duty aforesaid the said defendant, through the gross negligence and willfulness of its servants, so conducted themselves in and about the making up and operation of said train that the said train, consisting of flat and box cars, was coupled to and placed in front of the locomotive engine, the box cars being between the flat cars and engine in such a manner as to render the running of said train more than usually hazardous; and said train of cars while so made up, through the gross negligence and willfulness of the defendant and its servants, was so negligently run and operated by the defendant and its servants at a fast and dangerous rate of speed through a deep cut and around a sharp curve on the line of said railroad from Cantonment to Muscogee, aforesaid, that the said train ran into and collided with a hand car on said railroad track at said cut, and was thereby thrown from the track and wrecked, thereby injurying the said Joseph Jones, who thereafter, on the 5th day of July, 1897, died of the injury so caused. Because of the aforesaid acts of the defendant plaintiff was damaged to the extent of the pecuniary value of the life of the deceased, the said Joseph Jones, and for pecuniary loss and expenses incurred by his death occasioned as aforesaid, in the sum of fifteen thousand dollars damages; wherefore he brings this suit. And the plaintiff avers that the said Joseph Jones was an unmarried man at the time of his death, and did not leave any wife or children, or any person or persons dependent upon him for a support."

To this declaration the defendant interposed two pleas, as follows: "(1) Not guilty as alleged. (2) That it is not true that said Joseph Jones did not have any person dependent upon him for support, but that in fact he left his minor sister, Fannie Jones, so dependent."

On these pleadings the case was tried, resulting, as aforesaid, in a verdict and judgment for the plaintiff below.

W. A. Blount, for plaintiff in error.

S. R. Mallory, Jno. B. Jones, and A. A. Fisher, for defendant in error.

TAYLOR, C. J. (after stating the facts). At the trial, after the plaintiff had introduced evidence tending to

prove that his intestate, on the 4th of July, 1897, was a brakeman on a train of the defendant's made up at Cantonment on defendant's line of road, and on that day run from thence towards Muscogee, in said county of Escambia, Fla., and that between Cantonment and Muscogee, at a distance of from 1½ to 2 miles from Cantonment, the said train ran into a cut in which the track curved, and in the said cut and upon the said curve struck a hand car, and that by said collision several cars of the said train were derailed and destroyed, and the said Joseph Jones killed; and that said train consisted of many flat cars and a box car, all of which preceded the engine in the direction in which it was running; and tending to prove negligence on the part of the defendant in the manner in which the train was made up, and in which it was operated, and in the rate of speed at which it was run, and in its running into a sharp and long curve without proper precautions—the plaintiff introduced as a witness one Lambert, who, having testified, over the objection of the defendant, that before reaching the said cut a public road crossed the railroad track, was asked the following question: "Did or not the engineer in charge of said train whistle before he reached the said cross-road, and before he reached the curve at said cut?" To this question the defendant objected on the ground that it sought to elicit testimony that was impertinent and irrelevant, and because there was no allegation in the declaration of the existence of the cross-road aforesaid, and because there was no allegation in the declaration of negligence on the part of the defendant in not whistling upon the approach to the said cross-road or to the said curve or cut. The judge overruled this objection, and the defendant excepted, and this ruling is assigned as the first error. The witness answered that the engineer in charge of said train did not blow his whistle before he reached the cross-road, nor before he reached the said curve or cut. It is contended here, in support of this assignment, that the declaration in both of its counts predicates the negligence complained of upon certain specifically expressed acts of negligence that do not include the failure to sound the whistle at the cross-road or at the curve or cut, and that, consequently, no evidence is admissible in reference to such act of negligence. The first count of the declaration, we think, is subject to this contention, and under such first count, if standing alone, the testimony would have been inadmissible; but under the second count we think the questioned testimony was pertinent, and properly admitted. The second count, after alleging the negligent construction of the train in having flat and box cars attached and propelled in front of the engine, charges that "said train of cars, while so made up, * * * was so negligently run and operated by the defendant and its servants at a fast and dangerous rate of speed through

a deep cut and around a sharp curve on the line of said railroad * * * that the said train ran into and collided with a hand car on said railroad track at said cut, and was thereby thrown from the track and wrecked, thereby injuring the said Joseph Jones," etc.

The duty to sound the whistle of a moving locomotive, where the exigency exists calling for such signal, is as much a part of the proper operation of a train of cars as is the opening or closing of the engine's throttle; and the failure to sound it where the exigency demands it may, with perfect propriety, be expressed by the general expression, "a negligent operation or running of such train." The general allegation of a negligent operation of the train made in the second count of the declaration is not so wholly limited or qualified by the expression therein, "at a fast and dangerous rate of speed through a deep cut and around a sharp curve," as to exclude any other phase of negligence than that of fast running; but, as expressed in the second count, "the train was so negligently run and operated at a fast and dangerous rate of speed," etc., the general allegation of negligent operation calls for further explanation to make the negligence appear, and this further explanation can be supplied in the proofs, as was done in this case, by showing that the negligent operation consisted of running a train of cars, made up of flat and box cars, propelled in front of the engine, at a fast and dangerous rate of speed, over a crossing place and into a deep, sharply curved cut, without giving any signals or warning with the engine's whistle, in consequence of which a collision with a hand car resulted in the derailment of the train and in the death of plaintiff's intestate. The rule established in this state in negligence cases is that it is not necessary for the declaration to set out the facts constituting the negligence, but an allegation of sufficient acts causing the injury, coupled with an averment that they were negligently and carelessly done, will be sufficient. Walsh v. Western Ry. Co. of Florida, 34 Fla. 1, 15 South. 686; Jacksonville, T. & K. W. Ry. Co. v. Jones, 34 Fla. 286, 15 South. 924; Jacksonville, T. & K. W. Ry. Co. v. Garrison, 30 Fla. 557, 11 South. 929; Consumers' Electric Light, etc., Co. v. Pryor, 44 Fla. —, 32 South. 797. And where the negligence is alleged is general terms, and not confined to any specific acts of negligence, any acts of negligence contributory to the injury may be shown in proof.

The court, of its own motion, gave the following charge: "If you believe that at the time of his death the deceased had a minor sister, to whom he stood in the position of a parent, and whom he supported, and that she was dependent upon him for her support, then she would have a right to sue for the support which she lost by reason of his death, and such right of hers would deprive this plaintiff, as administrator of Joseph Jones of any right to sue; and if you believe that state of facts to

exist, then, without reference to the question of negligence or want of negligence on the part of the Louisville & Nashville Railroad Co. as causing the death of Joseph Jones, your verdict would be in favor of the defendant, the plaintiff not being entitled to recover under these circumstances. If, on the other hand, you should find from the evidence that the minor sister, if such sister existed, of Joseph Jones, was living with her father, and that he contributed to her support, and that anything which the deceased, Joseph Jones, may have contributed to her support, if he did so, was voluntarily contributed—which he was under no obligation to give, and which he could refuse to give at any time, as her father—if, as I have already stated, she lived with her father, and he was also supporting her, and that it was not necessary to her support that the deceased, Joseph Jones, should make contributions to her support, then she would not be dependent upon him within the meaning of the law, and the plaintiff would be entitled to maintain this action, if he has shown the other essential facts necessary to a maintenance of the action." This charge was excepted to, and is assigned as the second error. This charge was predicated on testimony tending to prove the following facts: The intestate, at the time of his death, had living a minor sister, then aged about 11 years. At the birth of this sister the intestate's father, the plaintiff, had given the sister to the intestate, who had promised to support her and look out for her; and that he had supported her and looked out for her generally from that time to the time of his death; that both the deceased and his sister lived with their parents at their father's home, and that deceased almost entirely supported his said sister. This charge was erroneous for two reasons: (1) Because the facts in proof upon which it was predicated did not justify some of the hypotheses of fact contained therein; and (2) because it erroneously states the law as to who, as dependents for support, are entitled to recover under our statute giving the right of recovery for death by wrongful act. The error in giving it necessitates a reversal because the subject of the charge vitally affected the substance of the right of action itself in the plaintiff who sued. At the common law no one had any right to recover for the negligence or wrongful death of another, and the right of recovery in such cases is due entirely to the statute giving such right, and it exists only in such persons as the statute gives it to. Section 2 of chapter 3439, Laws 1883, brought forward as section 2343, Rev. St., gives the right of recovery (1) to the widow or husband of the deceased, as the case may be; if there is neither widow nor husband, then (2) to the minor child or children; and, where there is neither widow nor husband or minor child, then (3) to any person or persons dependent on the person killed for a support; and, where there is neither of the above classes, then (4) to the executor or administrator of the person killed. In the case of Duval

v. Hunt, 34 Fla. 85, 15 South. 876, where this statute was involved, and where the question of parties to such actions was fully considered and discussed, it was held that: "From the terms of the statute itself, and by the judicial construction placed upon similar statutes, the existence of the right of action in any of these named classes of persons, commencing with the second class above, is wholly dependent upon the fact whether there is any person in esse belonging to any of the classes who are given by the statute the precedent right over him to maintain the action. For example, if there is in existence a legal widow of the deceased, then she alone has the right of action, and no right of action vests in either minor children, dependents, or personal representatives; and, if there is neither husband nor widow, but a minor child, such minor child would alone have the right to recover, and dependents, as such, and personal representatives, would not have any right to recover. The existence or nonexistence of any one having the precedent right of action under the statute enters into the very substance of the right of action itself when instituted by any of the named classes of persons after the first." It follows from this that, if the minor sister of the deceased, mentioned in the challenged charge, was in law and in fact a dependent upon the deceased for a support, then the right to recover vested in her to the exclusion of the administrator. By special plea the defendant alleged the existence of this sister as a dependent for support upon the deceased, and in bar of the plaintiff's right to recover as administrator, and, as before stated, this charge involved the very right of the plaintiff to recover at all in the case, independently of any question of negligence or damage sustained; and its erroneous statement of the law as to who came within the statutory category of dependents for support went to the vitals of the case. In the case of Duval v. Hunt, supra, it was also held that: "Where the suit is brought by a person who bases his right to recover upon the fact that he is a dependent upon the deceased for support, then he must show, regardless of any ties of relationship or strict legal right to such support, that he or she was, either from the disability of age, or nonage, physical or mental incapacity, coupled with the lack of property means, dependent in fact upon the deceased for a support." In that case one of the plaintiffs was a minor niece of the deceased, who had lived with her grandmother, who was the mother of the deceased, from her earliest infancy, and who, with the mother and sisters of the deceased, had lived with him, being cared for, protected, and supported by him for years before his death. The father of this niece was alive, strong, and healthy, but had not in fact supported her for years, but the deceased uncle did. Under these circumstances, the niece being without property, it was held in that case that she had the right, as a dependent for support, to recover; that her reasonable

expectancy was that he would have continued such support, and that the loss sustained in this expectancy, coupled with the dependence of her minority and lack of means, gave her the right to sue, and that it made no difference that her own father was alive, strong, and healthy. The challenged charge was inconsistent with this construction of the statute in that it made the right of the minor sister to the status of a dependent for support upon her deceased brother to depend, not upon a reasonable expectancy of a continuation of support formerly voluntarily contributed by him, but upon the existence of a legal obligation on his part to render such support; and in this respect the charge is chiefly erroneous. According to the facts upon which it was predicated as they are given to us in the abstracts of the record, we do not think that the hypothesis in the charge to the effect that the sister was supported by both the father and her deceased brother was warranted by the facts.

The defendant requested the court to give in charge to the jury the following: "In ascertaining the amount of estate which the deceased would have accumulated by the end of his probable life, you must not take into consideration any real estate which he would then have accumulated." Also the following: "In ascertaining the amount of the estate which the deceased would have left at the end of his probable life, if he had not been killed, you will exclude any accumulation which would arise from the income from property or investments or employment of capital, and take only into consideration his accumulations from his net earnings, reduced to their present value, as heretofore directed." The judge refused to give both of these charges, and such refusals are assigned as the third and fourth errors.

There was no testimony even tending to prove that the deceased had ever accumulated, or was about to acquire, or had any prospect or expectation of acquiring, any real estate, or that he had any income from property or investments, or that he had, or was about to have, any prospect or expectation of having any property or capital to invest, or of any income from such sources. These charges, therefore, had no basis in the evidence, and there was no error in their refusal.

The fifth and last assignment of error is expressly abandoned here.

For the error found, the judgment of the circuit court is reversed, and a new trial ordered, at the cost of the defendant in error.

SEABOARD AIR-LINE RY. *v.* COLLIER *et al.*

(*Supreme Court of Georgia, Aug. 12, 1903.*)

[45 S. E. Rep. 300.]

Railroads—Killing Stock—Duty to Fence.*

The trial judge correctly instructed the jury touching the liability of a railway company for killing stock running at large in a district in which the "fence law" was of force; and the finding against the defendant company was warranted by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by G. W. Collier and others against the Seaboard Air-Line Railway. Judgment for plaintiffs, and defendant brings error. Affirmed.

Brown & Randolph and Erwin & Erwin, for plaintiff in error.

J. N. Bateman and Westmoreland Bros., for defendants in error.

FISH, P. J. But two questions are presented for our determination in this case: (1) Did the evidence warrant a finding that the railway company was liable in damages for the value of two cows killed by the running of one of its trains? (2) Did the judge of the court below err in giving instructions to the jury respecting the legal duty devolving upon railway companies to observe proper precautions against injuring stock running at large in a militia district of this state wherein the "fence law" had been adopted by popular vote? A perusal of the evidence appearing in the record before us cannot justify any other conclusion than that the jury were warranted in finding that the company's engineer might, had he maintained a diligent outlook, have seen the cattle in ample time to have avoided injury to them. The company introduced in evidence "a certified copy of the minutes of the court of ordinary of Fulton county, Ga., giving the results of the election on the fence law in Peachtree and Buckhead districts, in the said county, showing the law to have gone into effect in 1883 and 1884." The purpose of this evidence was to show that in the district wherein the cows were killed owners of stock were under a legal duty to keep their stock within inclosures, and not to allow the animals to roam at large. As the jury was about to retire to make up a verdict, one of the members thereof addressed the court, saying he "understood that it was being contended in the case, in the

*As to the liability of a railroad company for killing cattle unlawfully at large, see note appended to Sauls *v.* D. W. Alderman & Sons Co. (S. Car.), 15 Am. & Eng. R. Cas., N. S., 558; Houston & T. C. Ry. Co. *v.* Hollingsworth (Tex. Civ. App.), 2 R. R. R. 905, 25 Am. & Eng. R. Cas., N. S., 905.

As to whether it is the duty of a railroad company to maintain a lookout for animals on track, see note appended to Missouri, K. & T. Ry. Co. *v.* Ward (Ind. Ter.), 11 Am. & Eng. R. Cas., N. S., 328.

argument of counsel for plaintiff, that the railroad company should have fenced in its right of way," and the "jury would like to know whether there was any law in Georgia requiring the railroad company to fence in its right of way." To this inquiry his honor replied, "in substance, that there was no law in this state which required a railroad to fence its right of way; that no such specific duty was imposed on it; that the existence of a stock law in a district did not, of itself, operate to relieve a railroad from liability for killing stock, * * * but that the existence of the stock law in any locality is a fact which the jury may consider in ascertaining the amount of care and diligence exercised by the parties, and in determining whether the railroad was liable or not, or the extent of such liability, if any; that the jury should look to the entire facts, as disclosed by the evidence, in determining what ordinary care required of the parties; and that the matter of a stock law or a fence or no fence could be considered by them, along with all the facts shown by the evidence, in determining the question of diligence or negligence, and whether ordinary care was or was not used." These instructions to the jury were certainly as favorable to the company as it had any right to demand or expect. We cannot agree with its counsel that, as matter of law, ordinary care and diligence does not require a railway company to look out for and anticipate the presence of stock on its right of way through a county or district in which the fence law is of force. Indeed, the decisions rendered by this court in Central Railroad v. Hamilton, 71 Ga. 461, and in Central Railroad v. Summerford, 87 Ga. 626, 13 S. E. 588, afford a conclusive reply to this contention.

Judgment affirmed. All the Justices concur, except TURNER, J., not presiding.

MERCER v. SOUTHERN RY.

(*Supreme Court of South Carolina, May 12, 1903.*)

[44 S. E. Rep. 750.]

Appeal—Review.

Where none of the testimony is printed in a case, the court cannot determine the applicability of the instructions.

Accident at Crossing—Absence of Signals—Contributory Negligence.*

An instruction that if the signals were not given at a crossing, and a person was killed, the railroad was liable, unless such person by his own carelessness contributed to his injury, and his negligence was the proximate cause of the injury, was proper.

Same—Same.*

An instruction, in an action for injuries at a crossing, that, whenever a railroad fails to give the statutory signal, it violates the law, and if a man is killed by such failure, and he does not contribute towards his own injury, the railroad would be liable, was proper.

Same—Negligence and Contributory Negligence.*

If a railroad company was careless and negligent, and a party killed

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*See foot-note appended to Burns v. Southern Ry. Co. (S. Car.), 6 R. R. R. 321, 29 Am. & Eng. R. Cas., N. S., 321.

at the crossing was also negligent, and the admixture of the negligence of both brought about the injury, the railroad company was not liable.

Same—Contributory Negligence—Intoxication.

If a person injured at a crossing was intoxicated at the time, and the intoxication actually contributed to the injury, the railroad company was not liable.

Jones, J., dissenting.

Appeal from Common Pleas Circuit Court of Cherokee County; Watts, Judge.

Action by Mary A. Mercer, administratrix of James W. Mercer, against the Southern Railway. From judgment for defendant, plaintiff appeals. Affirmed.

N. W. Hardin and Hall & Willis, for appellant.

Butler & Osborne and C. P. Sanders, for respondent.

POPE, C. J. This appeal involves questions as to the correctness of the charge of the Honorable Richard C. Watts, as presiding judge, to the jury, on the trial before them. The cause of action is the alleged negligence of the defendant in failing to comply with the requirements of the statute law as to ringing the bell or blowing the whistle of the engine, beginning at a distance of 500 yards of a crossing by said railway over a public highway, and continuing to ring the bell or sound the whistle until after such highway had been passed by such engine, and also the neglect to have the headlight on the engine kept burning at that time, whereby, it being a dark and windy night, the plaintiff came in collision with said engine, and was instantly killed, to the plaintiff's damage $1,950. The defendant denied all these allegations of fact, and also alleged that the death of the plaintiff, if he was killed by the railway train, was not owing to any fault or negligence of the defendant, but was due to the fault and negligence of plaintiff's intestate; that the intestate was guilty of contributory negligence, without which he would not have been killed; that the accident was the result of intestate's gross negligence. Testimony was offered by both sides. Judge Watts charged the jury. Verdict was for defendant. After judgment, plaintiff appealed on the following grounds:

"First. For that it is respectfully submitted his honor the circuit judge erred at the trial in this: Plaintiff requested his honor to instruct the jury as follows: 'It is negligence per se (of itself) for a railroad to fail to give the signals at crossings, as required by statute;' and he erred when he modified said request as follows: 'I charge you that, but don't charge you that in that language. I charge you, as a matter of law, that, wherever the railroad fails to give those signals at crossings as required by statute, it violates the statute law of the state; and if a man is killed by any failure on their part to comply with the statute law of the state, and it is their carelessness and negligence that causes the death, and the party who is killed does not contribute towards his own injury, then the plaintiff would be entitled to recover under such circumstances.' The error herein being that the failure

to give the signals is negligence per se, and it was error not to so charge. The plaintiff could recover unless Mercer was guilty of gross and willful negligence, and it was error to otherwise instruct the jury.

"Second. That he erred when he did not charge plaintiff's sixth request, without qualification, which was as follows: 'If the jury believes from the testimony that the signals were not given as required by statute, and that Mercer was killed upon the crossing, then they must find for the plaintiff, Mrs. Mercer, the mother, unless it is shown by the testimony that Jim Mercer at the time of the killing was guilty of gross or willful negligence;' and he erred when he qualified said request as follows: 'I charge you that she would be entitled to recover unless you are satisfied that he by his own carelessness and negligence contributed to his own injury, and that was the direct and proximate cause of the injury.'

"Third. That he erred when he charged the jury, 'Or, if the railroad was careless and negligent, and if the party killed was also careless and negligent, and if the admixture of the carelessness of the two brought about the injury, then the railroad is not liable;' whereas, it is submitted, as it was alleged that Mercer was killed at a public crossing on a dark night, and that no signals were given, or headlight upon the engine burning, that, if these allegations were established as true (and this was a question for the jury), then plaintiff must recover, unless the deceased was guilty of gross and willful negligence, and that such gross and willful negligence was the proximate cause of the injury.

"Fourth. That he erred when he charged the jury: 'Or, if the railroad was careless and negligent, and he was careless and negligent, and the carelessness and negligence of the two was the proximate or near cause of his injury, your verdict should be for the railroad;' whereas, it is submitted, he should have charged the jury that whoever's negligence —that of the deceased or defendant—was the proximate cause of the injury, against that one the verdict should have been rendered.

"Fifth. That he erred when he charged defendant's sixth request: 'If the jury find that the place in question was a public road crossing or traveled place, within the meaning of the statute, they must still find for the defendant, if they are satisfied that James Mercer was guilty of gross negligence, and such negligence as contributed to his injury;' whereas, it is submitted that if Mercer was killed at a crossing by defendant, and no signals were given, that the verdict must be for the plaintiff, unless Mercer was guilty of gross or willful negligence, and this negligence was the proximate cause of the injury, and it was error to say to the jury, 'guilty of gross negligence, and such negligence as contributed to the injury.'"

"Seventh. That he erred when he did not instruct the jury

plainly that if Mercer was killed upon a public crossing on defendant's track by one of its engines, and the testimony showed that the defendant did not give the signals as required by statute (which was negligence per se), and did not exercise due care, then plaintiff was entitled to recover, unless Mercer was guilty of gross or willful negligence, and this was the proximate cause of the injury.

"Eighth. That he erred when he instructed the jury, at request of defendant in sixteenth request, as follows: 'And if the intoxication actually contributed to the injury, the plaintiff cannot recover; the principle being that a person cannot voluntarily incapacitate himself from the ability to exercise ordinary care, and then recover for an injury to which a want of ordinary care on his part, while so intoxicated, proximately contributes.' If Mercer was killed at a public crossing, no signals being given, he must be guilty of gross and willful negligence, to defeat the action, and not 'want of ordinary care.' "

We will now briefly pass upon these exceptions. We will first observe that the sixth is conspicuously absent from the "case" for appeal. Before taking up the other exceptions, it may be said: "Instructions to a jury must be based upon and be applicable to the pleadings and *evidence*." (Italics ours.) 11 Ency. Pleading & Practice, pp. 158, 159. In the "case" there is not a particle of testimony printed. How can we tell whether the charge of the trial judge is responsive to the pleadings and evidence, when the latter is not printed in the "case." We might, and possibly should, decline to go further, but, under the circumstances, will not apply so stern a rule.

1. Sections 2132 and 2139 of the Civil Code of South Carolina, relating as they do to the equipment of railway engines with bell and whistle and headlight, and the duty of the one in charge of the engine to ring the bell or blow the whistle within 500 yards of a crossing of a highway, street, or traveled place, as does section 2132, and also that any collision by a person or property with such engine of the railway on a crossing by it over a highway, street, or traveled place, in the absence of the foregoing signals by the railway company, in the absence of proof that such failure of the railway company did not contribute to the injury, the railway shall be liable for all damages by the collision, unless it is shown that, in addition to a mere want of ordinary care, the person injured was at the time of the collision guilty of gross or willful negligence, or was acting in violation of law, and that such gross or willful negligence or unlawful act contributed to the injury, as provided in section 2139, have so often been before this court that it is hardly necessary to do more than to merely cite the numbers of such sections when injuries at railroad crossings of a highway, street, or traveled place are for consideration. When the circuit judge considered in his charge the fourth

request of plaintiff, he did not refuse to so charge. He used this language: "I charge you that, but I don't charge you that in that language." He went on, and, in a common-sense way, without quoting any Latin, explained to the jury what was meant by the request. His work was admirably done. There was no ambiguity in his language. No one could fail to understand what his language meant. This exception is overruled.

2. We overrule the second exception. There was no mistake of the judge, as shown by the exception itself. The circuit judge, in his charge, had to repeat the matter here involved several times, and in no instance did his language fail to convey the proper idea of what was meant by those statutory provisions. If he erred at all at this point, it was in favor of the plaintiff.

3. The circuit judge was endeavoring to impress upon the minds of the jurors the effect, in law, produced when the plaintiff and defendant concur in contributing to the disaster to plaintiff's intestate—trying to show to the jury that if the railway did not ring the bell or blow the whistle in 500 yards of the crossing in question, and yet the plaintiff, in addition to the want of ordinary care, by being guilty of gross or willful negligence, contributed to his injury, then, in law, the verdict should be for the defendant. We see no error here. It is a compliance with the statute itself. This exception must be overruled.

4. This exception is controlled by our preceding holdings, and is therefore overruled.

5. The language of the statute in question was embodied in his own language by the trial judge. This exception is overruled.

6. We find that the trial judge in his charge to the jury was very careful to convey to, and very successful in conveying to, the jury the meaning of our statute regulating such cases as the present. This ground of appeal is overruled.

8. We find that the language of the charge as here complained of was in accordance with law. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, A. J., concurs in the result, as neither the testimony, nor a statement thereof, is set out in the record.

JONES, J. (dissenting). The main question in the appeal is whether the circuit court erred in instructing the jury as to the rule of contributory negligence, as applicable under section 2139, Civ. Code 1902. That section provides: "If a person is injured in his person or property by collision with the engine or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this chapter, and that such neglect contrib-

uted to the injury, the corporation shall be liable for all damages caused by the collision or to a fine recoverable by indictment, as provided in the preceding section, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law, and that such gross or willful negligence or unlawful act contributed to the injury."

Beginning at folio 23 of the "case," the judge charged: "If you are satisfied by the preponderance or weight of the testimony that Mercer was killed, and he was killed at a traveled place, and he was killed by the carelessness and negligence of the railroad company, and he did not by his own act contribute to his injury, then your verdict should be for the plaintiff for such damages as you think she has sustained under the testimony in the case—and that is for you—proportioned to the injury sustained. Now, the law is this: If any one is killed by a railroad company, and he by his own carelessness and negligence contributes to the killing, if he was careless and negligent himself, and by his carelessness and negligence contributed to his death, then the railroad is not liable. Or if the railroad was careless and negligent, and if the party killed was also careless and negligent, and if the admixture of the carelessness of the two brought about the injury, then the railroad is not liable. But wherever a party is killed through the carelessness and negligence of the railroad, and he did not by his own act contribute to the injury, the railroad is liable."

Again, beginning at folio 32, the judge charged: "If he was killed through any negligence and carelessness of the railroad, if there was any absence of due care and precaution on their part, and he did not by his own act contribute to his own injury, the plaintiff is entitled to recover her damages, not exceeding the amount sued for, $1,950, as, in your opinion, is proportioned to the injury sustained by her. If, on the contrary, the railroad was negligent, and killed him, and he was careless and negligent on his part, and failed to observe due precaution and didn't do what a man under similar circumstances should have done—a man of ordinary reason and prudence should have done—or if he failed to do what a man under similar circumstances should have done, and he was a man of ordinary reason, and he by his own act contributed towards his injury, your verdict should be for the railroad; or if the railroad was careless and negligent, and he was careless and negligent, and the carelessness and negligence of the two was the proximate or near cause of his injury, your verdict should be for the railroad. But if he was killed through the carelessness and negligence of the railroad, and he was not careless and negligent himself, then your verdict should be for the plaintiff for the amount, under

the testimony, which you think proportioned to the injury sustained by her."

The foregoing fairly represents the main charge of the trial judge upon the point under consideration, and it is manifest therefrom that the jury were not instructed in accordance with the statute quoted, for, under these instructions, any ordinary negligence of plaintiff's intestate, which proximately contributed to his death, would defeat recovery, whereas, under the statute, such recovery would not be defeated by the contributory negligence of plaintiff's intestate, unless at the time of the collision he was guilty of gross or willful negligence, or conduct in violation of law, which proximately contributed to the injury. Bowen v. Ry. Co., 58 S. C. 230, 36 S. E. 590. This error was further emphasized in responding to plaintiff's sixth request to charge, as follows: "'(6) If the jury believe from the testimony that the signals were not given as required by statute, and that Mercer was killed upon the crossing, then they must find for the plaintiff, Mrs. Mercer, the mother, unless it is shown by the testimony that Jim Mercer at the time of the killing was guilty of gross or willful negligence.' I charge you that she would be entitled to recover, unless you are satisfied that he by his own carelessness or negligence contributed to his own injury, and that was the direct and proximate cause of his injury." There is nothing in the whole charge which in any way attempted to instruct the jury as to this requirement of the statute, unless it be found in charging defendant's sixth request, as follows: "'(6) If the jury find that the place in question was a public road crossing or traveled place, within the meaning of the statute, and that the defendant did not ring its bell or blow its whistle as required by statute, they must still find for the defendant, if they are satisfied that James Mercer was guilty of gross negligence, and such negligence as contributed to his injury.' I charge you that." This isolated sentence ought not to be construed as removing the error pointed out. The proper construction of the whole charge, giving this last portion all the force it deserves, is that the plaintiff was not entitled to recover (1) if her intestate was guilty of ordinary negligence, proximately contributing to the injury; (2) if her intestate was guilty of gross negligence, proximately contributing to the injury. After the said charge of the defendant's sixth request, the court again impressed the jury in these words: "I charge you, gentlemen, as I have before charged you, that if the railroad was guilty of carelessness and negligence in killing Mercer, if they did kill him, and there was no negligence or carelessness on the part of Mercer, then your verdict should be for the plaintiff. If Mercer by his own carelessness and negligence contributed to his injury, then he cannot recover. Or if the railroad was careless and negligent, and the admixture of the carelessness of the two was the cause of Mercer's injury, if he was injured,

your verdict should be for the railroad." It seems very clear to me that the jury could not but be impressed with the idea that ordinary negligence on the part of the plaintiff's intestate would defeat recovery if such negligence contributed proximately to the injury—a view in conflict with the provisions of the statute. The second, third, and seventh exceptions, raising this question, ought to be sustained, and the judgment of the circuit court ought to be reversed for such error.

The fact that the "case" does not state the testimony seems to me to be immaterial on this question. The "case" shows what were the issues under the pleadings, and the charge was applicable to such issues. Under such circumstances, a presumption arises that there was some testimony upon the issues which were submitted to the jury. This is not a case in which we are called upon to review findings of fact, and therefore the cases cited by respondent's counsel do not apply. The question of law raised is sufficiently presented by the pleadings, charge in submission of issues to the jury, and the exceptions thereto.

BUTTS v. ATLANTIC & N. C. R. CO.

(Supreme Court of North Carolina, Sept. 29, 1903.)

[45 S. E. Rep. 472.]

Nonsuit.

Where the evidence is conflicting, but, construed most favorably to plaintiff, affords more than a scintilla of proof tending to establish his case, a nonsuit is properly refused.

Accident at Crossing—Failure to Signal.*

A locomotive engineer's failure to ring the bell or sound the whistle on approaching a public highway crossing is evidence of negligence.

Same—Proximate Cause—Instructions.

On an issue whether defendant negligently ran its engine against plaintiff and injured him, an instruction is erroneous which makes the defendant's liability depend on its negligence, without regard to whether such negligence was the proximate cause of the injury.

Appeal from Superior Court, Craven County; Ferguson, Judge.

Action by Z. V. Butts against the Atlantic & North Carolina Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

W. C. Munroe and Simmons & Ward, for appellant.
L. J. Moore and D. L. Ward, for appellee.

DOUGLAS, J. This is an action to recover damages for personal injuries received by the plaintiff, who was struck by

*As to whether it is negligence per se to fail to give crossing signals, see foot-note appended to Ortolano v. Morgan's L. & T. R. & S. S. Co. (La.), 7 R. R. R. 103, 30 Am. & Eng. R. Cas., N. S., 103; Bowen v. Southern Ry. Co. (S. Car.), 18 Am. & Eng. R. Cas., N. S., 331; note, 5 Am. & Eng. R. Cas., N. S., 430.

a train operated by the defendant, and thrown from his wagon. There was testimony tending to prove that the plaintiff was traveling along a public highway within the corporate limits of the city of New Berne where the highway crossed the track at an acute angle, both the plaintiff and the train going in the same relative direction; that no signal for the crossing was given either by bell or whistle; that the plaintiff stopped, looked, and listened, and heard nothing. In view of this evidence, both the defendant's motions to nonsuit were properly refused, as were also the prayers for the direction of the verdict. There was conflicting evidence, but any such conflict must be reconciled or determined by the jury alone, the constitutional triers of fact. All that this court can say is that, taking the evidence of the plaintiff as true, and construing all the evidence in the light most favorable to the plaintiff, there was more than a scintilla of evidence tending to prove his contention. Printing Co. v. Raleigh, 126 N. C. 516, 36 S. E. 33; Mfg. Co. v. Railroad, 128 N. C. 280, 38 S. E. 894, 83 Am. St. Rep. 675; Boggan v. R. Co., 129 N. C. 154, 39 S. E. 808, 55 L. R. A. 418; Gordon v. Railroad, 132 N. C. 565, 44 S. E. 25.

It is well settled by the repeated adjudications of this court that the "failure of an engineer in charge of a locomotive to ring the bell or sound the whistle on approaching the crossing of a public highway, or a point where the public have been habitually permitted to cross," is at least evidence of negligence. Hinkle v. R. Co., 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581; Russell v. R. Co., 118 N. C. 1098, 24 S. E. 512; Fulp v. R. Co., 120 N. C. 525, 27 S. E. 74; Norton v. Railroad, 122 N. C. 910, 29 S. E. 886; Powell v. Railroad, 125 N. C. 370, 374, 34 S. E. 530; Edwards v. Railroad, 132 N. C. 99, 43 S. E. 585. The engineer is not obliged to do both, but must do one or the other, as circumstances may require. For instance, in going through a city at a slow rate of speed, it would be sufficient to ring the bell, especially if blowing the whistle were forbidden by ordinance. On the contrary, in running through the country at a high rate of speed, where the ringing of the bell could not be heard at a sufficient distance to be of any practical benefit, ordinary prudence would seem to require the whistle to be blown. The object of the law is not to impose unnecessary burdens upon the engineer, but simply to require such notice of the approaching train as will enable travelers upon the public highway to cross the track in reasonable safety—certainly without unnecessary danger.

In Edwards v. Railroad, 129 N. C. 78, 39 S. E. 730, this court has said: "We think that the testimony of a witness that he did not hear either the whistle or the bell, although in a position where he might reasonably have heard either, is sufficient evidence for the consideration of the jury. It tends to prove that neither the whistle nor the bell was

sounded; but whether it does prove it is for them alone to decide." In the present instance the jury might well have inferred that a warning, intended exclusively for those crossing the track, would, if given, have been heard by one listening for it at the crossing. When the law requires a party to prove a negative, it must of necessity permit him to prove it by negative testimony.

His honor charged the jury, among other things, as follows: "If you find that the defendant sounded the whistle and had the bell rung, and had the headlight lighted up, all for a reasonable distance before reaching the crossing, you should answer the first issue 'No.' (But the evidence shows that the plaintiff was injured in a collision with the defendant's locomotive, and if you find that the defendant did not give the signals, or any of them, you should answer the first issue 'Yes.')" The defendant excepted to so much of the above charge as is inclosed in parentheses. We think this exception should be sustained, inasmuch as his honor made the liability of the defendant to depend entirely upon its negligence, regardless of the fact whether such negligence was the proximate cause of the injury. In the case at bar the first issue was as follows: "Did the defendant negligently and carelessly run its engine against plaintiff and injure him as alleged in the complaint?" This question has been directly decided in Edwards v. Railroad, 129 N. C. 79, 39 S. E. 730, where this court says, on page 81, 129 N. C., and page 731, 39 S. E.: "His honor had previously charged as follows: 'If the jury find that the defendant's train approached the crossing in question without sounding the whistle and without ringing the bell, and struck and killed the plaintiff's intestate, then the jury are instructed that the defendant was guilty of negligence, and you will answer the first issue "Yes."' This instruction was erroneous, because, the killing being admitted, it made the answer to the first issue depend entirely upon the failure to sound the whistle or ring the bell. If the issue had been simply as to the negligence of the defendant, this instruction would have been correct, but such was not the issue. It was as follows: 'Was the plaintiff's intestate killed by the negligence of the defendant?' This issue involved two propositions: First, the existence of such negligence; and, secondly, its relation to the injury. The negligence of the defendant, no matter how great, would not of itself have rendered it liable in damages unless it had contributed to the death of the plaintiff's intestate; while, on the other hand, the mere killing would not have been actionable unless caused by some unlawful act or the negligence or willful omission of some legal duty on the part of the defendant." See, also, Curtis v. Railroad, 130 N. C. 437, 41 S. E. 929.

For this error in the charge there must be a new trial.

FLOYD v. PADUCAH RY. & LIGHT CO.

(Court of Appeals of Kentucky, May 5, 1903.)

[73 S. W. Rep. 1122.]

Appeal—Review—New Trial.

The Court of Appeals is slow to disturb the action of the circuit court in granting or refusing new trials where the grounds are in the discretion of the court; especially so where it grants a new trial.

Street Railways—Injury to Trespasser—Lookouts—Degree of Care.*

If an injury to a trespasser was caused by the negligence of the motorman in failing to exercise ordinary care to know of his presence on the track and of his danger, the company was liable, unless the motorman did not discover his presence in time to have avoided injuring him, and he, by his own negligence, so contributed to cause his injury that, but for such negligence, it would not have happened.

Same—Same—Discovery of Peril.

If the motorman discovered plaintiff's danger in time to have prevented the injury, but failed to exercise such care as was necessary and at his command, the company was liable without regard to his contributory negligence.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Action for personal injuries by William Floyd against the Paducah Railway & Light Company. From a judgment for defendant, plaintiff appeals. Reversed.

L. K. Taylor, for appellant.
Reed & Berry, for appellee.

O'REAR, J. This is the second appeal of this case. The first opinion states the facts, showing the nature of the injury to appellant and its cause. 64 S. W. 653. On the return of the case a retrial was had, where substantially the same facts appeared as were shown in the opinion alluded to, except that the witness Martin Rudolph did not testify at that trial. The jury returned a verdict in favor of appellant for $1,000. This was set aside by the court, and a new trial granted, upon application of appellee, upon numerous grounds filed; among others, that the verdict was not sustained by the evidence, and that it was contrary to the weight of the evidence. At a later term another trial was had, resulting in a verdict and judgment for appellee. Appellant asks a reversal of this last-named judgment, and that the circuit court be directed to enter a judgment upon the second verdict.

This court is slow to disturb the action of the circuit court in granting or refusing new trials, where the grounds are in discretion of the court. This is especially so where the circuit court grants a new trial, as it retains control of the case, and presumably the truth will avail the party complaining on a subsequent trial. This court will not reverse for grant-

*As to the care required of those in charge of street cars to avoid collisions with persons, animals, or vehicles, see Ackerman v. Union Traction Co., ante, p. 485, and foot-note.

ing a new trial, although it would have affirmed the judgment if the circuit court had refused a new trial. We are of opinion, however, that the rulings of the circuit court in instructing the jury were erroneous in several particulars. It will be remembered that appellant, who was deaf, was a trespasser upon appellee's right of way, walking on its track, going in the same direction as was the car that struck and injured him. He failed to look back, and was, therefore, unaware of the approach of the car, and, being deaf, did not hear the gong and whistle of the motorman. The evidence is pretty clear that the motorman saw appellant for a distance of from 75 to 150 feet before striking him. The car was traveling about 6 or 7 miles an hour. The repeated warnings not having attracted the attention of appellant, that fact was sufficient, it seems, to have called the attention of the motorman to appellant's danger, and to the fact that the car should be stopped, if necessary, to prevent its striking him. Instead of doing this, he continued with but slightly abated speed, until within 10 or 12 feet of appellant, when it was too late to check the momentum of the car sufficient to keep it from knocking appellant down and injuring him. Upon this state of case the court instructed the jury that appellant was a trespasser on appellee's track, and that appellee was required to exercise "only ordinary care to avoid injury" to appellant, but that, as to appellant, it was "the undoubted duty of plaintiff to have used all the care and means reasonably in his power to have avoided any injury from the street car, knowing his own infirmities of speech and hearing." In addition, the court seems to have made it impossible for plaintiff to have recovered because of the form of his instructions on the subject of appellant's contributory negligence, because the court instructed the jury that they should not find for appellant in any event, however negligent appellee may have been, if they should believe from the evidence that appellant was guilty of negligence on his part which contributed to the cause of the injury, and that, but for his own negligence, he would not have been injured. The court then told the jury that appellant's walking upon the track without looking back was such contributory negligence.

We are of opinion that the instructions were objectionable, both in form and substance. Without quoting them at length, or pointing out the defects in other particulars, we will say that the court should have said to the jury that if they believed, from the evidence, that plaintiff's injury was caused by the negligence of defendant's motorman in the operation of his car by the failure of such motorman to exercise ordinary care to know of appellant's presence on the track and of his danger, then they should find for the plaintiff, unless they should believe that the motorman did not discover appellant's presence in time to have avoided injuring him,

and that plaintiff, by his own negligence, so contributed to cause his injury as that, but for his own negligence, it would not have happened. But, if the jury should believe from the evidence that the motorman did discover plaintiff's danger in time to have prevented the injury to him, but failed to exercise such care as was necessary and was at his command to have prevented the injury, then the jury should find for the plaintiff, without regard to plaintiff's contributory negligence.

The measure of damages was correctly given. The definition of ordinary care was correctly given. After defining ordinary care, the court should have defined negligence as being the absence of such care.

For the errors indicated, the judgment is reversed, and cause remanded, with directions to award appellant a new trial under proceedings not inconsistent herewith.

SCHAFSTETTE v. ST. LOUIS & M. R. R. CO.

(*Supreme Court of Missouri, Division No. 1, April 1, 1903.*)

[74 S. W. Rep. 826.]

Harmless Error.

In an action against a street railway company, for injuries, an ex-motorman was asked, as an expert, in what distance "he" could have stopped the car, to which he answered that "it could have been stopped" within a given distance: *held*, that the error in the question was cured.

Same.

As defendant's witnesses testified that the car could have been stopped in two-thirds the distance estimated by plaintiff's witness, and that it was actually stopped in one-third the distance, and this testimony and other evidence adduced fully advised the jury of the distance in which the car could have been stopped by a man of ordinary strength and skill, the error in the question was harmless.

Contributory Negligence—Driving on Street Car Track.

A driver is not, as a matter of law, guilty of contributory negligence in turning into a street and driving along a street car track when he notices a car coming in the same direction, 500 feet away.

Duty of Motorman to Avoid Collision with Vehicle on Track.*

When a driver turns onto a street car track 500 feet ahead of a car, and drives in the same direction as the car is going, and the view of the motorman is unobstructed, it is the motorman's duty to check the car to avoid an accident, and if a collision occurs he is prima facie negligent.

Instructions.

Where the evidence showed that defendant's street car operator could have seen plaintiff driving on or close to the track for a distance of 500 feet before reaching the street intersection just beyond which the collision with plaintiff's wagon occurred, the court properly refused an abstractly correct instruction that, though there was much variance in the evidence as to the exact distance from the street intersection to the place of the accident, plaintiff was conclusively bound by his statement that it was only a few feet, as the operator had sufficient time to

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*As to the care required of those in charge of street cars to avoid collisions with persons, animals, or vehicles, see preceding case and foot-note.

stop the car and avoid the accident, even if it did occur near the street intersection.

Collision between Street Car and Other Vehicle—Evidence.

An allegation that a street car collided with the rear end of a wagon is supported by evidence that the car collided with a hind wheel of the wagon.

Same—Right of Way.

While a street car is entitled to the right of way on its own track, this does not warrant the operator of the car in running into a vehicle that happens to be on the track, or excuse his failure to exercise ordinary care to avoid a collision with such vehicle.

Same—Care Required of Motorman—Instruction.

Where the evidence in an action for negligent injuries showed that defendant's motorman had a clear view of plaintiff on or approaching defendant's track for a distance of 500 feet before he ran into plaintiff's wagon from the rear, the court properly refused to instruct the jury to find for defendant if its motorman could not, by the exercise of ordinary care, have discovered that plaintiff was dangerously near the track in time to have avoided the accident.

Same—Same—Same.

The instruction was properly refused, even though defendant's showing was that plaintiff ran into defendant's car.

Same—Contributory Negligence—Instruction.

Where all the evidence in an action for injuries resulting from a collision of a street car with plaintiff's wagon showed that plaintiff looked for cars before driving on defendant's track, and saw the car 500 feet away, and the court gave instructions fully covering the law as to plaintiff's contributory negligence, an instruction that plaintiff could not recover if he drove onto the track without looking was properly refused.

Same—Same—Same.

A requested instruction, in an action for negligent injuries against a street railroad, that defendant was entitled to a verdict if the accident was due to the negligence of both parties, was fully covered by an instruction that if plaintiff failed to exercise ordinary care to avoid the accident he could not recover, even though defendant was guilty of negligence.

Harmless Error.

Plaintiff's petition alleged that defendant's car negligently ran into the rear end of his wagon, and the instructions to the jury made his rights to a recovery dependent on a showing that the collision occurred in that manner, and that it was due to defendant's negligence as charged. Defendant claimed that the collision was caused by plaintiff driving into its car, and requested an instruction that it was entitled to a verdict if the jury found in accordance therewith: *held*, that the refusal of the instruction was harmless error, as it only stated the converse of the proposition in the given instructions.

Appeal from St. Louis Circuit Court; Walter B. Douglas, Judge.

Action by Joseph Schafstette against the St. Louis & Meramec River Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

McKeighan & Watts and Robt. A. Holland, Jr., for appellant.

Wm. L. Bohnenkamp and Wm. R. Gentry, for respondent.

MARSHALL, J. This is an action to recover damages for personal injuries sustained by the plaintiff on December 7,

1899, on Fair avenue, just south of Green Lea place, in St. Louis, in consequence of a collision between one of defendant's cars and the plaintiff's wagon. The negligence assigned is that while the plaintiff was driving his wagon along Fair avenue, near defendant's tracks, the defendant's servants "did so negligently, carelessly, unskillfully, and wrongfully manage, operate, control, and run at a high and unusual rate of speed one of its south-bound cars along its east track as to cause the same to run against and collide with, and the same did run against and collide with, the rear end of said wagon, in which plaintiff was driving as aforesaid, and that said defendant's servants and agents at the time saw said wagon, or by the exercise of reasonable care might have seen said wagon, and said plaintiff in his perilous position, in time to stop said car before striking or running against said wagon, and knew, or by reasonable care might have known, that its said car could not pass plaintiff's wagon at that point without striking it." The petition also sets out the ordinance of St. Louis which requires the conductor, motorman, gripman, driver, and any other person in charge of a car to keep a vigilant watch for vehicles and persons either on the track or moving towards it, and on the first appearance of danger to stop the car in the shortest time and space possible, and that in consideration of the franchise granted to it by the city the defendant had contracted and agreed to be bound by the ordinance aforesaid. The petition pleads a failure by the defendant to comply with the ordinance. The answer is a general denial and a plea of contributory negligence, in that the "plaintiff drove toward the track on said Fair avenue without first looking and listening to see whether or not a car was approaching on said track, and that said plaintiff, without so looking and listening, drove towards the said track and against an approaching car of the defendant." There was a verdict for the plaintiff for $1,750, and the defendant appealed. The case came to this court because the constitutionality of the nine jury law is called in question. That, however, is now settled by Gabbert v. Railroad (Mo. Sup.) 70 S. W. 891. But the case is nevertheless properly here for adjudication upon the merits.

The case made by the plaintiff is this: Green Lea place runs east and west, and intersects Fair avenue, which runs north and south. The defendant has a street car line on Fair avenue. At the time of the accident only the east track (which is the north-bound track) was completed, and for about four weeks before the accident the defendant's cars had run both ways over the one track. Fair avenue and Green Lea place were unimproved streets. At the southeast corner of said streets there was an iron post about in the line of the sidewalk. The roadway between the post and the track was very narrow, and there was a ditch on the sidewalk, and this, with the fact of the location of the pole

on the corner, made it necessary in driving from Green Lea place onto Fair avenue, and going to the south on the east side of Fair avenue, to drive close to the track. The plaintiff was a huckster, and had been in the habit of peddling vegetables in this neighborhood, and knew the conditions existing at the place in question. He drove west on Green Lea place to its intersection with Fair avenue, intending to go south on the east side of Fair avenue. As he reached Fair avenue he first looked to the north on Fair avenue, and saw a car "at the curve," which he says was a block and a half away. He then looked to the south on Fair avenue, and, seeing no car, he turned from Green Lea place onto Fair avenue, towards the south. In doing so he had to drive close to or upon the track, in order to avoid the pole at the corner. He says as soon as he had made the turn at the corner he pulled in towards the east, in order to get away from the track, but when he had gone only 18 to 20 feet the car, coming from north, struck the hind wheel of his wagon, and the collision threw him off the wagon and injured him. One of the plaintiff's witnesses, a lady who saw the accident, says that the plaintiff was trying to get away from the track, and was not on the track or within range of the car more than a minute. Another witness for the plaintiff testified that just before the collision a citizen hailed the car, and he saw the motorman look back to see if he had gotten on the car, and then he looked forward again, and immediately put on the brakes and tried to stop the car, but did not succeed in doing so in time to avert the collision, and that at that time the plaintiff's wagon was fully off of the track, but not out of range of the car.

The citizen who hailed the car testified, however, that he hailed the car when it was from 50 to 100 feet north of Green Lea place, but that the motorman looked straight ahead, and paid no attention to him, and did not stop to let him get on the car. He further testified that Green Lea place is a sixty-foot street; that the street is nearly level; that the car was running about 10 miles an hour. The witnesses differed in their estimates of how far the plaintiff's wagon was south of the intersection of Green Lea place and Fair avenue when it was struck. The plaintiff said it was 18 to 20 feet. Other witnesses put the distance at 40, 50, and 100 feet.

An ex-motorman was called as a witness for the plaintiff, and after much preliminary examination, in which all the circumstances and conditions were gone into, he was asked, "In what distance could you possibly stop the car?" This was objected to, "as not containing the proper elements for an expert's answer on the question involved." The objection was overruled, and the defendant saved an exception. The witness then answered: "It could have been stopped, if the car was running at the rate of ten miles an hour, with the brakes in 60 feet," or by using the reverse power in 40 to 45 feet.

This ruling is complained of on the ground that it calls for what the witness would do, and not for what a person of ordinary strength and skill could do. But the answer was, "It could have been stopped," etc.; thus ignoring the personal character of the inquiry, and answering the question as an expert.

The defendant's motorman and conductor testified that when the car approached Green Lea place there was a citizen at the southwest corner of that street and Fair avenue who was signaling to the car to stop for him to board it; that the car was running about four and a half to five miles an hour; that while attempting to make the stop for the citizen the plaintiff turned the corner with his wagon and drove into the car, and the front wheel of his wagon caught in the front gate of the car, and the wagon was dragged a short distance, but that the wagon was not turned over, and neither it nor the car was injured, but the plaintiff got frightened and jumped off the wagon; that the wagon thus ran into the car about five to eight feet south of Green Lea place; and that the rear of the car was about even with the south crossing of Green Lea place at that time. The motorman testified that a car running at the rate of five miles an hour can be stopped by using the brakes in 40 feet, which he says is the length of a car. The motorman and conductor testified that the car was stopped in half a car length after the collision. The errors assigned relate to the admission of the evidence of the plaintiff's expert witness, and to the instructions given for the plaintiff and refused for the defendant.

1. Whatever merit there may have been in the objection to the hypothetical question propounded to the plaintiff's expert on the ground that it required him to say within what space he could have stopped the car, and not within what space a man of ordinary strength and skill could have stopped the car, was cured by the answer of the witness, which ignored the personal character of the question, and answered the question from the standpoint of an expert. He placed it at 60 feet. But it is also to be observed that the defendant's motorman testified that the car could have been stopped in 40 feet, if it was running at 5 miles an hour, as he said this car was, and that in fact this car was stopped in half a car length, which was 20 feet, after the collision. Moreover, it must be noted that it is uncontradicted that for a block and a half north of Green Lea place the track was straight, and the motorman could have seen any obstruction on the track or any one approaching the track. It must be further remembered that the defendant's witnesses say the car was being signaled by a citizen, who was standing on the southwest corner of Green Lea place and Fair avenue, to stop so he could board it. Under these circumstances, the error in the question propounded to the plaintiff's expert does not constitute reversible error, for the other testimony and circum-

stances of the case fully advised the jury of what other persons of ordinary strength and skill could do, and particularly of what the motorman in charge of this car could do in this regard.

2. It is contended that the peremptory instructions asked at the close of the plaintiff's case and again at the close of the whole case should have been given. This contention is based upon the theory that the plaintiff's own evidence shows he was guilty of such contributory negligence as bars a recovery. The specific negligence claimed is that the plaintiff drove upon the track, or so near to it as to made a collision unavoidable, when he saw a car coming a block and a half away. The length of the blocks in the outlying part of the city where this accident occurred is not stated, but, assuming them to be the usual length of 300 feet, the fact is then presented that the plaintiff drove upon the track when the car was about 500 feet away—that is, about the width of Green Lea place—which is 60 feet, and the distance of a block and a half. The court is asked to say, as a matter of law, that to thus drive onto a track, or to turn into a street, when a street car is coming, but is 500 feet distant, constitutes such contributory negligence that the plaintiff cannot recover if the street car runs into the rear of the vehicle. The court is further asked to declare as a matter of law that under such circumstances it is the duty of the citizen to stop and wait until the street car has passed. And Boyd v. Railroad, 105 Mo. 371, 16 S. W. 909, and Watson v. Railroad, 133 Mo. 246, 34 S. W. 573, 3 Am. & Eng. R. Cas., N. S., 385, are especially relied upon to support these contentions. Those cases correctly declare the law to be that "one who knowingly crosses a track of a railway, in such close proximity to a moving train as to be struck thereby before he could cross," is guilty of such concurring negligence as bars a recovery, and that the operatives of a train, seeing a person who is sui juris approaching the track, have a right to presume that he will stop at a safe distance from the track, and not attempt to cross "immediately in front of the train." The law thus declared is correct, but it does not apply to, or fit the conditions presented by, this case.

The plaintiff did not attempt to cross the track "in such close proximity to a moving train as to be struck thereby before he could cross," nor "immediately in front of the train." The car was 500 feet distant when he went upon the track, and the motorman could have seen that he was upon the track when the car was that distance away from him, and could further have seen that he was not attempting to cross the track at all, but was driving on or near the track, and in the same direction that the car was traveling, thus having his back to the car, while the motorman had his face towards the plaintiff's wagon, and could not help from seeing

it if he had looked, and must be held in law to have seen it, because by the exercise of the slightest degree of care he could not fail to see it.

In the Boyd Case the deceased stepped upon the track "immediately in front of the engine," which was running at a speed of 40 or 45 miles an hour. In the Watson Case the deceased was struck "when about stepping" onto the track. Such cases are so radically different from this case that they can have no possible application.

It is argued, however, that if street cars are required to check up every time a person approaches the track no time can be made, and that the traveling public demands rapid transit. It is true that street cars are not compelled to check up every time a person approaches a track, but it is equally true that if a person is on or so near a track that a car cannot pass without a collision, and the operative of the car sees, or by the exercise of ordinary care can see, the condition of danger of such person, it is his duty to check the speed of the car, or even to stop the car entirely, to prevent injury to the person. This duty is just the same as between street cars and a citizen as it is between any two citizens when using a street. The traveling public has no right to demand such rapid transit on streets of a city as to amount to negligence in the running of the car. The citizen who is not in such a hurry, but is exercising ordinary care while upon the street, has rights that are just as sacred in the eye of the law as those of the hurrying crowds who demand such rapid transit, and if a street car company heeds the demands of the latter class, and thereby negligently injures the former, it must stand the consequences. The rights and duties of street car companies and citizens traveling in vehicles are thus stated in the recent case of Oates v. Street Ry. Co., 168 Mo., loc. cit. 544, 68 S. W. 908, 3 R. R. R. 916, 26 Am. & Eng. R. Cas., N. S., 916, 58 L. R. A. 447: "The sum of the adjudicated cases bearing upon the relative rights and duties of street cars and citizens traveling in vehicles drawn by horses or other animals is that both have a right to use the street, but that neither has an exclusive right. The operator of a street car is not necessarily obliged to stop the car every time a horse shies or scares at the approaching car, but when the operator of the car sees that a horse is frightened at the car it is his duty to manage his car in such manner as a man of ordinary prudence would do under the same circumstances, and it is always a question of fact for the jury whether such care in the running of the car has been observed. This duty may or may not lead to the necessity for bringing a car to a full stop. The duty of the company in this regard is just the same as the duty of one individual or citizen to another when they meet on the highway, and the horse of the one becomes frightened at the vehicle of the other, or at anything upon the vehicle of another. Because a street car carries more

people than any other kind of a conveyance, or because it is authorized to run more rapidly than a vehicle can ordinarily be legally driven, or because the rush and restlessness of the age make unreasonable demands for more and more rapid transit along the crowded thoroughfares of populous cities, it does not follow that a street car can be run in disregard of the rights of persons traveling by other means, nor that a street car company is exempt from the common-law duty of every one to exercise ordinary care, nor that it is only liable where the agents act wantonly, maliciously, and heedlessly. Benjamin v. Street Railway, 160 Mass., loc. cit. 5 [35 N. E. 95, 39 Am. St. Rep. 446], citing and following Commonwealth v. Temple, 14 Gray, 69, and Driscoll v. Street Railway, 159 Mass. 142 [34 N. E. 171]; Ellis v. Railroad, 160 Mass. 341 [35 N. E. 1127]."

It is not true as a matter of law, and prima facie cannot be true as a matter of fact, that it is negligence for a citizen to cross or drive upon and along a street car track when a street car is 500 feet away, although it may be coming in the same direction, and running at the speed of 5, 10, or even more miles an hour, when the track is straight, and the operative of the car can easily and plainly see that such person is in such a position. In such case, particularly where the citizen turns onto the track and drives upon or close to it, with his back to the approaching car, it is the duty of the operative to check the car and avoid the accident, and if a collision occurs it is prima facie, if not altogether, owing to the negligence of the operative of the car. It was not, therefore, error to refuse to give the peremptory instructions asked. And what is here said applies equally to the objection to the plaintiff's instructions given, for the same point is made against them, to wit, that there was no evidence that the plaintiff was exercising ordinary care, but, on the contrary, that his contributory negligence barred his recovery.

3. To fully appreciate the force of the reasons given for the error claimed in refusing certain instructions asked by the defendant, it is necessary to set out the instructions that were given for the defendant, which are as follows:

"No. 3. The court instructs the jury that if they believe from the evidence that at the time of, and immediately before, the collision between the car and plaintiff's wagon, the plaintiff, by the exercise of ordinary care in looking out for the approach of a car on the east track of defendant's line, could have avoided said collision, and that he omitted to use such care up to the time of such collision, and that his said omission directly contributed to produce the said collision, then your verdict should be for the defendant.

"No. 4. The court instructs the jury that if they find from the evidence that by exercising ordinary care plaintiff, up to the moment of the said collision of his wagon and the car, could have avoided said collision, and that the collision

occurred because plaintiff failed to exercise such ordinary care to avoid it, then your verdict should be for the defendant, even though you may further find from the evidence that the defendant's employees in charge of the car in question were also guilty of negligence in any of the particulars charged or alleged by the plaintiff in this case.

"No. 5. The court instructs the jury that the burden of proof is upon plaintiff to establish by a preponderance of the testimony the facts on which plaintiff charges negligence on the defendant, and unless plaintiff has so established said facts then the verdict of the jury should be for the defendant.

"No. 6. The court instructs the jury that there is no proof before them that the car was running at any excessive or forbidden rate of speed at or before the time when the collision occurred."

The defendant asked 12 other instructions, lettered from B to M, inclusive, which the court refused to give, and error is assigned as to the refusal of each (except D), and they will therefore be separately set out and considered.

Instruction B is as follows: "No. B. The court instructs the jury that they should accept as a fact admitted by the plaintiff his statement as a witness to the effect that the spot where the collision took place was less than 25 feet south of the trolley pole on the southeast corner of Green Lea place and Fair avenue." It is claimed that, as the plaintiff said the collision occurred about 18 to 20 feet south of the intersection of Green Lea place and Fair avenue, he was conclusively bound by that statement, without regard to what any other witness said about the distance, and State v. Brooks, 99 Mo. 137, 12 S. W. 633, and Feary v. Railroad, 162 Mo. 75, loc. cit. 105, 62 S. W. 452, are relied on to support the contention. Those cases decide that a party is bound by his oral admissions as well as by the admissions in his pleadings. But they have no application to this case, where it was simply a matter of judgment or opinion as to the locus in quo. It is claimed that the question of such distance has a bearing on the negligence of the defendant. But as the plaintiff entered upon the track when the car was 500 feet away, and as the operator of the car could have seen the plaintiff for 500 feet before the car reached Green Lea place, it is wholly immaterial whether the collision occurred 18 feet or 100 feet south of Green Lea place, for the operator had plenty of time to stop the car before it got to Green Lea place, or to slow it up and avoid the collision. Abstractly, the instruction was correct, but there was nothing in this case to warrant the giving of such an instruction.

Instruction C is as follows: "No. C. The court instructs the jury that unless they believe from the evidence that the car collided with the rear end of the plaintiff's wagon the jury should find for the defendant." It is claimed that the petition charged that the collision was with the rear end of the

wagon, whilst the evidence for plaintiff was that the car struck the hind wheel of the wagon, and hence it is contended that the instruction should have been given on the authority of Chitty v. Railroad, 148 Mo. 64, 49 S. W. 868. The hind wheel of a wagon is most assuredly a part of the rear end of a wagon. The evidence, therefore, did not tend to show that the accident occurred from a cause other than that specified in the petition, and therefore the Chitty Case is not applicable, and there was no error in refusing this instruction. Moreover, this point was fully covered by the instructions given.

Instruction F is next complained of, and is as follows: "No. F. The court instructs the jury that the cars had the right of way on the east track of defendant's line at the place where the accident to plaintiff occurred, and that it was the duty of the plaintiff to exercise ordinary care to keep out of the way of cars moving on said track; and, if you find and believe from the evidence that plaintiff's omission to use ordinary care (which included the duty to look out for cars approaching on the east track at the place where the injury occurred) contributed directly to produce the said collision, then your verdict should be for the defendant, even should you further be of the opinion that the defendant's motorman was negligent in any of the particulars charged in this case. If you find that plaintiff omitted to use ordinary care as above mentioned, then your verdict should be for the defendant." What is herein said with reference to the peremptory instructions applies here so far as the plaintiff's contributory negligence—or rather want of it—is concerned. As to the remainder of the instruction, it need only be said that, while a street car is entitled to the right of way on its own tracks, this does not warrant the operator of the car running into a vehicle that happens to be on the track, or in not using ordinary care to prevent a collision with such a vehicle. Such is the gravamen of this case. This instruction was therefore properly refused.

Instruction G is next complained of, and is as follows: "No. G. The court instructs the jury that if they find from the evidence that the motoneer (in charge of the car which struck plaintiff's wagon) could not, by the exercise of ordinary care on his part, avoid the collision after plaintiff's wagon approached so near the track as to be within striking distance of a car moving thereon, then your verdict should be for the defendant, no matter at what rate of speed you may find the car was running at the time when defendant's motorman, by the exercise of ordinary care, could have discovered that plaintiff's wagon was so near the car as to be in danger of being struck by the car." There was no evidence upon which this instruction could possibly rest. As hereinbefore several times said, the operator of the car had a free and unobstructed view of the plaintiff on or approaching the track for at least 500 feet before the collision occurred. This is not a

case where the plaintiff suddenly put himself in danger, and the operator of the car had not sufficient time to stop the car. It is a case of the operator of the car running into the rear end of a wagon that he could have seen was on the track when he was yet 500 feet away. At least, that is the plaintiff's showing, and so says the verdict of the jury. True, the defendant's showing is that the wagon ran into the car, and not the car into the wagon; but, whichever is the truth, this instruction would have no place in the case.

Instruction H is as follows: "No. H. The court instructs the jury that the railroad tracks of defendant at the place where plaintiff received his injuries were notice to plaintiff of danger in driving upon the same, and that it was the duty of the plaintiff, before going upon or approaching said tracks near enough to be within range of a car running thereon, to look out for the approach of a car on said tracks; and the jury are further instructed that if they believe from the evidence that the plaintiff on the occasion in question drove so near the east track of defendant's line as to be within range of a car running thereon, without looking out for an approaching car, and that if he had looked out for an approaching car and had used ordinary care to avoid the collision he would not have received his injuries, then your verdict should be for the defendant." Whilst this instruction was abstractly correct, it was already covered by the instructions given for the plaintiff and the defendant, and, in addition, it assumed that there was evidence to support the theory that the plaintiff drove onto the track, or near to, without looking out for the car, when such was not the fact, and all the evidence in the case showed that the plaintiff looked before driving onto the track, and saw the car coming, but it was 500 feet away, and threatened no injury to any one turning into the street or upon the track. This instruction was properly refused.

Instruction I is as follows: "No. I. The court instructs the jury that if they find and believe from the evidence that the collision for which plaintiff brings this suit was occasioned partly by the negligence of the motorman in charge of defendant's car, and partly by the omission of the plaintiff to exercise ordinary care, and to look out for said car, and that the negligence of both parties aforesaid directly contributed to the accident to the plaintiff, then your verdict should be for the defendant." This instruction was covered by instruction No. 4, given for the defendant.

Instruction J is as follows: "No. J. The court instructs the jury that if you find from the evidence that plaintiff's wagon ran into the car on the side, as the wagon and car were passing along towards the south, then your verdict should be for the defendant." This instruction expresses the defendant's theory, and it should have been given, unless it is essentially covered by other instructions given. Plaintiff's instruction No. 1 limited the plaintiff's right to recover to the

jury finding the fact to be that the car ran into the rear of the wagon, which, of course, is wholly inconsistent with the theory or fact that the wagon ran into the front end of the car. Defendant's instruction No. 5 also limited the plaintiff's right to recover to his showing that the accident occurred in consequence of the negligence charged against the defendant. Under these instructions, if the jury found the fact to be that the wagon ran into the car, and not the car into the wagon, the plaintiff was not entitled to recover. The issues were thus very simply and sharply drawn, the jury was instructed positively as to the conditions upon which the plaintiff would be entitled to a verdict, and it was not essential that the converse of the proposition should be stated to the jury, to wit, that the defendant was entitled to a verdict if the jury failed to find the facts to be such as it was declared necessary that they should be to entitle the plaintiff to recover. The jury could not have failed to understand the rights of the parties from the instructions given, and the defendant cannot be said to have been damaged by the refusal to give this instruction.

Instruction K is as follows: "No. K. The court instructs the jury that it was not the duty of defendant's motorman to begin to stop the car merely because plaintiff's wagon was in view, driving in the same direction as the car, and by the side of the track on which the car was running. The defendant's motorman had no duty to stop the car until plaintiff's wagon was so near the track as to be in danger of colliding with the car running thereon. If you find and believe from the evidence that from the moment when plaintiff's wagon approached so near the track as to be in danger of the collision until the time of the actual collision the defendant's motorman in charge of the car could not, by the exercise of ordinary care on his part, stop the car in time to avert the collision, then your verdict should be for the defendant." What is hereinbefore said in reference to the instructions for a nonsuit and in reference to defendant's instruction G applies equally to this instruction, and need not be repeated here.

Instruction L is in almost the same language as the last sentence of instruction K, and was therefore properly refused. There is no evidence in this case upon which to predicate such instructions.

Instruction M declared it to be the duty of the plaintiff on approaching the track to look and listen for the cars, and directed the jury to find for the defendant if the plaintiff failed to do so, and if the collision occurred because of such failure. The evidence is uncontradicted that the plaintiff did look and listen, and that the collision did not occur because of any failure to do so. Hence this instruction was properly refused.

These are all the errors assigned; and, as none of them have been found to be well taken, the judgment of the circuit court is affirmed. All concur.

CENTRAL OF GEORGIA RY. CO. *v.* PARTRIDGE.

(*Supreme Court of Alabama, Feb. 12, 1903.*)

[34 So. Rep. 927.]

Accident at Crossing—Willfulness—Speed in Violation of Ordinance—Absence of Signals—Negligence after Discovery of Peril.

Where defendant's railroad train ran over a street crossing at which plaintiff was injured at a rate of speed exceeding the statutory limit fixed by a city ordinance, without any signal, and there were circumstances authorizing the jury to find that the engineer saw or might have seen plaintiff and prevented the injury, such facts were sufficient to justify a recovery for an alleged willful injury.

Same—Wantonness and Contributory Negligence.*

Where there was evidence that plaintiff's injury at a railroad crossing was the result of wantonness on the part of the railroad company's employees, plaintiff's contributory negligence was no defense.

Same—Willfulness—Engineer's Lack of Knowledge.

Where, in an action for injuries at a railroad crossing, it was claimed that the injury was willfully inflicted, the fact that it was not shown that defendant's engineer in charge of the train which struck plaintiff had knowledge of the conditions at the crossing did not preclude a recovery, since it would be presumed that the railroad company informed the engineer of all the perils and dangers incident to the operation of the train.

Appeal from City Court of Birmingham; W. W. Wilkerson, Judge.

Action by Francis M. Partridge against the Central of Georgia Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The complaint contained six counts. The court gave the general affirmative charge in favor of the defendant as to the first five counts. The sixth count, after averring that the injury complained of was sustained by plaintiff while he was trying to cross the defendant's railroad track at a public crossing in the town of Avondale, and the injuries sustained, then continues as follows: "Plaintiff further alleges that defendant wantonly or intentionally caused plaintiff to suffer said injuries and damage in the manner following, viz.: Defendant's servant or agent in charge or control of said engine wantonly or intentionally caused or allowed said engine to strike or run upon plaintiff as aforesaid. All to plaintiff's damage twenty thousand dollars, wherefore he sues."

The defendant pleaded the general issue and several special pleas setting up the contributory negligence of the plaintiff. The court sustained the plaintiff's demurrers to the special

*As to the effect of contributory negligence on the right to recover for wrongs willfully or wantonly inflicted, see Sego *v.* Southern Pac. Co. (Cal.), 5 R. R. R. 32, 28 Am. & Eng. R. Cas., N. S., 32; King *v.* Illinois Cent. R. Co. (C. C. A.), 3 R. R. R. 875, 26 Am. & Eng. R. Cas., N. S., 875; Chicago Terminal Transfer R. Co. *v.* Gruss (Ill.), 5 R. R. R. 704, 28 Am. & Eng. R. Cas., N. S., 704; Central of Georgia Ry. Co. *v.* Forshee (Ala.), 18 Am. & Eng. R. Cas., N. S., 467; Louisville & N. R. Co. *v.* York (Ala.), 23 Am. & Eng. R. Cas., N. S., 470.

pleas, in so far as they sought to answer the sixth count of the complaint.

The injury to the plaintiff was inflicted on Saturday, January 5, 1901, about 8 o'clock at night, by a passenger train on defendant's road, running from the east, on which side is Woodlawn, to the west, to Birmingham. It occurred in the town of Avondale, shown to have a population of from 1,500 to 3,000 people as differently estimated by witnesses, and at a point on the west margin of Spring street, which runs east and west, where it crosses the railroad track. This street, as shown, is 80 feet wide, is the principal business street of the town, and more frequented than any other street. It was used at the time, as shown, by foot passengers, men, women and children, of all sorts and sizes, people on horseback, in buggies and carriages, and by people from Birmingham, Woodlawn and surrounding country, and more used on Saturday night, than any other night of the week. There was no conflict in the evidence showing the great frequency with which the street was used.

The speed at which the train was running was variously stated. One witness put it at not less than 25 miles an hour, and others that it was running very fast. The plaintiff testified, that it was going from 30 to 40 miles an hour. A witness for defendant, R. C. Burris, stated that he would judge it was running 10 miles, though he stated on the cross, that he was paying no special attention to it—whether it was running 10 or 100 miles, and that it might have been running 6 or 30 miles an hour.

The evidence tends to show without conflict, that no bell was rung, and no whistle blown, and it was not shown, even, if that were important, that the engine was provided with a headlight.

It was shown also, that a freight train, making much noise, had just passed the crossing, whether coming from the east or west, is not positively shown, some witnesses stating from the one and others from the other direction. The moving of this train obstructed the crossing for the time, and plaintiff is shown to have delayed going on the main line until it had gotten out of the way. There was a side track, making off from the main track on the east, which commenced about 382½ feet from the west margin of Spring street, where plaintiff was injured. It was further shown, that on the occasion, plaintiff walked from the north side of defendant's track, across the side track, which was from 15 to 20 feet from the main line. He testified, and there is no conflicting evidence as to this, that the night was dark, and when he passed over the spur track, he stopped and looked up and down the passenger track, and listened and did not hear or see any train approaching; that after stopping near the main line, and looking and listening, he stepped over the first rail of the main line, when for the first time he discovered the train

about five yards from him running very fast; that he did not know there was a train approaching,—there was none that he saw; that he was hit by it and knocked and rolled about two car lengths.

Kelly, a witness for defendant, testified he was a civil engineer and made measurements at the point of the accident; that the rails of the side and main tracks were about 20 feet apart; that the main track at that point is straight, looking east, as far as he could see, at least a half mile; that after getting in 10 feet of the main line, if there was anything in the way like cars on the side track, you could see back, east, to the switch stand, 382½ feet from where a person would be standing at the crossing; that when getting within 3 feet of the main line, one could see, east, towards Woodlawn, as far as he could see the track—at least half a mile.

There was no testimony as to whether the engineer in charge of the engine had ever been over that crossing before, or knew anything of its use by the public, or knew anything of the size of Avondale, or the number of people who crossed there.

An ordinance of the town of Avondale was introduced by plaintiff which forbade, under penalty, the running of any train within the limits of the town at a greater rate of speed than five miles an hour.

The defendant requested the court to give to the jury the following written charges and separately excepted to the court's refusal to give each of them as asked: "(1) If you believe the evidence you will find a verdict for the defendant." "(7) I charge you that if you believe the evidence you cannot find for the plaintiff on the sixth count of the complaint. (8) I charge you that if you believe the evidence the plaintiff cannot recover for the willful or wanton misconduct of defendant's servants. (9) If the jury believe all the evidence they will find that the engineer was not guilty of any willful or wanton negligence." "(16) I charge you that although you may find from the evidence that the servants of defendant were guilty of negligence contributing proximately to produce the injury to plaintiff, and although you may further find from the evidence that the agents and servants of defendant were guilty of wantonness in the management and running of said train, still if you find from the evidence that plaintiff was himself guilty of wanton and reckless conduct in going on said crossing in front of said train, then your verdict must be for defendant."

There were verdict and judgment for the plaintiff assessing his damages at $2,000. The defendant moved the court to set aside the verdict and to grant it a new trial upon the ground that the verdict was contrary to the law and the evidence and that there was no evidence of wantonness and willfulness on the part of the defendant's employees. The

court overruled this motion and the defendant duly excepted. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

London & London, for appellant.

HARALSON, J. 1. The assignments of error are in the refusal of the court to give general charges for the defendant and one other to be hereafter noticed.

There was no error in refusing the general charges for defendant. Under the facts of the case, the court was not authorized as a matter of law, to hold that the defendant's servants or employees were not guilty of wantonness or willfulness in inflicting injury on plaintiff.

The crossing at which plaintiff was injured was a public crossing, a right of way over which the public was entitled, as much so as the railroad itself. Whether or not the company was guilty of wantonness or willfulness, was a question properly submitted to the jury under all the evidence.

In L. & N. R. Co. v. Webb, 97 Ala. 315, 12 South. 374, it was held, that "when it is shown that the train was run at a greater rate of speed over a public crossing, used to the extent the evidence shows the present one was used, in a populous city, than is permitted by a city ordinance, and without regard to the regulations adopted by the city, for the protection of persons using the crossing as a public thoroughfare, and in violation of the statutes of the state regulating the speed and signals to be given at such places, and there is evidence tending to show that the injury resulted therefrom, it is proper and necessary to submit the fact of the degree of negligence to the determination of the jury."

In M. & C. R. Co. v. Martin, 117 Ala. 384, 23 South. 231, 237, it was again held, that "persons in the proper exercise of this right [of using a public crossing] are in no sense trespassers, and while it is incumbent on them to exercise due care, by looking and listening for approaching trains, it is equally the duty of those operating trains over such places to exercise due care to prevent such injury. If in utter disregard of this duty and of the many restrictions imposed by the statute and city ordinances enacted to protect life and property at such places, those in charge should rush an engine voluntarily and unnecessarily over a public crossing, where it is likely, at the time, that persons are exercising this right to cross the track as a public highway, a condition or fact, on account of its location in a populous city, and the extent of its use as such, would authorize a jury to infer was known to defendant, with such reckless speed that due care in keeping a proper lookout for persons who might be upon the track could not be had by those operating the train, or if such persons should be discovered upon the track, could not possibly stop or slacken its speed in time to avoid inflicting injury, and injury did result from such negligence, can it be said as a

conclusion of law, upon any safe rule, that such reckless conduct and disregard of consequences, is not the equivalent of willfulness or wantonness?" Birmingham R. & E. Co. v. Smith, 121 Ala. 352, 25 South. 768.

In Southern Railway Co. v. Bush, 122 Ala. 487, 26 South. 168, 173, it was said, that "while wantonness on the part of the engineer cannot be predicated on the mere fact that he ought to have seen deceased on the trestle, or on anything short of actual knowledge, yet this actual knowledge need not be positively or directly shown, but like any other fact, may be proved by showing circumstances from which the fact of actual knowledge is a legitimate inference. Otherwise, in cases of this character, this fact could never be proved except by the testimony of the engineer himself." After referring to the conditions and circumstances tending to show that the engineer might have seen a person on the track, it is added, that these "are relevant and admissible for the purpose of proving that he did see such person, and may be properly submitted to the jury on this issue; and while no presumption arises from these facts that the engineer did see the person on the track, yet this may be inferred from these facts by the jury whose province alone it is to decide the weight to be given to facts legally in evidence and their effect on the issue which they are admitted to prove." L. & N. R. Co. v. Orr, 121 Ala. 497, 26 South. 35; S. & W. R. Co. v. Meadors, 95 Ala. 137, 10 South. 141; Nave v. A. G. S. R. Co., 96 Ala. 268, 11 South. 391; Stringer v. A. M. R. Co., 99 Ala. 410, 13 South. 75.

2. There was no error in refusing the charge, that although the jury might find from the evidence that the servants of defendant were guilty of wantonness in the management of the train, which resulted in plaintiff's injury, yet if they further found, that plaintiff was himself guilty of wanton and reckless conduct, in going on said crossing in front of said train, then their verdict must be for defendant. A railroad company, even in case of a trespasser, has no right to kill him on that account, or fail to use all preventive means to avoid doing so, after discovering his peril. Even consent of the party injured could not give the right to kill.

In the case of Stringer v. A. M. R. Co., supra, in referring to wantonness and willfulness on the part of defendant, may be found the expression: "Proof of the latter character of negligence, will authorize a recovery although the party injured may have been found guilty of contributory negligence, unless the contributory negligence on his part is of the same character as that of which defendant was guilty, in which event, he would not be entitled to a verdict." This expression does not seem to have been necessary to the decision of the cause before the court, but, whether a dictum or not, the doctrine is unsound and clearly repudiated by later decisions of the court. L. & N. R. Co. v.

Orr, 121 Ala. 495, 26 South. 35; Same v. Markee, 103 Ala. 160, 170, 15 South. 511, 49 Am. St. Rep. 21.

3. It is insisted that the engineer of defendant is not shown to have known of the conditions at the crossing, and, therefore, his conduct cannot be said to have been wanton or willful. A railroad company would be grossly negligent to place an engineer in charge of a train who was not familiar with the run, and it will not be inferred or presumed it did so. This inference or presumption, as bearing on the question whether the engineer knew of the conditions at the crossing, is evidently matter proper for the consideration of the jury. "It is presumed the master or the person placed in charge of a hazardous business or department thereof is familiar with the dangers, latent or patent, ordinarily accompanying the business he had in charge." The master should inform the servant of the particular perils and dangers of the same. Bailey, Mast. Liab. 109; Wood, Master & Servant, §§ 335, 354; Robinson M. Co. v. Tolbert, 132 Ala. 462, 31 South. 519.

What we here say is to be taken in connection with what has been said above, as to the necessity of the jury's finding that the engineer was in fact acquainted with the conditions under which he was operating the train.

The motion for a new trial was properly overruled.

No error appearing in the rulings of the court, the judgment is affirmed. Affirmed.

SUTLIFF *v.* PENNSYLVANIA R. CO.

(*Supreme Court of Pennsylvania, May 18, 1903.*)

[55 Atl. Rep. 973.]

Railroads—Injury to Person on Track.

Evidence in an action for injuries received while on the track of a railroad company *held* to sustain verdict for plaintiff.

Appeal from Court of Common Pleas, Luzerne County.

Action by Wells Sutliff against the Pennsylvania Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, and MESTREZAT, JJ.

Henry W. Palmer, for appellant.

John T. Lenahan and E. F. Cooke, for appellee.

FELL, J. The only error assigned is the refusal of the court to direct a verdict for the defendant on the ground of contributory negligence. The defendant owns a covered wooden bridge, 800 feet long, which spans the Susquehanna river at Nanticoke, and is used for the transportation of its cars and by the public on the payment of tolls. The eastern approach to the bridge is an elevated trestle 900 feet long, 21

feet wide, and 20 feet high, on one side of which are the railroad tracks, and on the other a passageway for wagons. The bridge is not wide enough to allow its use by cars and wagons at the same time, and on the approach the space between the side of a car and the wheels of a wagon passing it is only three or four feet. Because of the impossibility of cars and wagons passing on the bridge, and the great danger in their passing on the approach, a safety gate is placed at the eastern end of the approach. This gate is lowered when the bridge is in use for the passage of trains, and raised when the bridge is open to the public. This use of the bridge was understood by the plaintiff, who, having paid toll, and finding the gate raised, drove on the approach. After proceeding about 700 feet, he was stopped by a line of wagons which had been halted near the end of the bridge. It appeared that some of the cars of a coal train that was being pushed across the bridge in the direction the plaintiff was going had been derailed at the west end of the bridge. In order to clear the track, the train had been cut, and at the time the plaintiff was stopped, a part of the train was being drawn out of the bridge by an engine running with its tender in front. The plaintiff testified that he got off the wagon, and stood on the railroad tracks, and then for the first time saw this train as the engine was coming out of the bridge; that it approached and passed him at the rate of eight or ten miles an hour, and that he was injured in the attempt to hold his horses. This is the testimony that the court had to consider in passing on the request for instructions. We see nothing in it that would warrant the withdrawal of the case from the jury. The plaintiff drove on the approach with notice, because of the position of the gate, that the bridge was open and safe for travel. The engine was then half way across the bridge, and if the plaintiff could have seen it, his natural assumption would have been that it was going in the same direction he was, and that he could proceed in safety. When he first saw that he was in danger, he had neither time to turn around nor space in which to do so, as the engine was within 200 feet of him, and the approach to the bridge was too narrow to admit of his turning his wagon. Of course, the fact that the gate was up would not release him from the charge of contributory negligence if he went on notwithstanding an obvious danger which he saw or should have seen. But this view of the case was fully covered in the charge, in which it was said : "Although the pole or gate was raised, still it was Mr. Sutliff's duty to exercise reasonable care to see that there was no danger or apparent danger on the bridge. * * * If you believe he saw the engine on the bridge, had reason to believe it would return, and found he was in a bad place, and could with reasonable skill and effort extricate himself from the place, it was his duty to so do."

The judgment is affirmed.

BAKER *et al.* *v.* ROANOKE & T. R. R. R.

(*Supreme Court of North Carolina, Sept. 22, 1903.*)

[45 S. E. Rep. 347.]

Killing Stock—Negligence—Prima Facie Case—Presumption of Negligence—Question for Jury.

Where, in an action against a railroad company for killing stock, plaintiff makes a prima facie case under Code 1883, § 2326, by proof of the killing, and that the action was commenced within six months, and defendant introduces evidence tending to show that it was not negligent, the question of defendant's negligence is for the jury.

Appeal from Superior Court, Bertie County; Fred Moore, Judge.

Action by G. W. Baker and another against the Roanoke & Tar River Railroad. From a judgment for plaintiffs, defendant appeals. Affirmed.

Day & Bell, J. B. Martin, and F. D. Winston, for appellant. St. Leon Scull and B. B. Winborne, for appellees.

CLARK, C. J. This was an action for negligently killing a horse. At the close of the evidence the defendant moved to nonsuit the plaintiff. The action was brought within six months, and, the killing having been shown, the statute raised a presumption of negligence, and, the burden to rebut such presumption being upon the defendant, the judge could not find affirmatively that the defendant's evidence had been sufficient to do this. That was a matter for the jury. The judge could instruct the jury, as he did in this case, that a certain state of facts, if believed by them, would rebut the presumption, but not that certain evidence, though uncontradicted, would do so. The burden is on the defendant to rebut the presumption, and the jury alone can pass on its credibility; otherwise, if the only eyewitness is witness for the defendant, the plaintiff would be at his mercy, and would be deprived altogether of the benefit of the statute, because he did not happen to see the killing. It would be a novelty to nonsuit the plaintiff on the defendant's evidence.

The statute, Code 1883, § 2326, originally enacted in 1856, is clear and unambiguous: "When any cattle or other live stock shall be killed or injured by the engines or cars running upon any railroad, it shall be prima facie evidence of negligence on the part of the company in any action for damages against such company," with a proviso that the plaintiff cannot have "the benefit of this section" unless the action is brought within six months. The defendant relies upon an expression in the opinion in Doggett v. Railroad, 81 N. C. 467, "that, when all the facts and circumstances of the accident are known, the law itself will raise or refuse the inference of neglect, upon which the liability of the company depends. The force of the presumption only applies when the facts are not known, or when, from the testimony, they are uncertain."

In the present case this dictum, if it bore the meaning the defendant attributes to it, would not apply, because the facts are disputed. The defendant was not content with the plaintiff's evidence, but put in testimony of its own to show a different state of facts, of course; otherwise it would have been useless. Furthermore, this expression in the Doggett Case has been recently and authoritatively construed and explained (or overruled, as it may be considered) in Hardison v. Railroad, 120 N. C. 492, 26 S. E. 630, in which Furches, J., speaking for a unanimous court, says: "It seems to us that the language used by the court in Doggett v. Railroad, 81 N. C. 459, and in Durham v. Railroad, 82 N. C. 352, is calculated to produce an erroneous impression, and that it would have been more accurate to have said that the prima facie case created by the statute is rebutted where the undisputed facts show there was no negligence on the part of defendant, than it was to say that the statute did not apply. There is no exception in the statute. It is in terms general, and applies alike to all cases of killing stock by a railroad. But this prima facie case may be rebutted, and that is what we suppose the court meant in the cases of Doggett and Durham, supra." Accordingly, in Hardison's Case, 120 N. C. 492, 26 S. E. 630, which reviewed and construed Doggett's and Durham's, the court held: "Where, in the trial of an action against a railroad company for killing stock, the plaintiff showed the killing, and that the action was commenced within six months thereafter, and the defendant introduced evidence tending to show that it was not negligence, it was error to direct a verdict for the defendant." The court held that by the terms of the statute, when, as in Hardison's Case, the killing and the beginning of the action within six months were shown, nothing else appearing, it was the duty of the judge to instruct the jury (if they believed the evidence) "to find the first issue for the plaintiff, but, as the defendant introduced evidence tending to show that there was no negligence on the part of the defendant in killing the cow—that is, to rebut the prima facie case of the plaintiff—it then became an issue of fact, which could not be found by the court, but should have been left to the jury." Hardison's Case is approved by a unanimous court, the above paragraph being quoted verbatim and approved in Hunter v. Tel. Co., 130 N. C., top p. 609, 41 S. E. 797. To same purport are all the older cases. Pippen v. Railroad, 75 N. C. 54, Battle v. Railroad, 66 N. C. 343, and Clark v. Railroad, 60 N. C. 109, in which last (the first case after the statute) Battle, J., says the defendant is "put by the law under the heavy burden of proving affirmatively a negative." In fact, the statute is too explicit to admit of more than one construction, and has been adopted in many other states. 2 S. & R. on Neg. § 432. In this very case the defendant itself requested, and the court charged: "If the defendant's engineer and fireman were keeping a proper lookout, and the

horse suddenly ran to the train, and the fireman looked and saw him, and at once notified the engineer, and before the engineer had time to apply the brakes, and the train was properly equipped, the horse was stricken, and the engineer could not have prevented it under all the circumstances, then the defendant has rebutted the statutory presumption of defendant's negligence, and, in the absence of other negligence on the part of the defendant, the jury should find the issue as to negligence 'No.'" There was evidence that the horse ran along the track 120 to 165 feet before he was struck, and other evidence by reason of which the jury did not find that the presumption of negligence was rebutted.

There are other exceptions, but they are without merit, and require no discussion. It was agreed that, if the plaintiff could recover, the measure of damages was $55.

We find no error.

ALABAMA MIDLAND RY. CO. v. E. SWINDELL & CO.

(Supreme Court of Georgia, June 29, 1903.)

[45 S. E. Rep. 264]

Jurisdiction.

This court has jurisdiction to review the judgments of the city court of Bainbridge upon direct writ of error.

Fires Set by Locomotives—New Trial.

Under the ruling made in the case of Southern Railway Co. v. Pace, 40 S. E. 723, 114 Ga. 712, and the cases which that decision followed, the evidence in the present case was not sufficient to authorize a verdict for the plaintiff, and a new trial should have been granted.

(Syllabus by the Court.)

Error from City Court of Bainbridge; B. B. Bower, Judge.

Action by E. Swindell & Co. against the Alabama Midland Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Hawes & Hawes and D. H. Pope, for plaintiff in error.

A. L. Townsend and Jas. K. Hines, for defendant in error.

COBB, J. 1. The motion to dismiss the writ of error must be overruled. Under the ruling in Cooper v. State, 103 Ga. 405, 30 S. E. 249, which was followed in Medlock v. Haslett, 115 Ga. 428, 41 S. E. 594, the act of November 21, 1901 (Acts 1901, p. 94), had the effect to constitute the then existing city court of Bainbridge a constitutional city court.

2. The evidence discloses a case very similar to that which was contained in the record in the case of Southern Railway Co. v. Pace, 114 Ga. 712, 40 S. E. 723. That decision was followed in the case of Southern Railway Co. v. Horine, 115 Ga. 664, 42 S. E. 52. Under these rulings, the evidence in the present case did not authorize a verdict in favor of the plaintiff, and the judge should have granted a new trial.

Judgment reversed. All the Justices concur.

MYERS *v.* BOSTON & MAINE R. R.

(*Supreme Court of New Hampshire, Merrimack, June 2, 1903.*)

[55 Atl. Rep. 892.]

Injury to Trespasser on Track—Negligence—Failure to Discover Plaintiff's Danger.*

A railroad company is liable for injuries to a trespasser on the track, provided its servants failed to use due care to discover him in a position of danger, under such circumstances as would have put a man of average prudence on inquiry.

Same—Presumption That Trespasser on Engine Will Alight in Safe Place.

Plaintiff, who was a trespasser, rode on the footboard, at the rear end of the tender of a switch engine, in company with a switchman. After the engine stopped opposite a station, near a side track on which

*As to the care due trespassers on track, see generally, foot-note appended to Carrier *v.* Missouri Pac. Ry. Co. (Mo.), 7 R. R. R. 585, 30 Am. & Eng. R. Cas., N. S., 585; Wright *v.* Southern Ry. Co. (N. Car.), 7 R. R. R. 677, 30 Am. & Eng. R. Cas., N. S., 677 (from employees in charge of hand cars); Corbett *v.* Oregon Short Line R. Co. (Utah), 7 R. R. R. 736, 30 Am. & Eng. R. Cas., N. S., 736; Richmond Passenger & Power Co. *v.* Racks (Va.), 7 R. R. R. 615, 30 Am. & Eng. R. Cas., N. S., 615; Ashworth *v.* Southern Ry. Co. (Ga.), 5 R. R. R. 679, 28 Am. & Eng. R. Cas., N. S., 679 (at point where trespasser should be expected); Martin *v.* Chicago & N. W. Ry. Co. (Ill.), 1 R. R. R. 718, 24 Am. & Eng. R. Cas., N. S., 718, (at point where ordinance makes it an offense to cross track); Haltiwanger *v.* Columbia, N. & L. R. Co. (S. Car.), 3 R. R. R. 883, 26 Am. & Eng. R. Cas., N. S., 883 (where track is used as foot path); Brooks *v.* Pittsburg, etc., Ry. Co. (Ind.), 1 R. R. R. 521, 24 Am. & Eng. R. Cas., N. S., 521; Vanarsdell *v.* Louisville & N. R. Co. (Ky.), 1 R. R. R. 61, 24 Am. & Eng. R. Cas., N. S., 61 (lookouts); Chicago Terminal Transfer Co. *v.* Kotoski (Ill.), 5 R. R. R. 530, 28 Am. & Eng. R. Cas., N. S., 530 (failure to stop train after seeing person on track); Mizzell *v.* Southern Ry. Co. (Ala.), 1 R. R. R. 514, 24 Am. & Eng. R. Cas., N. S., 514; Denver & R. G. R. Co. *v.* Buffehr (Colo.), 4 R. R. R. 762, 27 Am. & Eng. R. Cas., N. S., 762 (willfulness and negligence after discovery of peril); Humphreys *v.* Valley R. Co. (Va.), 5 R. R. R. 649, 28 Am. & Eng. R. Cas., N. S., 649 (negligence after discovery of peril, sufficiency of evidence); Missouri, etc., Ry. Co. of Texas *v.* Haltom (Tex.), 1 R. R. R. 58, 24 Am. & Eng. R. Cas., N. S., 58 (knowledge of trespasser's peril, sufficiency of evidence); notes, 5 Am. & Eng. R. Cas., N. S., 483; 11 Am. & Eng. R. Cas., N. S., 831; 19 Am. & Eng. R. Cas., N. S., 120; 20 Am. & Eng. R. Cas., N. S., 322; 8 Am. & Eng. R. Cas., N. S., 671 (signals at crossings); 13 Am. & Eng. R. Cas., N. S., 824 (wanton negligence); 8 Am. & Eng. R. Cas., N. S., 677 (trespasser seen in perilous place); 7 Am. & Eng. R. Cas., N. S., 121 (drunken trespasser); Texas & P. Ry. Co. *v.* Harby (C. C. A.), 15 Am. & Eng. R. Cas., N. S., 737 (degree of care required in stopping train); St. Louis, I. M. & S. Ry. Co. *v.* Beecher (Ark.), 10 Am. & Eng. R. Cas., N. S., 557 (distinction between care due in running train towards a trespasser and a passenger); Nelling *v.* Chicago, St. P. & K. C. R. Co. (Iowa), 4 Am. & Eng. R. Cas., N. S., 539; Florida, etc., R. Co. *v.* Williams (Fla.), 5 Am. & Eng. R. Cas., N. S., 709 (to person seen on track); Pierce *v.* Walters (Ill.), 8 Am. & Eng. R. Cas., N. S., 672 (trespasser on bridge); Jackson *v.* Kansas City, etc., R. Co. (Mo.), 19 Am. & Eng. R. Cas., N. S., 199; Texas & P. Ry. Co. *v.* Roberts (Tex.), 10 Am. & Eng. R. Cas., N. S., 727; Louisville & N. R. Co. *v.* Taafe (Ky.), 15 Am. & Eng. R. Cas., N. S., 693 (person seen on track); Chamberlain *v.* Missouri Pac. Ry. Co. (Mo.), 3 Am. &

it was about to enter, the switchman alighted to turn the switch, and, without observing plaintiff, who had gotten off the footboard on the track, signaled the engine to back, which was immediately done, and plaintiff was struck. Plaintiff could have safely alighted from either end of the footboard without stepping on the track, and knew that the engine was a switch engine, and liable to back at any minute: *held* that, since the switchman was entitled to presume that if plaintiff would alight, he would do so in a safe place, and not on the track, the switchman was not guilty of negligence in failing to inform himself as to plaintiff's position before signaling the engine to back.

Exceptions from Superior Court, Merrimack County; Peaslee, Judge.

Action by George L. Myers against the Boston & Maine Railroad Company for personal injuries. Case transferred from superior court. Plaintiff was run over by an engine while on defendant's tracks for his own convenience. At

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Eng. R. Cas., N. S., 401 (persons on track in populous neighborhood); Louisville & N. R. Co. v. Tinkham (Ky.), 13 Am. & Eng. R. Cas., N. S., 800; Missouri Pac. Ry. Co. v. Prewitt (Kan.), 13 Am. & Eng. R. Cas., N. S., 807; Sheehan v. St. Paul & D. Ry. Co. (C. C. A.), 8 Am. &. Eng. R. Cas., N. S., 128; Thomas v. Chicago, M. & St. P. Ry. Co. (Iowa), 9 Am. & Eng. R. Cas., N. S., 854 (trespasser in perilous place); Morgan v. Wabash R. Co. (Mo.), 20 Am. & Eng. R. Cas., N. S., 372 (lookout where track used as foot path); McCall v. Southern Ry. Co. (N. Car.), 23 Am. & Eng. R. Cas., N. S., 760 (duty to stop train when person on track is apparently unconscious of danger); Tully v. Philadelphia, etc., R. Co. (Del.), 23 Am. & Eng. R. Cas., N. S., 209; Louisville & N. R. Co. v. Hocker (Ky.), 23 Am. & Eng. R. Cas., N. S., 522 (trespassers in switch yard); Cleveland, C., C. & St. L. Ry. Co. v. Tartt (C. C. A.), 18 Am. & Eng.R. Cas., N. S., 226; Grady v. Georgia R. R. & Banking Co. (Ga.), 20 Am. & Eng. R. Cas., N. S., 400; Louisville & N. R. Co. v. Vittitoe (Ky.), 8 Am. & Eng. R. Cas., N. S., 666; Thomas v. Chicago, M. & St. P. Ry. Co. (Iowa), 21 Am. & Eng. R. Cas., N. S., 586; Ward v. Illinois C. R. Co. (Ky.), 18 Am. & Eng. R. Cas., N. S., 689; Becker v. Louisville & N. R. Co. (Ky.), 20 Am. & Eng. R. Cas., N. S., 803 (trespasser seen on bridge); Thomas v. Chicago, M. & St. P. Ry. Co. (Iowa), 21 Am. & Eng. R. Cas., N. S., 586 (trespasser seen on track); Sloniker v. Great Northern Ry. Co. (Minn.), 13 Am. & Eng. R. Cas., N. S., 819 (failure to exercise ordinary care when trespasser's peril is apparent); Merrilees v. Wabash R. Co. (Mo.), 22 Am. & Eng. R. Cas., N. S., 158 (negligence after discovery of peril); Tucker v. Norfolk & W. R. Co. (Va.), 3 Am. & Eng. R. Cas., N. S., 651 (injury after notice of trespasser's peril); Pierce v. Walters (Ill.), 8 Am. & Eng. R. Cas., N. S., 672 (injury to trespasser rescuing child on bridge); St. Louis, etc., R. Co. v. Dingman (Ark.), 4 Am. & Eng. R. Cas., N. S., 261; Dyche v. Vicksburg, S. & P. R. Co. (Miss.), 23 Am. & Eng. R. Cas., N. S., 526; Texas & P. Ry. Co. v. Staggs (Tex.), 8 Am. & Eng. R. Cas., N. S., 197; Egan v. Montana Cent. Ry. Co. (Mont.), 20 Am. & Eng. R. Cas., N. S., 72 (lookouts); Huff v. Chesapeake & O. Ry. Co. (W. Va.), 17 Am. & Eng. R. Cas., N. S., 762 (liability depending on existence of wanton or gross negligence); Trudell v. Grand Trunk Ry. Co. (Mich.), 20 Am. & Eng. R. Cas., N. S., 316 (not liable where absence of gross negligence); Reidel v. Philadelphia, W. & B. R. Co. (Md.), 10 Am. & Eng. R. Cas., N. S., 91; Cleveland, C., C. & St. L. Ry. Co. v. Tartt (C. C. A.), 18 Am. & Eng. R. Cas., N. S., 226; Ward v. Illinois C. R. Co. (Ky.), 18 Am. & Eng. R. Cas., N. S., 689 (speed in excess of ordinance); Schug v. Chicago, M. & St. P. Ry. Co. (Wis.), 15 Am. & Eng. R. Cas., N. S., 705.

the close of plaintiff's evidence a nonsuit was ordered, subject to exceptions. Exceptions overruled.

Martin & Howe, for plaintiff.
Streeter & Hollis, for defendants.

BINGHAM, J. Notwithstanding the plaintiff was a trespasser upon the defendants' premises at the time he received his injury, it was the duty of the defendants, in the exercise of ordinary care, to avoid injuring him through their active intervention, if they knew of his presence in a dangerous situation, or if their failure to learn of it was due to their culpable ignorance. In other words, they were in fault if they failed to use due care to discover his presence in a position of danger, when circumstances existed which would put a man of average prudence upon inquiry. Mitchell v. Railroad, 68 N. H. 96, 34 Atl. 674; Shea v. Railroad, 69 N. H. 361, 363, 41 Atl. 774. This does not mean that the defendants were bound to ascertain and take precautions in reference to the plaintiff's possible or chance presence in a dangerous situation upon their premises, but that they were required not to actively injure him, if circumstances existed that warranted their anticipating his presence in such a situation as a probable occurrence. Shea v. Railroad, supra; Davis v. Railroad, 70 N. H. 519, 49 Atl. 108. The trial justice, in entering the order of nonsuit, must have ruled, as a matter of law, that the defendants could not reasonably be required to anticipate the presence of the plaintiff upon their track in a position of danger at the time their servant signaled the engineer to back the engine. If this ruling was right, the order must stand. The evidence was that the plaintiff, while riding from White River Junction to West Lebanon on a shifting engine, stood upon the footboard at the rear end of the tender, just south of the drawbar, and about midway between the rails. Upon arriving at West Lebanon, the engine was stopped opposite the station, which was on the north side of the track. A servant of the defendants, who had ridden over on the footboard, before getting off to go about his work, told the plaintiff to get off when the engine stopped. Another servant, a switchman, who saw the plaintiff riding upon the footboard, got off before the engine stopped, and went to set a switch, so that the engine might be backed upon a side track in the yard. When the engine came to a standstill, the plaintiff stepped down from the footboard upon the track. The switchman, without observing the plaintiff, though he could have seen him had he looked, gave a signal to back the engine, which was immediately done, and the plaintiff was run upon and injured. The plaintiff could have safely alighted from either end of the footboard without stepping upon the track, and knew the engine upon which he was riding was a shifter.

It was the duty of the plaintiff to use due care to avoid being injured. He was bound to use the care men of average

prudence use under similar circumstances, and one of the circumstances to be considered is his knowledge of the situation and its dangers. He is held to know everything in respect to his situation and its dangers which he would have known had he exercised due care. Knowing the use made of the engine, and the position it was then occupying upon the track, as a man of average prudence, he ought to have known that it was liable to be moved at any moment, either forward or backward. He had no reason to believe that it would remain stationary for any given length of time. If moved backward, he knew that it would pass over the track immediately back of the footboard on which he stood, and would injure him if he was upon the track. He could have seen the switchman had he looked, and further informed himself of the danger of going upon the track at that time and place. He did not look to see the switchman, or take any precautions to ascertain whether he could safely step upon the track. The evidence shows that he was careless when his duty required him or be careful.

If it would not be unreasonable to conclude from the evidence that the switchman should have anticipated the plaintiff would be getting off after the engine was stopped, still it does not follow that a jury would be warranted in concluding that the switchman was also bound to have anticipated that he would get off in a negligent and careless manner. When the switchman last saw the plaintiff, he was in a position of safety upon the engine; and the switchman had the right to assume that, if the plaintiff concluded to get off, he would exercise the care of a man of average prudence acting under like circumstances, and get off when and where he could safely do so. That the plaintiff might carelessly step upon the track was not sufficient to charge the switchman with knowledge that he would do so, or to make it the switchman's duty to look, and ascertain what he actually did. A jury would not be warranted in finding that the switchman was bound to anticipate that the plaintiff would negligently step upon the track as a probable occurrence. Waldron v. Railroad, 71 N. H. 362, 365, 366, 52 Atl. 443.

The nonsuit was properly ordered. Exceptions overruled.

WALKER, J., did not sit; the others concurred.

ILLINOIS CENT. R. CO. *v.* LEINER.

(*Supreme Court of Illinois, April 24, 1903.*)

[67 N. E. Rep. 398.]

Killing of Trespasser on Train—Liability.*

A carrier is liable to a trespasser on one of its trains, if he was

*As to the care due trespassers on trains, see preceding case and footnote.

killed through the wanton or reckless conduct of the carrier's employees.

Same—Wantonness or Willfulness—Sufficiency of Evidence.

In an action against a railroad company for wrongful death, owing to a collision between trains, evidence *held* sufficient to warrant submission to jury of the question whether the misconduct of those operating the trains had been wanton and willful.

Fellow Servants—Employee Not on Duty.*

A freight conductor, not on duty, but riding on one of the master's trains, on his way to his home, is not a fellow servant with servants who are operating the master's trains.

Remarks of Counsel.

Counsel for plaintiff stated to the jury that he would submit no instructions to them, but that the instructions would be those asked by defendant. The court directed him to confine his argument to facts in the record, and he then stated, "It is the sworn duty of the jury to consider the instructions offered, for the reason that, when passed upon by the court, and read to you by the court, they are the law governing the case, and they should be followed by the jury": *held*, that defendant could have suffered no injury from the remark as to plaintiff not submitting instructions.

Appeal from Appellate Court, Fourth District.

Action by Henry J. Leiner, as administrator of William A. Wing, against the Illinois Central Railroad Company. From a judgment of the Appellate Court (103 Ill. App. 438) affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action on the case, brought against appellant to recover damages for the death of appellee's intestate, William A. Wing, which occurred January 12, 1901, in a rear-end collision in the city of Belleville, St. Clair county, Ill., while said William A. Wing was riding in the caboose of a certain freight train of said defendant. The case was tried by the court and a jury, who returned a verdict for the plaintiff below for the sum of $5,000. Judgment was rendered upon the verdict, after overruling motions for new trial and in arrest of judgment. The case was taken by appeal to the Appellate Court, where the judgment has been affirmed. The present appeal is prosecuted from such judgment of affirmance. At the close of all the evidence the defendant asked the court to give the jury a written instruction finding the defendant not guilty. This instruction was refused.

Kramer, Creighton & Shaeffer (John G. Drennan, of counsel), for appellant.

M. W. Borders, for appellee.

MAGRUDER, C. J. Upon the trial of this case no instructions were asked by the appellee. The appellant presented to the trial court 23 instructions to be given to the jury, of which 12 were given as asked, and 11 were refused. No complaint is made as to the action of the trial court in the admission or exclusion of evidence. Substantially the only

*As to the care due trespassers on trains, see preceding case and footnote.

question in the case is that which arises from the refusal of the trial court to instruct the jury to find for the defendant. Nearly all the instructions asked by the appellant, and given in its behalf, left it to the jury to determine whether the servants of the appellant in charge of the trains which collided, or any of them, were at the time guilty of such willful and wanton misconduct as directly contributed to the death of appellee's intestate, William A. Wing. The only material question, therefore, is whether there is sufficient evidence in the record tending to prove such wantonness or willfulness. That question has been settled in favor of appellee by the judgments of the lower courts. As, however, appellant claims that the evidence does not tend to show that the injury which resulted in Wing's death was wantonly and willfully inflicted, the evidence will be examined so far as it bears upon that proposition.

1. Appellant claims that, at the time deceased lost his life, he was a trespasser upon the freight train upon which he was riding. The deceased was an employee of the appellant as a conductor upon one of its freight trains, but, as we understand the evidence, on the evening of Saturday, January 11, 1901, he had brought his freight train to East St. Louis, and was there released from his work, so that he was entitled to go to his home at Sparta to spend Sunday. In order to reach Sparta, it was necessary for him to ride upon one of appellant's trains from East St. Louis to Coulterville, passing through Belleville. Belleville is 13 miles southeast from East St. Louis. On the evening of January 11th the deceased obtained from the proper officials at Carbondale, by telegraph, a telegraphic pass, permitting him to ride on a certain passenger train (No. 203), which was to leave East St. Louis at 9:04 p. m. that evening. The pass did not reach him until 8:58, about 6 minutes before the passenger train was to start. As we understand the proof, it was necessary for him to walk some 500 feet to reach the passenger train from the place where he obtained his pass, and it is quite evident that he missed the train from lack of time to reach it. He then made application to the conductor of freight train No. 255 for transportation on that train to Coulterville through Belleville. He stated to the conductor that transportation had been furnished to him, and the conductor permitted him to go upon the train, and told him to enter the caboose and go to bed, and he would wake him up when they reached Coulterville. The conductor did not require him to exhibit his pass, or any evidence of his right to travel upon the freight train. Freight train No. 255 consisted of 30 cars drawn by one engine, with a caboose at the end of the train. Although this train was to leave East St. Louis at 10 o'clock, it did not actually get started until 12:40; and although it ordinarily took only 1 hour to go from East St. Louis to Belleville,

being a distance of only 13 miles, yet the train did not reach Belleville until 3:20 on the morning of January 12, 1901. It consumed 2 hours and 40 minutes in making the journey from East St. Louis to Belleville. The delay was caused by the inability of the engine to haul the 30 cars to the top of the elevation near the western limits of the city of Belleville. The conductor was obliged to divide his train, and take each half up the hill separately. In addition to this, it was necessary to detach the engine and go to Belleville and get water and return. The deceased went to sleep in the caboose before train No. 255 left East St. Louis, and was asleep in the caboose when the train arrived at Belleville. By the terms of some rule of the company, as is claimed by the appellant, freight train No. 255 carried no passengers, though no such rule was produced in evidence.

It is claimed that the deceased was a trespasser, upon the alleged ground that, although he was an employee of the company—though not then engaged in the work of the company—and although the company was then indebted to him in the sum of $100 for services performed by him, yet that he had not become a passenger, while riding upon this freight train, which was not authorized to carry passengers, notwithstanding the fact that he was riding with the consent of the conductor. In other words, the deceased is alleged to have been a trespasser, because he was riding on a freight train in violation of a rule of the company. We do not deem it necessary to stop to discuss the question whether he was a trespasser, or not, because of the facts thus stated. If he was, the appellant would be liable if he was killed through the wanton or reckless conduct of the appellant's employees in charge of the trains.

In Toledo, Wabash & Western Railway Co. v. Beggs, 85 Ill. 80, we said (page 84): "Was defendant in error a passenger on this train, in the true sense of that term? He was traveling on a free pass issued to one James Short, and not transferable, and passed himself as the person named in the pass. By his fraud he was riding on the car. Under such circumstances, the company could only be held liable for gross negligence, which would amount to willful injury." We have discovered nothing in the conduct of the deceased, as developed by the testimony in this regard, to indicate that he was guilty of any fraud against appellant, or practiced any deceit upon the conductor of freight train No. 255. But even if he had been guilty of such fraud, the appellant would be liable in this action if it was guilty of such gross negligence as amounted to willful injury. See, also, Chicago & Northwestern Railway Co. v. Chapman, 133 Ill. 96, 24 N. E. 417, 42 Am. & Eng. R. Cas. 392, 8 L. R. A. 508, 23 Am. St. Rep. 587. In the cases of Toledo, Wabash & Western Railway Co. v. Brooks, 81 Ill. 245, and Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Best, 169 Ill. 301, 48 N. E. 684,

no question of wantonness or recklessness is involved or raised in the pleadings.

The view thus expressed was embodied by the appellant in several of the instructions asked by it, and given in its behalf by the trial court. One of those instructions was as follows: "The court instructs the jury that even if you believe from the evidence in this case that Ring, the rear brakeman on train No. 255, should have flagged the extra train that was following the train at the time said train No. 255 was standing at the depot in the city of Belleville, yet, unless you further believe from the evidence in this case that such failure to flag the said extra train upon the part of said Ring amounted to willful and wanton misconduct on his part, plaintiff would not be entitled to recover in this case, if you further believe from the evidence that the said W. A. Wing had no right to be upon said train at the time he received his fatal injuries." Another of said instructions given for the appellant was as follows: "The court instructs the jury that if you believe from the evidence in this case that W. A. Wing, the deceased, had no right to be upon the train No. 255, and had no right to ride on said train from East St. Louis to Belleville at the time in question, then, under the law, he was a trespasser upon said train, and the defendant in this case is not liable for an injury occurring to said W. A. Wing while upon said train, unless such injury was the result of the willful and wanton misconduct of the servants of the defendant."

Second. Whether, therefore, the deceased was a trespasser or not, the question remains whether there is evidence tending to show that he was killed through the wanton or reckless conduct of the appellant's employees who were in charge of the trains whose collision caused his death.

The question whether a personal injury has been inflicted by willful or wanton conduct or gross negligence is a question of fact to be determined by the jury. In Chicago, Burlington & Quincy Railroad Co. v. Murowski, 179 Ill. 77, 53 N. E. 572, 15 Am. & Eng. R. Cas., N. S., 697, we said (page 80, 179 Ill., and page 573, 53 N. E.): "Whether the defendant was guilty of willful or wanton conduct or gross negligence was purely a question of fact for the jury to determine from all the evidence, introduced by the respective parties, bearing upon that point in the case, and it was not the province of the court to inform the jury that some particular fact in the case was conclusive of that question." See, also, Odin Coal Co. v. Denman, 185 Ill. 413, 57 N. E. 192, 76 Am. St. Rep. 45; Carterville Coal Co. v. Abbott, 181 Ill. 495, 55 N. E. 131; Lake Shore & Michigan Southern Railway Co. v. Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218.

It is not always easy to define what degree of negligence the law considers equivalent to a willful or wanton act. The character of an act, as being willful or wanton, is greatly

dependent upon the particular circumstances of each case. In the case of an injury to a trespasser, a railroad company has been said to be liable for "such gross negligence as evidences willfulness." Illinois Central Railroad Co. v. Godfrey, 71 Ill. 500, 22 Am. Rep. 112. Such gross negligence as evidences willfulness is "such a gross want of care and regard for the rights of others as to justify the presumption of willfulness or wantonness." It is such gross negligence as to imply a disregard of consequences or a willingness to inflict injury. Lake Shore & Michigan Southern Railway Co. v. Bodemer, 139 Ill. 596, 29 N. E. 692, 54 Am. & Eng. R. Cas. 177, 32 Am. St. Rep. 218.

To constitute willful and wanton negligence, it is not always necessary to prove that the defendant's servants are actuated by ill will towards the plaintiff. In East St. Louis Connecting Railway Co. v. O'Hara, 150 Ill. 580, 37 N. E. 917, we said (page 585, 150 Ill., and page 919, 37 N. E.): "If it be true, as the evidence tends to show, that the defendant's servants, at the time plaintiff was injured, were running their engine in the dark, without a headlight, or a bell ringing, and at a high and dangerous rate of speed, along a much-frequented street, and where many persons were likely to be passing on their way to the ferry landing or otherwise, such acts would be liable to the construction of being in wanton and willful disregard of the rights and safety of the public generally, so as to amount in law to wanton and willful negligence. And it was not necessary, in order to raise an inference of such negligence, to prove that the defendant's servants were actuated by ill will, directed specifically towards the plaintiff, or to have known that he was in such position as to be likely to be injured."

In Elgin, Joliet & Eastern Railway Co. v. Duffy, 191 Ill. 489, 61 N. E. 432, 23 Am. & Eng. R. Cas., N. S., 361, we said (page 492, 191 Ill., and page 432, 61 N. E.): "The declaration charges the defendant with willfully and maliciously inflicting the injury. If the record discloses any evidence tending to support that averment, negligence on the part of the appellee, if conceded, would not excuse the appellant. Lake Shore & Michigan Southern Railway Co. v. Bodemer, 139 Ill. 596, 29 N. E. 692, 54 Am. & Eng. R. Cas. 177, 32 Am. St. Rep. 218. The evidence tends to prove that the train was going at a high rate of speed around a sharp curve, where the view was obstructed by an embankment, approaching a street which was much traveled, giving no warning by the ringing of the bell or sounding the whistle; and this testimony, without passing upon its weight, or whether it was overcome by other evidence, tended to prove the charge of willfulness and wantonness in the management of the train. The jury might well have based its verdict upon that theory of the case."

In Odin Coal Co. v. Denman, 185 Ill. 413, 57 N. E. 192,

76 Am. St. Rep. 45, we said (page 418, 185 Ill., and page 194, 57 N. E.): "'Willful' is a word of familiar use in every branch of law, and, although in some branches of law it may have a special meaning, it generally, as used in courts of law, implies nothing blamable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this; that he knows what he is doing, and intends to do what he is doing, and is a free agent."

In Carterville Coal Co. v. Abbott, 181 Ill. 495, 55 N. E. 131, we said (page 502, 181 Ill. and page 134, 55 N. E.): "Where an owner, operator, or manager so constructs or equips his mine that he knowingly operates it without conforming to the provisions of this act, he willfully disregards its provisions, and willfully disregards the safety of miners employed therein."

Thompson in his Commentaries on the Law of Negligence (volume 1, § 21), defines willful negligence to be "a willful determination not to perform a known duty." The same author says: "The true conception of willful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed upon the person by operation of law." Id. § 20. He also says: "An entire absence of care for the life, the person, or the property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal willfulness, such as charges the person whose duty it was to exercise care with the consequences of a willful injury." Id. § 22.

The court gave for the appellant, at its request, upon the trial below, the following instructions:

"(1) The court instructs the jury that the plaintiff in this case is not entitled to recover unless you believe from the preponderance of the evidence in the case that the servants of the defendant in charge of the trains in question, or some of them in charge of said trains, were at the time guilty of willful and wanton misconduct, and that such willful and wanton misconduct resulted in, and was the cause of, the death of the said W. A. Wing.

"(2) The court instructs the jury that the mere violation of a city ordinance regulating the rate of speed of a train through a city, or the rules of the railroad company with reference to the management of its trains, does not of itself amount to a willful and wanton misconduct.

"(4) The court instructs the jury that even if you believe from the evidence in this case that the servants of the defendant in charge of the extra train that followed train No. 255 at the time in question ran said train at a greater rate of speed than was permitted by the ordinance of the city of Belleville,

and did not have said train under control, as required by the rules of the company, such neglect and failure upon the part of the servants in charge of said train would not entitle plaintiff to recover in this case, unless you further believe that such failure to comply with said ordinance and rules of the company with reference to the speed of said train amounted to willful and wanton misconduct on the part of such servants.

"(5) The court instructs the jury that what is meant by 'willful and wanton misconduct' is such conduct as amounts to an intentional wrong, or of such a reckless character as shows that the person or persons guilty of such misconduct were at the time acting in such a manner as shows that they had an utter disregard for the safety and lives of other persons."

In its own instructions the appellant thus defines "willful and wanton conduct" as being conduct "of such a reckless character as shows that the person or persons guilty of such misconduct were at the time acting in such a manner as shows that they had an utter disregard for the safety and lives of other persons." A careful examination of the testimony in this case will reveal the fact that there was sufficient evidence tending to prove such wanton and willful misconduct on the part of the servants in charge of these two trains as to justify a submission of the question to the jury; and, of course, the finding of the jury is conclusive upon the court.

As has already been stated, freight train No. 255, in the caboose of which the deceased had taken passage and had gone to sleep, left the city of East St. Louis at 12:40, and reached the depot in the city of Belleville at 3:20. It remained stationary at the depot for 20 minutes, and until the hour of 3:40 in the morning of January 12th, at which time the collision occurred. This train No. 255 was a regular or time-table train, and was entitled to the right of way. Another freight train, called the "extra train," left the city of East St. Louis at 3 o'clock on the morning of January 12th, and reached the depot in the city of Belleville upon the same track on which freight train No. 255 stood, and collided with the latter train at 3:40. This extra train consisted of 34 cars, and was drawn by two engines. Nineteen of the 34 cars were equipped with air brakes. The engineer, Pope, who was in control of this extra train, knew when the train left East St. Louis at 3 o'clock in the morning that freight train No. 255 had preceded his train, and was traveling on the same track and going in the same direction, but he had no knowledge where train No. 255 was. It must have been known when the extra train started from East St. Louis, or ought to have been known, in the train dispatcher's office, that train No. 255 had not yet reached Belleville. Although the time usually consumed by a freight train in the journey from East St. Louis to Belleville was one hour, yet this extra train was traveling so rapidly that it reached the depot in Belleville, where the collision took place, within 40 minutes

from the time it left East St. Louis, although it made two stops on the way—one at what is called the "Belt," and the other for the purpose of taking on coal. The proof shows that, under the ordinances of Belleville, freight trains were forbidden to travel faster than 6 miles an hour, and that this fact was known to the engineer of the extra train. Yet that train, when it reached the western limits of the city of Belleville, and after it entered the limits, was traveling at the rate of 30 miles per hour, with 2 engines and 34 cars. The population of the city of Belleville is 20,000 inhabitants. It is 4,157 feet from the Belleville & Southern Depot, controlled by appellant, where this collision occurred, to the western limits of the city of Belleville, which is in the direction of the city of East St. Louis. From the western limits of the city to this depot there is an exact fall in grade of 39.58 feet. At what is called "Centreville Avenue," at a distance of 1,523 feet west of the depot, there is a sharp curve, and, on account of this curve and the houses adjacent thereto, it is impossible to see a train at the depot until this curve is reached, and there is a fall in the grade of 1 foot to every 100 feet from that point to the depot. When the extra train reached this curve, which was only 1,523 feet from the depot, it was traveling at the rate of 20 to 22 miles an hour. Not until it reached this point did the engineer, Pope, see the red light in the darkness of the night upon the rear end of train No. 255, which stood at the depot. He then attempted to curb the speed of the train, but was unable to lessen its speed to any considerable extent. Accordingly, when the extra train struck train No. 255, at 3:40 a. m., the former was traveling at the rate of 15 miles per hour. It took only 35 seconds to go from the curve to the depot. The engineer on the extra train, Pope, seeing the collision inevitable, leaped from the engine, and saved his life. The train was traveling at such a rapid speed that when it struck train No. 255 the 30 loaded cars of the latter train were knocked forward four or five lengths, and the extra train telescoped or went through the caboose and five loaded cars, and the front engine of the extra train, when it finally came to a stop, was standing on its rear wheels. Wing, who was asleep in the caboose of the train, was killed instantly. Not only was the extra train traveling at a greater rate of speed than was allowed by the ordinances of Belleville, to wit, 6 miles an hour, but it was traveling in violation of the rules of the company, which were well known to the engineer operating the train. One of those rules was as follows: "All second and inferior class trains, including extras and following sections of first-class trains, must approach time-table stations under control, expecting to find main track occupied. This does not excuse trains, when detained at stations, from flagging, as provided in rules 96 to 99, inclusive." Another rule of the company was as follows: "Second and inferior class trains must run carefully through

the yard limits at East St. Louis and Belleville, expecting to find the main track occupied. In case of accident the responsibility rests with the approaching train." The extra train here was a second and inferior class train. Belleville was a time-table station, and the engineer of the extra train found the main track occupied by freight train No. 255. The rules of the company required him to run his train carefully through the yard limits at Belleville, upon the theory that the main track would be occupied. Instead, however, of running his train carefully, and with the expectation of finding the main track occupied, he was running it for a long distance within the city limits at the rate of 30 miles an hour in the darkness of the night, and, when he reached the distance of 1,523 feet from the depot, was running at the rate of from 20 to 22 miles an hour, and thereafter at the rate of 15 miles an hour. Not only did the engineer on the extra train know the rules above mentioned, and the ordinances of the city limiting the speed of the train, but he knew that there was a steep down grade from the city limits to the depot, and that there was a sharp curve at Centreville avenue, 1,523 feet west of the depot, and that a train at the depot could not be seen, even in the daytime, until Centreville avenue was reached.

As to the servants of appellant who were in charge of train No. 255, the following state of facts is shown by the evidence; Carnes, the conductor of this train, knew before he left the city of East St. Louis, at 12:40 on the morning of January 12th, that this extra train was to leave East St. Louis at 2:30 o'clock on that morning. As a matter of fact, the extra train did not leave East St. Louis until 3 o'clock. When train No. 255 arrived at the depot in Belleville at 3:20 in the morning, Carnes, the conductor, knew that an extra train was to leave East St. Louis at 2:30, and that, in the ordinary course of travel, it would reach the depot at Belleville at 3:30—in one hour. He was told by the train master at East St. Louis that this extra train would leave that city at 2:30 a. m. He knew, as well as Pope, that there was a sharp curve 1,523 feet west of where the caboose was standing, in which the deceased, Wing, was sleeping; and he knew that his train (No. 255) could not be seen by the extra train coming behind it until the latter reached the curve, and knew moreover, that there was a very steep decline in the grade from the western limits of the city to the depot; but, notwithstanding all this, no effort was made to flag the oncoming extra train. There was a rule of the company which required a flagman to be sent back 3,600 feet when a train was detained at a depot 10 minutes. In other words, as stated by the Appellate Court, "the rules of the company provide that when a train is detained at a station for more than ten minutes, where the rear of the train cannot be plainly seen from a train moving in the same direction for a distance of one-half mile, a flagman must go back a distance of 3,600 feet and protect the

train." When train No. 255 arrived at the depot in Belleville, at 3:20 a. m., Carnes, the conductor, and W. E. Ring, the rear brakeman, were in the caboose with the deceased; the latter being asleep. Carnes, the conductor, said to Ring: "Now, Ring, we have been a long time out of East St. Louis, and there was an extra ordered to leave there at 2:30. Keep your eyes open." And the brakeman replied: "All right." After the conductor made this remark to Rear Brakeman Ring, he got on top of the train and went forward. He went into the office to get orders, and the engineer went to sign the register. Train No. 255 remained longer than 10 minutes at the depot. It remained 20 minutes, to wit, from 3:20 a. m. to 3:40 a. m., and the engineer expressed the fear that his engine would not be able to move the train. Yet, notwithstanding this lapse of time, the rear brakeman did not go back to flag the oncoming extra train, nor give it any notice that train No. 255, was standing upon the track at the depot. The conductor failed to see that the brakeman performed the duty thus enjoined upon him by the rules of the company. If the extra train had been flagged in accordance with the rule of the company, the accident, unquestionably, would have been avoided. The conductor and brakeman and engineer in control of train No. 255 knew all the facts that have already been stated in regard to the impossibility of seeing a train at the depot from any point westward distant farther than 1, 523 feet, and they also knew that there was a down grade, rendering it difficult to suddenly stop a long train. The conductor and Ring, the brakeman, also knew that Wing, the deceased, was asleep in this caboose, and must have known that he was liable to be killed in case the extra train collided with No. 255; and yet notwithstanding all this knowledge, nothing was done towards flagging the extra train, and thereby trying to prevent a collision.

Under the state of facts here detailed, we are unable to say that there was no evidence tending to show such wanton and willful misconduct, as the jury were required to find in the given instructions, in order to justify a recovery by the appellee. Certainly, in the language of the instruction asked by the appellant, and given for it by the trial court, the servants of appellant who were in control of these trains which collided "were at the time acting in such a manner as shows that they had an utter disregard for the safety and lives of other persons."

3. It is claimed by appellant that the deceased, Wing, was a fellow servant with the employees of appellant in charge of the trains in question, and that for that reason appellant cannot be held liable. This objection appears not to have been made upon the trial in the court below, and no instruction was asked by appellant, or given by the court, embodying this theory of the case. Aside from this, however, it cannot be maintained that Wing was a fellow servant of the

employees in charge of the trains, for the reason that he was not at the time of the accident working for the appellant, but was riding on the train on his own business. Certain authorities are referred to by counsel for appellant which hold, as it is claimed, that an employee of a railway company, who is furnished free transportation to ride to and from his work, or, under the custom of the company, is carried free upon its trains to and from his work, is a fellow servant with the employees of the company who are engaged in operating the train. Here, however, freight train No. 255 was not carrying Wing while he was engaged in the work of appellant, but was taking him to his home to visit his family after his work for the appellant had ceased. Where a person in the employ of a railroad company travels back and forth from his home to the place where his services to the company are rendered, on the cars of the company, and his transportation free of charge constitutes a part of his contract for service, he is, while so traveling, not a passenger, and cannot recover for the injuries received on account of the negligence of the train crew, because he is a fellow servant of the train crew, and assumes all the risks which they assume. But no such state of facts exists here. A shoveler of snow, while going to his work upon a train engaged in the work of removing snow from the track, was injured by the overturning of the car in which he was riding, through the negligence of the conductor, and in such case might be regarded as a fellow servant with the conductor of the train crew. But in such case he and the train crew were both engaged in the same work for the company—the one in the work of shoveling snow, and the other in the work of removing the snow from the track. So, where a laborer, while riding on a gravel train to his place of labor, was injured by a collision caused by the negligence of the company's servants in charge of the train, he was held to be a fellow servant with the train crew, but in such case he and the train crew were both engaged in a common service in behalf of the company. No such state of facts exists in the case at bar. On the contrary, in the case of Ohio & Mississippi Railroad Co. v. Muhling, 30 Ill. 9, 81 Am. Dec. 336, we said (page 23, 30 Ill., and 81 Am. Dec. 336): "The evidence shows that defendant in error, when he received the injury, was going from his residence to Trenton or Summerfield, to purchase flour. He was in the pursuit of his own business, and not that of the company. Whatever might have been his former relations with the company, he was then engaged in his own business. He was at that time in the situation of any other stranger to or passenger upon the road, liable to no greater burthens, nor entitled to more privileges, than any other passengers similarly situated. He had no control over the running of the train, was not then engaged in the business of the company, and was, as far as this record discloses, free from all negligence, and was in no wise responsible for

the injury; nor did his connection with the road in the remotest degree contribute to the misfortune."

4. Counsel for appellant complain of certain remarks made to the jury in his address to them by counsel for appellee. In these remarks, counsel for appellee stated to the jury that appellee would submit no instructions to them, but that the instructions which would be read to them were those which had been asked by the appellant. This statement was literally true, but it was unnecessary to make it to the jury; and, when the attention of the court was called to it by counsel for appellant, counsel for appellee was directed to confine his argument to facts within the record. Counsel for appellee then said to the jury: "It is the sworn duty of the jury to consider the instructions offered, for the reason that, when passed upon by the court, and read to you by the court, they are the law governing the case, and they should be followed by the jury." It seems to us that this was a perfectly fair statement on the part of counsel for appellee, and that appellant could have suffered no injury from any remarks made by counsel for appellee upon this subject.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

BARFIELD v. SOUTHERN RY. CO.

(*Supreme Court of Georgia, June 30, 1903.*)

[45 S. E. Rep. 282.]

Railroads—Injuries at Crossing—Nonsuit.

When this case was here before (42 S. E. 95, 115 Ga. 724), it was held that the plaintiff was not entitled to recover, because it affirmatively appeared from his own testimony that he could, by the exercise of ordinary care, have avoided the injuries for which he sued. The evidence in the present case is substantially the same as that in the record of the previous case, and there was therefore no error in granting a nonsuit. (Syllabus by the Court.)

Error from Superior Court, Fayette County; E. J. Reagan, Judge.

Action by J. J. Barfield against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

E. J. Spurlin and R. L. Berner, for plaintiff in error.

Arthur Heyman and Wise & Blalock, for defendant in error.

PER CURIAM. Judgment affirmed.

HARRIS *et al.* *v.* SOUTHERN RY. CO.

(*Court of Appeals of Kentucky, Oct. 7, 1903.*)

[76 S. W. Rep. 151.]

Instructions.

An appellant cannot complain of the giving of instructions which are given upon his hypothesis of the case, and are in substance the same as those offered by himself.

Boy Trespassers on Train—Care Due from Trainmen.*

Where a boy goes upon a freight train without the knowledge or consent of those in charge of it, they owe him no duty until they discover his peril, and, if they do not discover it in time to prevent injury by the exercise of ordinary care, the railroad is not responsible for any injury that he may sustain.

Injury to Boy Volunteering to Assist Trainmen—Alighting from Moving Train at Direction of Trainmen—Liability.

Where the engineer and fireman of a train invite a boy to go on the tender and shovel coal for their convenience, and direct the boy to get off while the train is in motion, and in attempting to alight he is injured, the railroad is responsible, unless at the time the boy attempted to alight the speed of the train made the danger so imminent and obvious that an ordinarily prudent person of his age would not have incurred the risk.

Instructions.

An appellant is not entitled to a reversal because of a defect in the

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*As to the care due trespassers on train, see note appended to Merrielees *v.* Wabash R. Co. (Mo.), 22 Am. & Eng. R. Cas., N. S., 158; Young *v.* Texas & P. Ry. Co. (La.), 14 Am. & Eng. R. Cas., N. S., 831 (ejection of trespasser at perilous place, and ejection of crippled trespasser); Cook *v.* Southern Ry. Co. (N. Car.), 21 Am. & Eng. R. Cas., N. S., 591 (care required in ejecting trespasser); Bias *v.* Chesapeake & O. Ry. Co. (W. Va.), 13 Am. & Eng. R. Cas., N. S., 616; Leonard *v.* Boston & A. R. R. (Mass.), 13 Am. & Eng. R. Cas., N. S., 825; Farber *v.* Missouri Pac. Ry. Co. (Mo.), 7 Am. & Eng. R. Cas., N. S., 700; St. Louis S. W. Ry. Co. *v.* Huffman (Tex. Civ. App.), 2 Am. & Eng. R. Cas., N. S., 157; St. Louis & S. F. R. Co. *v.* Kilpatrick (Ark.), 17 Am. & Eng. R. Cas., N. S., 212; Thurman *v.* Louisville & N. R. Co. (Ky.), 3 Am. & Eng. R. Cas., N. S., 652 (ejection of trespasser); Chesapeake & O. Ry. Co. *v.* Anderson (Va.), 9 Am. & Eng. R. Cas., N. S., 136 (ejection from moving train); Pierce *v.* North Carolina R. Co. (N. Car.), 13 Am. & Eng. R. Cas., N. S., 666 (ejection in wrongful manner, and liability of lessor for ejection by lessee's servant); Cook *v.* Southern Ry. Co. (N. Car.), 21 Am. & Eng. R. Cas., N. S., 591 (ejection from moving train); Fagg *v.* Louisville & N. R. Co. (Ky.), 22 Am. & Eng. R. Cas., N. S., 171 (ejection of drunken trespasser at perilous place); Enright *v.* Pittsburg Junction R. Co. (Pa.), 20 Am. & Eng. R. Cas., N. S., 564 (ejection of infant trespasser from moving train); Mugford *v.* Boston & M. R. R. (Mass.), 16 Am. & Eng. R. Cas., N. S., 684 (ordered from moving train); Johnson *v.* Chicago, St. P., M. & O. Ry. Co. (Iowa), 15 Am. & Eng. R. Cas., N. S., 683 (violent ejection from moving train of trespasser who had been repeatedly ordered off); Elliot *v.* Louisville & N. R. Co. (Ky.), 15 Am. & Eng. R. Cas., N. S., 805 (assault upon after ejection); Welsh *v.* West Jersey & S. R. Co. (N. J.), 15 Am. & Eng. R. Cas., N. S., 674 (use of excessive force in ejecting); Wabash R. Co. *v.* Kingsley (Ill.), 13 Am. & Eng. R. Cas., N. S., 835 (liability for injuries from ejection); Rowell *v.* Boston & M. R. Co. (N. H.), 16 Am. & Eng. R. Cas., N. S., 571 (manner of ejection, liability); Trezona *v.* Chicago G. W. Ry. Co. (Iowa), 12 Am. & Eng. R. Cas., N. S., 104 (ejection no ground for recovery); Bolin *v.* Chi-

instructions, where he did not himself offer any instructions on such point.

New Trial.

Under the provision of Civ. Code, § 343, requiring that all the grounds relied on for a new trial be specified in writing, failure of one moving for a new trial to complain of certain instructions amounts to a waiver of any error in such instructions, though he objected and excepted to them when given.

Appeal from Circuit Court, Anderson County.

"Not to be officially reported."

Action by Willie Harris and others against the Southern Railway Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

R. F. Peak and F. R. Feland, for appellants.

Willis & Todd and Humphrey, Burnett & Humphrey, for appellee.

NUNN, J. It appears from the record that appellant Willie Harris was a boy about 13 years of age when he lost his leg by being run over by one of appellee's trains in the town of Lawrenceburg, Ky. Appellant's evidence, with four or five witnesses to sustain him, showed that he went upon the engine and tender of appellee at the direction and re-

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cago, etc., Ry. Co. (Wis.), 19 Am. & Eng. R. Cas., N. S., 735 (trespasser on train forced by pain and fear to jump, not guilty of contributory negligence); Galveston, H. & S. A. Ry. Co. v. Zantzinger (Tex.), 13 Am. & Eng. R. Cas., N. S., 840 (unnecessary force); Farber v. Missouri Pac. Ry. Co. (Mo.), 7 Am. & Eng. R. Cas., N. S., 700; Higgins v. Southern Ry. Co. (Ga.), 5 Am. & Eng. R. Cas., N. S., 694; St. Louis S. W. R. Co. v. Huffman (Tex. Civ. App.), 2 Am. & Eng. R. Cas., N. S., 157 (while train is in motion); Farber v. Missouri Pac. Ry. Co. (Mo.), 7 Am. & Eng. R. Cas., N. S., 700 (wilful negligence of trainmen); Illinois Cent. R. Co. v. King (Ill.), 13 Am. & Eng. R. Cas., N. S., 829; Cincinnati, etc., R. Co. v. Jackson (Ky.), 23 Am. & Eng. R. Cas., N. S., 216; Handley v. Missouri Pac. Ry. Co. (Kan.), 16 Am. & Eng. R. Cas., N. S., 674; Bolin v. Chicago, etc., Ry. Co. (Wis.), 19 Am. & Eng. R. Cas., N. S., 735 (may eject from moving train); Highland Ave. & B. R. Co. v. Robinson (Ala.), 19 Am. & Eng. R. Cas., N. S., 357 (wantonness and recklessness in ejecting, pleading); Williams v. Southern Ry. in Kentucky (Ky.), 7 R. R. R. 732, 30 Am. & Eng. R. Cas., N. S., 732 (liability for malicious act of brakeman in ordering boy from moving freight car); Hamilton v. Chicago, M. & St. P. Ry. Co. (Iowa), 7 R. R. R. 823, 30 Am. & Eng. R. Cas., N. S., 823 (liability for beating by conductor); Richmond Traction Co. v. Wilkinson (Va.), 7 R. R. R. 723, 30 Am. & Eng. R. Cas., N. S., 723 (negligence in ejecting child from street car); Johnson v. New York Cent., etc., R. Co. (N. Y.), 6 R. R. R. 595, 29 Am. & Eng. R. Cas., N. S., 595; Wilson v. Atchison, etc., Ry. Co. (Kan.), 6 R. R. R. 664, 29 Am. & Eng. R. Cas., N. S., 664; Burns v. Southern Ry. Co. (S. Car.), 4 R. R. R. 287, 27 Am. & Eng. R. Cas., N. S., 287; Louisville & N. R. Co. v. Kermery (Ky.), 1 R. R. R. 515, 24 Am. & Eng. R. Cas., N. S., 515 (duty to prevent trespasser on train from being injured in probable collision); Feeback v. Missouri Pac. Ry. Co. (Mo.), 1 R. R. R. 713, 24 Am. & Eng. R. Cas., N. S., 713; Illinois Cent. R. Co. v. McManus (Ky.), 2 R. R. R. 572, 25 Am. & Eng. R. Cas., N. S., 572 (ejection from moving train); Johnston v. Chicago, etc., Ry. Co. (Iowa), 1 R. R. R. 504, 24 Am. & Eng. R. Cas., N. S., 504 (negligence in ejecting).

quest of those in charge of it for the purpose of shoveling coal from the back end of the tender to the front, for the convenience of the fireman in putting it into the engine; that he continued at this for 15 or 20 minutes while the train was in the yards of appellee switching and making up its train preparatory to its departure for Louisville. When the train was ready, and after it had started to Louisville, the engineer or fireman directed appellant to get off the engine. By the time he had left the place of his work on the tender and had gotten down to the steps of the engine, the train was moving pretty fast, and in getting off he lost his leg by the wheels of the train running over it. Five or six witnesses for appellee testified that appellant lost his leg by his own improper and unauthorized conduct in climbing a ladder and jumping off of it while the train was in motion; that this occurred three or four cars back from the engine; and that those in charge of the train did not know of his position on the train until after he was injured. The court gave to the jury six instructions, to all of which the appellant objected and excepted at the time, and offered five instructions, which the court refused, to which he objected and excepted. The jury returned a verdict in favor of appellee. The appellant made a motion and filed grounds for a new trial, which the court overruled, and appellant has appealed. The grounds for a new trial are as follows: "(1) Because the verdict is not sustained by sufficient evidence. (2) Because the verdict is contrary to law. (3) Because incompetent evidence was permitted to go to the jury, and excepted to at the time by the plaintiff. (4) Because competent evidence was excluded from the jury, and excepted to at the time by the plaintiff. (5) Because the court erred in giving instruction No. 6 to the jury, to which the plaintiff excepted at the time, and still excepts. (6) Because of error of the court in refusing to give instructions A, B, C, D, and E, and each of them, offered by plaintiff; to which ruling of the court plaintiff excepted at the time, and still excepts."

The court did not err in permitting incompetent evidence to go to the jury, nor in excluding competent evidence. If the jury believed the theory of the defense as deposed by its witnesses, they had sufficient evidence upon which to base their verdict.

As to appellant's fifth reason assigned for a new trial—that the court erred in giving instruction No. 6—we are of the opinion that the court did not err, for the reason that this instruction was given upon the hypothesis of appellant, and was proper; for, if appellant did get upon the train of appellee without the knowledge or consent of those in charge of it, they owed him no duty until they discovered his peril, and, if they did not discover his peril in time to have prevented his injury by the exercise of ordinary care, then the appellee was not responsible for appellant's injury. But we are of the

opinion that the court did err in giving instructions on his theory of the case, for, if appellant was directed or invited by the engineer and fireman, or either of them, to go upon the tender and shovel coal for their convenience, and they started the train to Louisville, and after it was moving they directed him to get off the train while it was in motion, and under such circumstances he attempted to alight from the train, and as a result thereof he received his injury, the appellee was responsible, unless at the time he attempted to alight the speed of the train made the danger to him so imminent and obvious that an ordinarily prudent person of his age and discretion would not have incurred the risk. This idea should have been embraced in the instructions. But we are not authorized to reverse this case because of this defect in the instructions, for the reason that the appellant did not offer any instructions on this point. The instructions offered by the appellant were, in substance and effect, the same as those given by the court. And for the further reason that appellant, in his grounds filed for a new trial, only complains of the court's action in the giving of instruction No. 6, and therefore he must be deemed to have waived the errors of the court in giving all instructions except No. 6. In Hopkins v. Com., 3 Bush, 481, this court said: "The Code requires all the grounds relied on for a new trial to be specified in writing; consequently, no error not so stated could be noticed by the circuit court, but all such pretermitted objections must be treated as waived in that court, and is necessarily beyond the sphere of this court's revisory jurisdiction, which is only to decide whether, on the grounds properly before it, the circuit court erred in its judgment." Also in McLain v. Dibble, 13 Bush, 298, the court said: "The ground for a new trial must be specified, otherwise the party excepting will be regarded as having waived the supposed error." See, also, Slater v. Sherman, 5 Bush, 206, Railroad Co. v. Mahony's Adm'x, 7 Bush, 235, and Civ. Code, § 343. The record shows that at the time the court gave its instructions, the appellant objected and excepted to the giving of each and all of them, but, as stated, when he filed his grounds for a new trial, he only complained to the giving of No. 6, and therefore, under the authorities referred to, he must be deemed to have waived his objections and exceptions to all except No. 6, which, as before stated, was a proper instruction.

Wherefore the judgment is affirmed.

MARKS v. ATLANTIC COAST LINE R. CO.

(*Supreme Court of North Carolina, Sept. 29, 1903.*)

[45 S. E. Rep. 468.]

Accident on Track—Contradictory Testimony of Engineer.

The jury, in an action for injury by a train to a man on the track, may consider the account of the accident given by the engineer on

the stand, as well as his contradictory account furnished the railroad company soon after the accident, and believe the one or the other.

Same—Contributory Negligence.

For an epileptic to walk on a railroad track, where he falls in a fit, and is struck by a train, is contributory negligence.

Same—Same—Negligence.*

Evidence in an action for injury by a train to plaintiff while on the track, where he had fallen in a fit, *held* sufficient to sustain a finding that the engineer, by the exercise of due care and prudence, could have prevented the injury, notwithstanding plaintiff's negligence.

Appeal from Superior Court, Halifax County; Moore, Judge.

Action by George Marks against the Atlantic Coast Line Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Thos. N. Hill and Day & Bell, for appellant.

Claude Kitchin, E. L. Travis, and Walter E. Daniel, for appellee.

MONTGOMERY, J. This action was commenced by the plaintiff to recover damages against the defendant on account of personal injuries suffered by him through the alleged negligence of the defendant. The plaintiff was afflicted with epilepsy, and while walking upon the defendant's track near Tillery, in Halifax county, fell in a fit. The evidence of B. L. Turrentine, who was engineer on the occasion, was, in substance, that when he first saw what turned out to be the plaintiff, between 400 and 500 yards off, he could not tell what it was, but at the distance of 300 yards he saw it was a man, and he commenced sounding the whistle, and kept it up until the collision; that the plaintiff was sitting on the end of the cross-ties, with his head down on his crossed arms; that as soon as he blew the whistle the plaintiff looked around at the engine as if in full possession of himself, and as if he would get out of the way; that he did not know how far he was from plaintiff, when he became uneasy for fear that plaintiff would not get off, but he put on the brakes when he was about 50 yards off; that his engine and cars were properly equipped, and he could have stopped the train within the space of 100 yards. A statement in writing made by the witness to the defendant company at the time of the plaintiff's injury was introduced as evidence, the substance of which is as follows: That he could not make out what the plaintiff was when he first saw him, but in coming at 300 feet he saw that it was a man; that before he got within 300 feet of him "he was so doubled up and in such position that I could not see exactly what it was. As soon as I saw that it was a man I commenced blowing (blew the long station blow), and kept blowing as I approached him. I was expecting him to get

*As to the care due trespassers on track, see generally, preceding case and foot-note.

off every second. As the engine approached him, and when about a hundred feet from him, he turned his head and looked at the engine approaching." He said the track was straight, and it was about 3:15 p. m. There was evidence going to show that a man could be seen on the track for a mile or more from where the engineer was when he first saw the plaintiff; that the track was straight and the view unobstructed.

The defendant objected to his honor's submitting the second issue on contributory negligence, but for reasons that will be hereafter pointed out that issue was properly submitted. There were six exceptions to the admission of evidence, none of which can be sustained. The other exceptions (30 in number) were for failure to give instructions requested by the defendant, and to those given by his honor in his charge.

It seems to us that the charge on the question of damages was sufficient in law and clearly to be understood by the jury. The others, though numerous, all revolve around one pivotal point. The varying aspects in which the contentions of the defendant are presented concern the position of the plaintiff on the track and the consequent responsibility of the defendant in reference thereto. The jury had a right to consider, and doubtless did consider, the evidence given in on the stand by the witness Turrentine, and also his written statement made to the company shortly after the plaintiff was injured. If they believe his evidence on the stand they could, under the instructions of his honor, have answered the first issue as to the negligence of the defendant, "No." If, however, they believed what he had said in his written statement to the defendant company, they were compelled, under all the evidence in the case, to find that the witness (engineer) failed to keep a proper lookout, or that, if he did, he saw the plaintiff in an apparently helpless condition, and failed to use the appliances which he had to prevent his injury, and to find the first issue in the affirmative. If the plaintiff was seen by the engineer sitting on the end of the cross-ties, in an upright position, and apparently in his senses, the engineer had a right to presume, up to the last moment, that he would use his senses, keep a watchout for the train, and get off the track; or if the plaintiff had been seen by the engineer sitting on the end of the cross-ties, with his face in his hands, and his arms resting on his knees, and at a distance sufficient for the engineer to have checked his train and prevented the injury of the plaintiff, if he was really in a helpless condition, and upon the engineer sounding the whistle the plaintiff raised his head up, upon hearing the whistle, and looked straight at the engine continuously up to the time of the accident, then the engineer had a right to presume that the plaintiff was in possession of his senses, and would get off the track. Upton v. Railroad, 128 N. C. 173, 38 S. E. 736.

The second issue as to the contributory negligence of the

plaintiff was properly answered in the affirmative. The plaintiff was an epileptic, and the railroad track was not a proper place for him to have occupied.

The jury answered the third issue, as to whether the defendant could have prevented the injury by the exercise of due care and prudence, notwithstanding the negligence of the plaintiff, in the affirmative, and there was evidence upon which they could have made that finding.

The instructions asked by the defendant proceeded upon the view that the plaintiff was upon the track in a natural position, and apparently aware of the nature of his position and of the peril he was in.

There was evidence to the contrary. His honor in the charge covered fully every legal phase of the case in connection with the evidence, and we see no error in it. No error.

GLEASON v. WORCESTER CONSOLIDATED ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Worcester, Oct. 21, 1903.)

[68 N. E. Rep. 225.]

Street Railways—Injury to Person on Track—Contributory Negligence and Absence of Gross Negligence.*

In an action against a street railway for injuries sustained by one not a passenger, plaintiff cannot recover without evidence that he was in the exercise of ordinary care, even though defendant's servants were guilty of gross negligence.

Same—Same—Ordinary Care on Part of Plaintiff—Insufficiency of Evidence.

In an action against a street railway for injuries received by one on its tracks, if from the evidence the inference of ordinary care on plaintiff's part can be only conjectural, there is no question for the jury.

Same—Same—Contributory Negligence—Direction of Verdict.

Where one who was working in a ditch in a street beside a street railway track was killed by being run over by a car while standing on the track beside the ditch, he having stepped onto the track within 8 or 10 feet of the car, and in an action for the death there was evidence that he had been looking toward the approaching car just before going on the track, a verdict for defendant was properly directed because of insufficient evidence that deceased exercised care.

Exceptions from Superior Court, Worcester County; Henry N. Sheldon, Judge.

Action by one Gleason against the Worcester Consolidated Street Railway Company. Judgment for defendant, and plaintiff brings exceptions. Exceptions overruled.

H. L. Parker, Jr., for plaintiff.
Charles C. Milton and Chandler Bullock, for defendant.

BARKER, J. The action is for damages for causing the death of the plaintiff's intestate, who was struck and killed by one of the defendant's cars. As he was not a passenger,

*See generally, preceding case and foot-note.

even if the defendant was guilty of negligence, or the defendant's servants were guilty of gross negligence in causing the death, the plaintiff cannot recover without affirmative evidence sufficient to justify a finding that her intestate was in the exercise of ordinary care. If from the evidence the inference that he exercised ordinary care can be only conjectural, the question ought not to be submitted to a jury. Creamer v. West End Street Railway Co., 156 Mass. 320, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. Rep. 456; Mathes v. Lowell, etc., Street Railway, 177 Mass. 416, 59 N. E. 77; Cox v. South Shore Street Railway, 182 Mass. 497, 499, 65 N. E. 823, and cases cited. The plaintiff's intestate was employed in operating a stationary engine and air compressor, used in constructing a sewer in the street. The sewer trench was parallel with the defendant's tracks, and between them and the sidewalk, and the sides of the trench were sustained by sheathing. which came above the surface of the street. The edge of the trench was about two feet from the nearest track. The engine and compressor were at the northerly end of the trench, and the place where the plaintiff's intestate stood when operating them was about two feet from the nearest rail of the nearest track. Northerly of the boiler of the apparatus was a shield of boards, two or three feet square, to catch any oil flying from the compressor, and this shield was nearly parallel with the track, and about 18 inches from the rail, and between the edge of the shield and the boiler was just room for passage. The plaintiff's intestate could not reach the other side of the compressor nearest the sidewalk except by going out onto the street, and going round the end of the compressor. The occupation of the plaintiff's intestate confined him substantially to a single spot, in which he stood with his face toward the north, toward the pressure tank, and it was necessary for him to have his hand on the throttle a good share of the time, in order to control his engine. It was sometimes necessary to oil certain parts of the apparatus, but he was not engaged in oiling anything at the time, and there was nothing shown that would call him away from his engine, and no evidence that anything about his work required him to go between the rails of the track. Just before the accident he had gone around the boiler, and had some talk with the fireman, after which they both turned to their work. While they were talking, the plaintiff's intestate was looking southerly down the track toward the car which afterwards struck him, and which the fireman testified that he (the fireman) saw about 300 feet away as he turned to his work. The fireman had just turned to his work, and had only time to turn a valve, when the car flew by, and struck the plaintiff's intestate, who had stepped out upon the track at a point just opposite the wooden shield. The car knocked him down, and carried his body under the wheels and fender 60 feet up the track, which was upon an up grade of 5 per

cent. There was conflicting evidence as to the rate of speed, and the evidence would have justified a finding that the rate was anywhere from 4 to 15 miles an hour. The plaintiff's intestate was unconscious until his death. Besides the testimony of the fireman, there was that of the motorman of the car, and also that of a traveler on the street, who testified that he was driving northerly, and that the plaintiff's intestate was standing beside his engine, and then, when the car was 8 or 10 feet away, stepped out upon the track, and turned north, and that he had just stepped upon the track when the car was upon him, and that he turned half round to the right, and put his hand up in front of the car. The motorman testified that he saw a man step onto the track from behind the engine about eight feet in front of the car. The fireman testified that the car was going eight or nine miles an hour, the motorman that it was going four or five miles an hour, and that he was ringing his gong all the time, and that at once, as soon as he saw the man, he shut off the power, turned on the whole reverse power, and put on the full force of the emergency air brake. The traveler testified that the car was going 15 miles an hour, and that he heard the gong when the car was at Kendall street, 300 feet away. Twenty minutes after the accident, the fireman found the throttle of the compressor wide open, although he never knew the plaintiff's intestate to leave his work unless he shut down his engine before. To step from a place of safety, only two feet away, upon the track of an electric street railway, directly in front of, and only eight or ten feet from, an approaching electric car, whether the car is approaching at the rate of four or five, or eight or nine miles, or fifteen miles an hour, is not evidence of care on the part of the person who does the act. It may or may not be consistent with ordinary care. If the person who does it is struck by the car and killed, no recovery can be had for his death without affirmative proof that he was exercising care to avoid being hit. Assuming, from the fact that the plaintiff's intestate left his engine without shutting it down, that he had occasion to pass in the street around the shield to the other end of the compressor, he knew that a car might at any time come up the street behind him, and that if he placed himself within the space it would cover he might be hit unless he got out of the way. If we also assume, as the plaintiff contends could be inferred fairly, that he had just seen the approaching car, as he was looking towards it while talking with the fireman, he had had actual knowledge that a car was then approaching. His conduct in stepping onto the track within eight or ten feet of the car is as consistent with the theory that he had not seen the car, and went upon the track without taking any care to avoid being hit, or that he had forgotten that it was approaching, and so took no care or precaution, as with the theory that he had the danger in mind, and thought that he had time to

enter upon the track and still get out of the way of the car. Either inference is purely conjectural. In our opinion, the verdict for defendant was ordered rightly, because there was no sufficient or affirmative evidence that the plaintiff's intestate exercised care. See Kelley v. Wakefield, etc., Street Railway, 175 Mass. 331, 56 N. E. 285; Hurley v. West End Street Railway, 180 Mass. 370, 62 N. E. 263. This view makes it immaterial whether the evidence offered by the plaintiff and excluded, to show negligence on the part of the defendant, was excluded rightly.

Exceptions overruled.

WILMURTH'S ADM'R v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky, Oct. 15, 1903.)

[76 S. W. Rep. 193.]

Trespassers on Track—Care Due after Discovery of Peril.*

Where plaintiff's intestate was a trespasser on defendant's railroad track at the time he was struck by a train, the railroad company only owed him the duty, after becoming aware of his presence and peril, of exercising ordinary care to avoid injurying him by giving the customary signals to warn him of the approach of the train, and, if practicable, and necessary to avoid striking him, to slacken the speed and stop the train.

Same—Negligence after Discovery of Peril—Sufficiency of Evidence.

Plaintiff's intestate, who had been plowing in a field, crossed defendant's double track to go to his house, and on returning found his course across the track obstructed by a passing freight train. He stopped on the cross-ties of the opposite track, waiting for the train to pass, when he was struck and killed by the pilot beam of a locomotive drawing a passenger train approaching from the rear. Several witnesses testified that the view in the direction from which the passenger train approached was unobstructed for 1,440 feet, and it appeared that just before he was struck intestate was kneeling down, and looking under the freight train at his team, which was running away in the field. There was evidence that no signals were given as the passenger train approached, which was contradicted, and that the freight train was making considerable noise. The engineer admitted that he saw intestate on the track when the train was within 200 feet of him, and that he gave an alarm signal at that time, and another witness testified that the train could have been stopped in 250 yards: *held*, that the evidence authorized an inference that intestate's presence and peril were in fact known to the engineer in time to have prevented his death by giving proper signals or stopping the train, and that the direction of a verdict in favor of defendant was, therefore, error.

Licensees—Mere Acquiescence in Use of Track by the Public.†

Mere acquiescence on the part of a railroad company in the use of its track by the public does not confer any authority or right to use the same, or amount to a license.

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*As to the care due trespassers on track, see preceding case and foot-note.

†As to what does, and does not, constitute a license to travel on a railroad right of way, see Bullard v. Southern Ry. Co. (Ga.), 6 R. R. R. 606, 29 Am. & Eng. R. Cas., N. S., 606; Denver & R. G. R. Co. v. Buffehr (Colo.), 4 R. R. R. 762, 27 Am. & Eng. R. Cas., N. S., 762 (use of track after repeated protests and warnings); Gulf, etc., Ry.

Appeal from Circuit Court, Hickman County.

"Not to be officially reported."

Action by Joe W. Wilmurth's administrator against the Illinois Central Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

R. B. Flatt and J. C. Dean, for appellant.

Pirtle & Trabue, N. P. Moss, and J. M. Dickinson, for appellee.

SETTLE, J. The appellant, as administrator of his infant son, J. W. Wilmurth, sued the appellee, Illinois Central Railroad Company, in the lower court, to recover damages for the death of the intestate, caused by the alleged negligence of its servants in running a passenger train of which they were in charge against or over him. After the proof of both appellant and appellee had been introduced, the jury, in obedience to a peremptory instruction from the court to that effect returned a verdict for the appellee, and the petition was thereupon dismissed, at appellant's cost. Of that judgment, and the further judgment of the lower court overruling his motion for a new trial, appellant complains, and insists that a reversal should be granted by this court.

It appears from the record that the intestate was 11 years

Co. v. Matthews (Tex.), 1 R. R. R. 580, 24 Am. & Eng. R. Cas., N. S., 580 (custom to use track as foot path); Haltiwanger v. Columbia, N. & L. R. Co. (S. Car.), 3 R. R. R. 883, 26 Am. & Eng. R. Cas., N. S., 883 (duty to persons walking on track used as foot path); Furey v. New York Cent. & H. R. Co. (N. J.), 2 R. R. R. 1, 25 Am. & Eng. R. Cas., N. S., 1; James v. Illinois Cent. R. Co. (Ill.), 4 R. R. R. 232, 27 Am. & Eng. R. Cas., N. S., 232; Chicago Terminal Transfer Co. v. Kotoski (Ill.), 5 R. R. R. 530, 28 Am. & Eng. R. Cas., N. S., 530 (person intending to become a passenger while crossing a trestle by invitation of conductor, in order to reach train); note, 20 Am. & Eng. R. Cas., N. S., 395 et seq.; 11 Am. & Eng. R. Cas., N. S., 831; Illinois Cent. R. Co. v. O'Conner (Ill.), 20 Am. & Eng. R. Cas., N. S., 816 (effect of mere failure to object to persons crossing right of way); McCall v. So. Ry. Co. (N. Car.), 23 Am. & Eng. R. Cas., N. S., 760 (evidence of use of track as path way); Jones v. Charleston, etc., Ry. Co. (S. Car.), 23 Am. & Eng. R. Cas., N. S., 261; Cederson v. Ore. R. & Nav. Co. (Ore.), 21 Am. & Eng. R. Cas., N. S., 625 (license to use right of way as foot path, sufficiency of evidence); Egan v. Montana Cent. Ry. Co. (Mont.), 20 Am. & Eng. R. Cas., N. S., 72 (mere failure to prohibit employees from using spur track as foot path); Grady v. Georgia R. R. & Banking Co. (Ga.), 20 Am. & Eng. R. Cas., N. S., 400 (no implied license to cross tracks in railroad yard through spaces casually left between cars); Floyd v. Paducah Ry. & Light Co. (Ky.), 23 Am. & Eng. R. Cas., N. S., 167 (public could acquire no right to use as foot path track not in highway); Jones v. Charleston, etc., Ry. Co. (S. Car.), 23 Am. & Eng. R. Cas., N. S., 261; Trudell v. Grand Trunk Ry. Co. (Mich.), 20 Am. & Eng. R. Cas., N. S., 316 (child playing on right of way); Southern Ry. Co. v. Lynn (Ala.), 21 Am. & Eng. R. Cas., N. S., 570 (ejected passenger necessarily crossing trestle); Girton v. Lehigh Valley R. Co. (Pa.), 21 Am. & Eng. R. Cas., N. S., 157 (passenger crossing track to depot); Florida Cent. & P. R. Co. v. Foxworth (Fla.), 13 Am. & Eng. R. Cas., N. S., 469 (person crossing track in street at other place than crossing).

of age; that he had been plowing in a field on the opposite side of the railroad from his father's house, and that in returning from the house, whither he had gone, probably for water, to where the horse and plow had been left by him in the field, he found, upon reaching the railroad, which contained a double track, that one of the tracks was occupied by a passing freight train. While on the cross-ties of the track running parallel with the one occupied by the moving freight train, waiting for that train to pass out of the way, the passenger train, which he doubtless did not see or hear, owing to the noise made by the freight train, approached at great speed in his rear, and the pilot beam of its locomotive striking him on the back of the head produced sudden death.

The appellant introduced ten or more witnesses, not fewer than six of whom, among them J. A. Porter, surveyor of Hickman county, testified that from the point of the injury north—the direction from which the passenger train approached—the track was straight and unobstructed, for 1,440 feet or more; 1,440 being the measurement of the county surveyor. Wes Carter testified that he was within 30 yards of the railroad track, and at a point midway between the boy and the public crossing, which was about 1,800 feet from the latter; that he was watching the passenger train by which the boy was killed; and that it gave no alarm, either by blowing its whistle or ringing its bell, as it approached the boy, or before striking him; and that he saw the fireman looking out ahead in the direction of the boy when as much as 1,800 feet (600 yards) away from the place of the injury. Five other witnesses besides Carter testified that the train gave no alarm at any time in approaching the boy, and Hardy Beasley, a former locomotive fireman of experience, testified that this passenger train could have been stopped within 250 yards. George Muscovally testified that he was on the train by which the boy was killed, and that after the train had stopped and backed up to where the body of the boy lay he heard the engineer say that he saw the boy on the west side of the track, sitting on the end of the cross-ties, looking under the north-bound passing freight train at his horse running away in a field east of the railroad. Two other witnesses—Joe Wilmurth and Sid Willet--testified that the fireman told them that he saw the boy as soon as the train rounded the curve, which was 1,440 feet distant, and that he thought him a man until they backed up to where he was killed. It is true that the engineer in charge of the passenger train testified, in substance, that the locomotive whistle was blown for the public crossing, which is 1,800 feet north of where the boy was killed, and again just south of the crossing, where is located a station board marked "Thurmond," and, in addition, that the engine bell was rung at the crossing and station board; that, after rounding the curve south of the crossing, he saw the freight train of 30 cars on the other

track going north, and therefore meeting him; and that when he got, as he supposed, within 200 feet of where the boy was killed, he saw (to use his language) an "object on the outside of the rail, crouched close to the rail; couldn't tell hardly what this object was, because I noticed as he raised up he had his back to me." He further said that the bell was still ringing, and he then gave the stock alarm with the whistle, and as the boy raised he pulled the whistle "wide open" to attract his attention, put on the air brakes, and used every effort to stop the train; but the boy, without moving further, except to raise himself in a half stooping position, was struck by the pilot. The engineer also testified that after leaving the curve the fireman was engaged in replenishing the fire, and he was not, therefore, on the lookout ahead, as was the engineer, at the time of striking the boy. The fireman corroborated the engineer in the matter of the signals, but said he did not see the boy before he was struck by the train, as he was engaged at the time in replenishing the locomotive fire. The engineer was likewise corroborated, in the main, by the conductor and a brakeman as to the giving of the signals, though they did not see the boy until after he was killed.

It will be readily seen that the evidence is conflicting, but it cannot be said that there is no evidence tending to show negligence upon the part of appellee's servants in charge of the train by which appellant's intestate was killed. Clearly, the intestate was a trespasser upon appellee's track. Appellee's servants, the engineer and fireman, were under no obligation to be on the lookout to discover his presence on the track. The only duty they owed him after becoming aware of his presence and peril was to exercise ordinary care to avoid injuring him by giving the customary signals to warn him of the approach of the train, and of his danger therefrom, and, if practicable, and necessary to avoid striking him, to slacken the speed and stop the train. The engineer admits that he saw the intestate on the track, but says the train was within 200 feet of him when his presence was discovered, and that he gave the alarm signal at once. The appellant's witnesses testify, however, that no signal was given at all until after the train struck the intestate. It may be true that the intestate was not seen by the engineer or fireman until the locomotive was within 200 feet of him, yet the immediate giving of the alarm signal might have warned him of the nearness of the train, and afforded him the opportunity to take the one step necessary to remove his person from the end of the cross-tie upon which he was standing, and thereby have prevented contact with the train. If, therefore, under these circumstances, no signals were given by the engineer, would not the failure to do so constitute negligence? Upon the other hand, if, as testified by appellant's witnesses, the view of the track from the engine of the

approaching train was unobstructed for a distance of from 480 to 600 yards to where the intestate was located, would it do violence to the evidence to indulge the inference that his presence and peril were in fact known to the engineer and fireman in time to have prevented his death by the giving of the proper signals, or the stopping of the train. Undoubtedly, the situation was one of peril to the intestate. If he was watching the horse left at the plow, it had to be done by looking under the moving freight train as it passed between him and the horse, and to thus look it was doubtless necessary for him to stoop or bend his body, which he seems to have done with his back towards the approaching passenger train; and if this was his position when discovered by appellee's engineer, the latter must have known that the noise of the moving freight train would render it difficult for the intestate to hear the signals of alarm from the passenger train customarily made by the blowing of the whistle and the ringing of the bell, and it was, therefore, incumbent on the engineer not only to give the customary alarm signals, but, if practicable and necessary, to slacken the speed of, and even stop, the train, provided that, in the exercise of ordinary care, such precautions could have been taken by him after the discovery of the intestate's peril, and before the train struck him.

As before stated, the evidence is conflicting as to the appellee's negligence, but the well-settled rule in this state is that, where the evidence conduces in any degree to establish the right of recovery, a peremptory instruction will be unauthorized, as it is the province of the juries to pass upon questions of negligence in such cases. We are of opinion that the evidence of appellant presents a state of facts from which negligence on the part of appellee's servants may be inferred. Whether these facts are of sufficient weight to influence a verdict in his behalf must be determined by a jury. Upon the other hand, if they are outweighed or discredited by the evidence furnished by the witnesses of the appellee, the verdict of the jury must so declare. For the reasons indicated, we are constrained to hold that the lower court should have refused the peremptory instruction.

We are unable to agree with appellant's counsel that this case comes within the rule stated in Cahill v. Cincinnati, etc., Railway Co., 92 Ky. 345, 18 S. W. 2, which holds that, while the failure of those in charge of a railroad train to give signals of its approach to a private crossing is not generally regarded as negligence; yet, where a signal which it is the duty of the company to give, and which is usually given at a public crossing, may be heard at a private crossing by those entitled to use the private crossing, they have the right to rely upon the signals being given, and the failure to give it is negligence as to them as well as to persons traveling on the public highway. The proof in this case does not show that

a private crossing exists on the appellee's track at the point claimed by appellant, or that the intestate was killed just at that point. At most, the use that was made of the alleged crossing by appellant and his landlord was merely permissive, so far as appellee is concerned. Besides, it was not shown in evidence that appellant or others had been accustomed to rely upon any signal given at the public crossing. There is no claim set up in the pleadings of the existence of a private crossing, or of the right of the intestate to its use, and it is well settled that the mere acquiescence on the part of a railroad company in the use of the track by the public does not confer any authority or right, or amount to a license to use the same. Brown's Adm'r v. L. & N. R. R. Co. (Ky.) 30 S. W. 639; Embry v. L. & N. R. Co. (Ky.) 36 S. W. 1123; Dilas' Adm'r v. C. & O. Ry. Co. (Ky.) 71 S. W. 492. We think the facts of this case come within the rule announced in I. C. R. R. Co. v. Hocker (Ky.) 55 S. W. 438; L. & N. R. R. Co. v. Tinkham's Adm'r (Ky.) 44 S. W. 439; Newport News & M. V. Co. v. Deuser, 97 Ky. 92, 29 S. W. 973.

For the error of the lower court in giving the peremptory instruction, and refusing a new trial, the judgment is reversed, and cause remanded for a new trial, and for proceedings consistent with the opinion herein.

MOORE v. NASHVILLE, C. & ST. L. RY.

(Supreme Court of Alabama, May 21, 1903.)

[34 So. Rep. 617.]

Judgment—Sufficiency.

A judgment entry read: "On this the 18th day of November, 1902, come the parties by attorney, and the plaintiff demurs to defendant's pleas. It is considered and adjudged by the court that the demurrers be, and the same are hereby, overruled. Issue being joined, come a jury of good and lawful men, to wit, —— and eleven others, who, being duly sworn and charged according to law, upon their oaths do say: 'We, the jury, find in favor of the defendant.' It is therefore considered by the court that the defendant go hence and recover of the plaintiff the costs in this behalf expended, for which let execution issue. It is further considered by the court that the plaintiff have thirty days in which to prepare and have signed his bill of exceptions": *held* a sufficient judgment to support an appeal.

Ejection of Passenger—Disorderly Conduct—Use of Force—Pleading.*

Code 1896, § 3457, invests conductors of passenger trains with the

*As to the liability of a carrier for forcible ejection of passenger, see monograph appended to Birmingham Ry. & Electric Co. v. Baird (Ala.), 22 Am. & Eng. R. Cas., N. S., 909; Indiana, D. & W. Ry. Co. v. Ditto (Ind.), 4 R. R. R. 703, 27 Am. & Eng. R. Cas., N. S., 703; McGarry v. Holyoke St. Ry. Co. (Mass.), 5 R. R. R. 294, 28 Am. & Eng. R. Cas., N. S., 294 (right to use force); Sharer v. Paxson (Pa.), 2 Am. & Eng. R. Cas., N. S., 429; McGhee v. Reynolds (Ala.), 22 Am. & Eng. R. Cas., N. S., 17; Raynor v. Wilmington, etc., R. Co. (N. Car.), 23 Am. & Eng. R. Cas., N. S., 561.

powers of police officers, and authorizes them to eject passengers who are disorderly or use profane, vulgar, or obscene language, using only such force as may be necessary to accomplish the removal: *held*, that pleas attempting to justify the ejection of a passenger, which set up disorderly conduct on his part, but which did not aver that the conductor used only such force as was necessary to accomplish his removal, were bad.

Same—Same.

A plea setting up in substance merely that the conductor at the time he was ejecting the passenger was acting as a police officer of the state was insufficient.

Same—Same—Evidence.

In an action against a railroad for wrongfully ejecting plaintiff from a car, testimony that on entering the car plaintiff went to his son, who was sitting down, and asked him to lend him 15 cents; that cursing or profane language was used by others who were on the outside of the car; that after receiving the injuries plaintiff requested a witness to take care of him—was irrelevant.

Res Gestæ.

None of such matters were a part of the res gestæ.

Same—Issues.

The negligence of the conductor in leaving plaintiff on the platform after ejecting him from the car, knowing that he was so drunk as to be unable to take care of himself, not being counted on in the complaint, could not be made the basis of a recovery.

Witnesses—Expenses.

The fact that defendant transported its witnesses to the place of trial free of charge and paid their hotel bills was a circumstance tending to show bias, and was proper matter for the jury, and it was error to instruct them that as matter of law the fact that defendant paid the expenses of its witnesses "had nothing to do with the issues in the case."

Instructions.

If the charge as given has a tendency to mislead, an explanatory charge should be requested.

Same.

The giving of an abstract charge is not reversible error.

Same—Evidence.

Where the testimony was in direct conflict on every material issue of fact, defendant was not entitled to the affirmative charge.

Appeal from Circuit Court, Marshall County; A. H. Alston, Judge.

Action by Charles H. Moore against the Nashville, Chattanooga & St. Louis Railway. Judgment for defendant, and plaintiff appeals. Reversed.

The complaint contained but one count, and in this count the plaintiff sought to recover damages for personal injuries sustained by reason of his being ejected from a passenger coach constituting a part of a train on defendant's railway; it being averred in the complaint that the plaintiff was originally a passenger upon said train, and that, while endeavoring to find a seat in the coach which he had entered, he "was rudely, willfully, violently, and wrongfully seized by" the conductor of said train, naming him, and was by said conductor "pushed rudely down the aisle of said coach, forcibly ejected therefrom onto the platform thereof, and there hurled

backwards with great violence by the said Martin [the conductor] into a ditch, all of which occurred in the presence and hearing of the passengers in said coach, and also in the presence and hearing of a great crowd of people who had gathered about the train; and by reason of all of which the plaintiff suffered great injuries, to wit." There then follow the injuries complained of, which included personal injuries, and mental suffering incident to ridicule, mortification, and disgrace.

The defendant filed five pleas. The first was the general issue. The second plea was as follows: "(2) That the plaintiff himself was guilty of negligence which contributed proximately to his injury, in this: that at the time of the alleged injury to him he was voluntarily intoxicated, and using obscene or abusive language while on defendant's car, in the presence of other passengers thereon, some of whom were women, and in order to prevent the plaintiff from annoying the said passengers the defendant's conductor took hold of the plaintiff, and put him out on the platform of the car, and on account of plaintiff's drunken condition he fell off of the platform, and thus received the injury complained of, if injury there was." The third and fourth pleas were substantially the same as the second. The fifth and sixth pleas were as follows: "(5) That the plaintiff was himself guilty of negligence which contributed proximately to his injury, in this: that at the time of the alleged injury the plaintiff, while a passenger on the train of the defendant railway, was disorderly, and using profane, vulgar, or indecent language, and the said Bright Martin was compelled to remove plaintiff for said train, and in so doing said Bright Martin was acting as police officer, as provided by section 3457 of the Code of Alabama of 1896. (6) That the defendant is in no way responsible for the conduct of said Bright Martin at the time of the alleged injury, as the said Martin was at that time acting as a police officer of the state of Alabama, by virtue of the power conferred upon him under section 3457 of the Code of Alabama of 1896."

The plaintiff demurred separately to the 2d, 3d, 4th, and 5th pleas, upon the grounds that said pleas constitute no valid defense to plaintiff's cause of action, and because said pleas fail to aver that defendant's conductor used no more force than was necessary in putting plaintiff out on the platform of said car. To the sixth plea the plaintiff demurred upon the following grounds: "(1) Because the averment in said plea, that the defendant is in no way responsible for the conduct of said Martin at the time of the alleged injury, is a mere conclusion of the pleader. (2) Because the averment that the said Martin was at the time acting as a police officer of the state of Alabama, by virtue of the power conferred upon him under section 3457 of the Code of Alabama, is a mere conclusion of the pleader, and no valid defense to plaintiff's

complaint." These demurrers were overruled, and issue was joined on the pleas filed by the defendant.

The evidence introduced for the plaintiff tended to show that, having a ticket which entitled him to ride as a passenger on defendant's train, he boarded said train, and that, as he was trying to find a seat in the coach which he had entered, Bright Martin, the conductor on said train, forcibly took hold of the plaintiff and knocked him to his knees, and then shoved him down the aisle to the platform of the car, where he caught him in the collar with one hand and by the leg with the other hand, and threw him from the platform into a ditch near the side of the track; that at the time he was so assaulted by the conductor the plaintiff was in no way misbehaving; that he was not drunk at the time, nor was he boisterous or cursing; that after he was thrown in the ditch he was helped on the train by two other people, and while he was being put on the train the conductor Martin also helped put him back on the train. The plaintiff introduced evidence tending to show that he sustained the injuries complained of in the complaint. The plaintiff sought to prove that upon entering the train he went to his son, who was sitting down, and asked him to lend him 15 cents. The defendant objected to the introduction of this evidence, the court sustained the objection, and the plaintiff duly excepted. The plaintiff sought to prove by several of the witnesses that, at the time the plaintiff was ejected from the train, there was the use of a great deal of profane language by persons who were on the outside of the car. The defendant objected to the introduction of this evidence, the court sustained the objection, and the plaintiff duly excepted.

During the examination of one Mose Head, a witness for the plaintiff, he testified, in answer to a question, that the plaintiff told him after the train pulled out that he wanted the witness "to take care of him." The defendant objected to the question which elicited this answer, the court sustained the objection, and the plaintiff duly excepted. Upon motion of the defendant the court excluded the answer from the jury, and to this ruling the plaintiff duly excepted.

The evidence for the defendant tended to show that at the time the plaintiff boarded the train he was very drunk; that there were in the coach at the time several women; that the plaintiff used vulgar and obscene language, and was very boisterous; that the conductor remonstrated with him, and asked him not to be guilty of such conduct, and told him if he did not stop he would have to put him off the train; that, upon plaintiff continuing to be guilty of such boisterous and indecent conduct, the conductor pushed him to the door onto the platform, and that he was so drunk that he fell from the platform into the ditch. On the cross-examination of each of the defendant's witnesses, they testified that the defendant gave

them passes over the road to attend the trial and paid all of their expenses.

The plaintiff requested the court to give to the jury the following written charge, and separately excepted to the court's refusal to give the same as asked: "(6) The court charges the jury that, if they believe reasonably from the evidence that conductor Martin knew at the time he ejected plaintiff that he was so drunk as to be unable to protect himself, then it makes no difference whether plaintiff fell off said platform or was pushed off, the Nashville, Chattanooga & St. Louis Railway would be liable in damage."

The plaintiff separately excepted to the court giving, at the request of the defendant, the following written charges: "(2) The fact that the defendant paid the actual expenses of its witnesses while attending this trial has nothing to do with the issues in this case; such payment by the defendant was right and proper. (3) Under the law in this state, the conductor of a railroad train is a police officer, and not only has the right, but it is his duty, to keep order on the train on which he is conductor, and to eject all persons who use obscene or abusive language in the presence and hearing of the passengers. (4) If the jury believe from the evidence that the plaintiff, Moore, was intoxicated, and used obscene or vulgar language in the car of the defendant railway, then the conductor had the right to put Moore out of the car, and to use such force as was necessary to accomplish it. (5) The court charges the jury that if they find from the evidence that at the time of the alleged injury plaintiff was a passenger on defendant's train, that Bright Martin was a conductor on said train, that plaintiff became disorderly, in that he used profane, vulgar, or indecent language, which act on the part of the plaintiff rendered it necessary for the said Bright Martin to eject plaintiff, and that, while Martin was trying to eject plaintiff from the train, plaintiff resisted the efforts of Martin to so eject him, which resistance on the part of the plaintiff was the cause of the plaintiff being injured, then the jury should find a verdict for the defendant."

There were verdict and judgment for the defendant. The judgment entry is in the following language: "On this the 18th day of November, 1902, come the parties by attorney, and the plaintiff demurs to defendant's pleas. It is considered and adjudged by the court that the demurrers be, and the same are hereby, overruled. Issue being joined, come a jury of good and lawful men, to wit, W. H. Scarbrough and eleven others, who, being duly sworn and charged according to law, upon their oaths do say: 'We, the jury, find in favor of the defendant.' It is therefore considered by the court that the defendant go hence and recover of the plaintiff the costs in this behalf expended, for which let execution issue. It is further considered by the court that the plaintiff have

thirty days in which to prepare and have signed his bill of exceptions."

The plaintiff appeals, and assigns as error the several rulings of the court to which exceptions were reserved.

In this court the appellee made a motion to dismiss the appeal upon the following grounds: (1) The record shows that there was no judgment rendered by the court below which would support an appeal, and (2) that the bill of exceptions was not signed during term time, and there was no such order of the court as authorized it to be signed after the adjournment of the court. The judgment of the court was rendered on November 18, 1902. The bill of exceptions was signed on December 17, 1902.

McCord & McCord, for appellant.
Oscar R. Hundley, for appellee.

TYSON, J. The motion of appellee to dismiss the appeal because no judgment was rendered by the trial court upon the verdict of the jury must be denied. Bell v. Otts, 101 Ala. 186, 13 South. 43, 46 Am. St. Rep. 117; 1 Freeman on Judgments, § 2. The order of the court allowing 30 days for the preparation and signing of the bill of exceptions is sufficient.

The complaint alleges a wrongful ejection of the plaintiff by the conductor from one of the cars of defendant onto the platform of said car, and from there to the ground, resulting in injuries to his person. The defendant filed five special pleas, numbered 2, 3, 4, 5, and 6. All of them except the sixth are in form pleas of contributory negligence. They are, however, really an attempt to justify the conduct of the conductor in ejecting the plaintiff under section 3457 of the Code of 1896. As pleas of justification they are manifestly insufficient. While they aver the disorderly conduct of the plaintiff, they do not aver that the conductor used only such force as was necessary to accomplish his removal from the car. The demurrer interposed to each of them should have been sustained. The sixth was also bad. It averred substantially nothing more than that the conductor at the time he ejected the plaintiff was acting as a police officer of the state by virtue of the power conferred upon him by section 3457. The fact that he was clothed with the authority of a police officer and acted in that capacity on the occasion of plaintiff's ejection does not relieve his company (the defendant) from liability if he was not justified in the exercise of that authority, or if in the exercise of it he used more force than was necessary.

We are unable to see the relevancy of the testimony offered by plaintiff that he applied to his son to loan him 15 cents, or that cursing or profane language was used by others who were on the outside of the car. Nor was there error in excluding the request to Head by plaintiff "to take care of him" after he had received the injuries complained of. None of

these matters were a part of the res gestæ of the transaction, and could shed no light upon the material issue in the case.

Charge 6 requested by plaintiff was properly refused. The negligence of the conductor in leaving the plaintiff on the platform, after ejecting him from the car, knowing that he was so drunk as to be unable to take care of himself, is not counted on in the complaint, and could not, therefore, be made the basis of a recovery.

Charge No. 2 given at the request of defendant was improper. It invaded the province of the jury, and asserted an incorrect proposition of law. While it may be true, as asserted in it, that it was right and proper for the defendant to pay the expenses of its witnesses, yet the fact that its witnesses were transported by it to the place of the trial free of charge and their hotel bills paid is a circumstance tending to show bias, and was proper matter for the consideration of the jury. Ala. Great So. R. Co. v. Johnston, 128 Ala. 283, 21 S. W. 771. This being true, it was clearly error to instruct the jury that, as matter of law, the fact that defendant paid the expenses of its witnesses "has nothing to do with the issues in the case."

The only objection urged against charge 3 given for defendant is that it was misleading. It asserted a correct proposition of law, and, if its tendency was to mislead, this should have been corrected by requesting an explanatory charge.

Conceding that charge 5 was abstract, the giving of it is not reversible error. 2 Mayfield's Dig. pp. 565, 573.

In conclusion, it may not be amiss to say that we cannot concur in the view urged by appellee's counsel that it was entitled to the affirmative charge, and therefore, if error was committed, it was without injury. The testimony was in direct conflict upon every material issue of fact presented by the pleadings.

Reversed and remanded.

ATLANTIC & B. R. CO. v. ANDERSON.

(*Supreme Court of Georgia, July 1, 1903.*)

[45 S. E. Rep. 271.]

Injury to Passenger—Accommodations at Station.*

Although it may be customary for a railway company, at a particular station, to afford passengers a convenient means of boarding its trains by crossing a gang plank laid across the intervening space between the station platform and the baggage car of a train, and

*Duties as to stations and stopping places, see monograph appended to Muhlhause v. Monongahela St. Ry. Co. (Pa.), 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131; Mayne v. Chicago, R. I. & P. Ry. Co. (Okla.), 6 R. R. R. 61, 29 Am. & Eng. R. Cas., N. S., 61 (persons having business at stations); Houston, E. & W. T. Ry. Co. v. Grubbs (Tex.), 3 R. R. R. 754, 26 Am. & Eng. R. Cas., N. S., 754; Davis v. Houston, E. & W. T. Ry. Co. (Tex.), 3 R. R. R. 800, 26

then passing through the baggage car into the coaches in which they are expected to ride, yet the company cannot be heard to say that a passenger who was injured by its negligent act in starting one of its trains without warning would not have been hurt had he adopted this means of boarding the train, instead of attempting, immediately before the train started, to mount the steps of one of the passenger coaches from the ground, at a point beyond the platform; especially when such passenger had no notice of its peculiar custom of receiving passengers, as well as their trunks, at the door of its baggage car.

Case at Bar.

There being in the present case no complaint of any error on the part of the presiding judge during the progress of the trial, and the evidence introduced in behalf of the plaintiff fully warranting the finding in his favor, no reason appears for reversing the judgment overruling the defendant company's motion for a new trial.

(Syllabus by the Court.)

Error from City Court of Douglas; J. W. Quincey, Judge.

Action by C. G. Anderson against the Atlantic & Birmingham Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. L. Sweat, for plaintiff in error.

W. W. Bennett, for defendant in error.

PER CURIAM. Judgment affirmed.

BAINBRIDGE v. UNION TRACTION CO.

(Supreme Court of Pennsylvania, May 4, 1903.)

[55 Atl. Rep. 836.]

Injury to Passenger—Contributory Negligence.

Where evidence in an action for injuries to a passenger on an open electric street car showed that he left his seat, and stepped onto the running board of the car, holding on with his left hand, a bag of

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Am. & Eng. R. Cas., N. S., 800 (distant corner of depot grounds); Sweet v. Louisville Ry. Co. (Ky.), 3 R. R, R. 768, 26 Am. & Eng. R. Cas., N. S., 768; St. Louis, etc., Ry. Co. v. Wilson (Ark.), 3 R. R. R. 793, 26 Am. & Eng. R. Cas., N. S., 793 (duty to heat waiting room); Davis v. Houston, E. & W. T. Ry. Co. (Tex.), 3 R. R. R. 800, 26 Am. & Eng. R. Cas., N. S., 800 (duty to light depot grounds); Duell v. Chicago & N. W. Ry. Co. (Wis.), 5 R. R. R. 594, 28 Am. & Eng. R. Cas., N. S., 594 (duty to light platform); Simmons v. Oregon R. & Nav. Co. (Ore.), 5 R. R. R. 280, 28 Am. & Eng. R. Cas., N. S., 280 (duty to stop train at safe place); Montgomery St. Ry. v. Mason (Ala.), 5 R. R. R. 316, 28 Am. & Eng. R. Cas., N. S., 316; (failure to provide safe place for discharging passengers); St. Louis S. W. Ry. Co. of Texas v. Ricketts (Tex.), 5 R. R. R. 467, 28 Am. & Eng. R. Cas., N. S., 467 (failure to heat and light depot); St. Louis, etc., Ry. Co. v. Wilson (Ark.), 3 R. R. R. 793, 26 Am. & Eng. R. Cas., N. S., 793 (refusal to unlock station room); Herrman v. Great Northern Ry. Co. (Wash.), 4 R. R. R. 154, 27 Am. & Eng. R. Cas., N. S., 154 (unsafe approach to union depot); Owen v. Washington & C. R. Ry. Co. (Wash.), 4 R. R. R. 667, 27 Am. & Eng. R. Cas., N. S., 667 (imputable negligence of city with respect to lights at station); Duell v. Chicago & N. W. Ry. Co. (Wis.), 5 R. R. R. 594, 28 Am. & Eng. R. Cas., N. S., 594 (safe place to alight, sufficiency of evidence).

tools in the other hand, and was thrown off when the car stopped with a sudden jerk, his contributory negligence barred recovery for the injuries received.

Same—Same.*

A passenger on an electric street car, leaving his seat, and stepping onto the running board of the car while in motion, assumes the risk of his position.

Appeal from Court of Common Pleas. Philadelphia County.

Action by Henry Bainbridge against the Union Traction Company. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, FELL, MESTREZAT, BROWN, and POTTER, JJ.

Hazleton Mirkil and Horace M. Rumsey, for appellant.
Thomas Leaming and Charles Biddle, for appellee.

BROWN, J. The plaintiff below got on a car of the defendant company at Twelfth and Walnut streets, in the city of Philadelphia, and took a seat about the middle of it. When it was approaching Sixty-Third street, of his own motion he left his seat, and stepped down on the running board, holding the rail with his left hand, and having in his right a bag containing tools. While in this position, he says the car stopped with a sudden and violent jerk on the west side of Sixty-Third street, and he was thrown off, sustaining the injuries for which he is seeking compensation.

When the appellant left this seat, where he was safe, and stepped down on the running board of the car, and remained there while it was in motion, he voluntarily put himself in a place of danger, and took upon himself the risk of his position from any cause. Thane v. Scranton Traction Company, 191 Pa. 249, 43 Atl. 136, 71 Am. St. Rep. 767; Bumbear v. United Traction Company, 198 Pa. 198, 47 Atl. 961; Woodroffe v. Roxborough, etc., Railway Company, 201 Pa. 521, 51 Atl. 324. With one hand grasping the rail, and another holding onto the bag of tools, the risk which he took of being thrown from the car, while so standing on the running board, by its sudden stopping, was most imminent, and for his negligence in the assumption of such a risk he alone must bear the consequences. That the appellant stepped down on the running board of the moving car because he intended to get

*See Anderson v. City & Suburban Ry. Co. (Ore.), 6 R. R. R. 763, 29 Am. & Eng. R. Cas., N. S., 763; Moody v. Springfield St. Ry. Co. (Mass.), 6 R. R. R. 116, 29 Am. & Eng. R. Cas., N. S., 116; Woodroffe v. Roxborough, C. H. & N. Ry. Co. (Pa.), 2 R. R. R. 186, 25 Am. & Eng. R. Cas., N. S., 186; Baltimore Consol. Ry. Co. v. Foreman (Md.), 2 R. R. R. 182, 25 Am. & Eng. R. Cas., N. S., 182; note. 7 Am. & Eng. R. Cas., N. S., 305; 1 Am. & Eng. R. Cas., N. S., 371 (passenger riding in dangerous place, in general); Nieboer v. Detroit Electric Railway (Mich.), 23 Am. & Eng. R. Cas.,N. S., 93; Hassen v. Nassau Elec. R. Co. (N. Y.), 12 Am. & Eng. R. Cas., N. S., 1.

off at Sixty-Third street in no manner excuses his negligence. The speed of the car was slackening as it approached Sixty-Third street; he knew it would stop; he had signaled the conductor to have it stopped, and his signal was heeded; but, instead of waiting for it to stop, he started to get off while it was in motion by stepping down on the running board. The judgment of the court below is sustained by Hunterson v. Union Traction Company (this day decided) 55 Atl. 543, in which we have reaffirmed the rule as laid down in Powelson v. United Traction Company, 204 Pa. 474, 54 Atl. 282, that to step on or off a moving car, whether the power which propels the car be steam or electricity, is per se negligence, and, if injury results to the passenger, he cannot recover damages.

In view of the negligence of the plaintiff, it is immaterial whether there was any evidence of the negligence of the defendant.

Judgment affirmed.

CHOCTAW, O. & G. R. CO. v. HILL.

(*Supreme Court of Tennessee, May 9, 1903.*)

[75 S. W. Rep. 963.]

News Agent—Ejection from Train—Subsequent Offer to Pay Fare.

A servant employed by a railway news company was by agreement with the railroad company transported by it without payment of fare, subject to the orders of the railroad company and to its regulations in the same manner as any of its own servants. Being detected in a violation of the rules, he was ejected from the train, to which he subsequently returned, offering to pay his fare to a point to which he desired to go, but was again ejected: *held*, that such ejection was wrongful.

Same—Same—Elements of Damages.*

In an action against a railway company for wrongful ejection from its train, evidence that plaintiff was jerked off the car was sufficient to justify an instruction authorizing damages for physical suffering.

Same—Same—Physical Suffering—Evidence.

In an action against a railroad company for wrongful ejection from its train, an instruction that the jury might consider plaintiff's loss of time, physical and mental suffering, humiliation of feeling, etc., and give what, in their sound discretion, would be fair and just compensation, was not error.

Same—Same—Punitive Damages.

In an action against a railroad company for wrongful ejection

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*Damages for mental suffering of passenger wrongfully ejected, see foot-note appended to Mabry v. City Electric Ry. Co. (Ga.), 6 R. R. R. 900, 29 Am. & Eng. R. Cas., N. S., 900; foot-note appended to Walker v. Boston & M. R. Co. (N. H.), 3 R. R. R. 80, 26 Am. & Eng. R. Cas., N. S., 80; International & G. N. R. Co. v. Anchonda (Tex.), 3 R. R. R. 788, 26 Am. & Eng. R. Cas., N. S., 788 (right of husband to recover for mental anguish of wife separated from children); note appended to Texarkana, etc., Ry. Co. v. Anderson (Ark.), 18 Am. & Eng. R. Cas., N. S., 37; Louisville & N. R. Co. v. Hine (Ala.), 14 Am. & Eng. R. Cas., N. S., 382 (ridicule not an element unless approximate upon the wrong, in action for ejection of passengers); note appended to San Antonio Traction Co. v. Crawford (Tex. Civ. App.), 5 R. R. R. 517, 28 Am. & Eng. R. Cas., N. S., 517 (liability for insults by servants).

from its train, in which there was evidence that plaintiff was forcibly jerked from the train, and then held and restrained of his liberty, a charge authorizing punitive damages was not error.

Exemplary Damages—Instruction.

In an action against a railroad company for wrongful ejection from its train, an instruction that whenever the element of malice or oppression, or a reckless disregard of the rights of others, enters into a transaction, and when the act is done in the strict line of duty of the conductor, but done under a state of facts not justifying the act done, and in a wrongful or perhaps careless manner, the law authorizes exemplary damages, is not objectionable because of the use of the phrase, "and when the act is done in the strict line of duty of the conductor."

Instructions.

The charge was not erroneous because of the use of the expression "careless manner," the word "careless" being used in the sense of "reckless."

Excessive Verdict.

In an action against a railroad company by a railway news agent for wrongful ejection from the train, in which it appeared that plaintiff was forcibly jerked from the train, and thereafter held and restrained of his liberty, and that his stock in trade was lost or destroyed in consequence, a verdict for $250 was not excessive.

Appeal from Circuit Court, Shelby County; J. P. Young, Judge.

Action by John W. Hill against the Choctaw, Oklahoma & Gulf Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wright, Peters & Wright, for appellant.
Jno. E. Bell, for appellee.

NEIL, J. This action was brought in the court below by the defendant in error to recover damages for his wrongful ejection from one of the trains of the plaintiff in error. There was a verdict for $250, on which the court below entered judgment. A motion for new trial was made and overruled in that court, and thereupon the plaintiff in error prayed for and obtained an appeal to this court, and has assigned errors.

There was testimony introduced in the court below tending to show the following facts, viz.: That defendant in error was a newsboy on plaintiff in error's train, in the employ of the Van Noy News Company, but by contract between the latter and the railway company, likewise with the consent of defendant in error, he was subject to the orders of the railway company, and amenable to its rules and regulations just as any servant of the latter, and was to be transported back and forth without payment of fare. That on the 24th of August, 1902, while defendant in error was in this service on one of his accustomed trips, and while the train was standing at Oklahoma City, he was detected in the violation of a rule of the railway company, which, on pain of discharge from the service of the company, forbade its servants to drink beer or spirits, or to have the same in possession; the defend-

ant in error having been seen drinking beer at a restaurant in Oklahoma City, and having purchased and carried upon his train a pint bottle of whisky for the conductor. That upon being so detected he was ordered by S. H. Barnes, the superintendent of that division of the road, to leave the train. That he threw the bottle of whisky out of the window of the car he was then in, and asked to be allowed to remain upon the train and proceed to Memphis, saying that he was willing to pay that fare. The superintendent denied this request, and upon his failure to go ordered the conductor to remove him from the train. That the conductor did so. That he in a very short time returned to the train, going through the ladies' car, and thence into the car in which he had previously been traveling, and in which his goods were, consisting of newspapers, fruit, tobacco, and confections. That he took off his cap, but still kept on the rest of his uniform. That he was again ordered from the train, but in response said he wished to pay his fare, and go at least to the next station, Shawnee Town, so that he could have time to get his goods together, that they might not be lost. That he tendered at this time $5, but the conductor refused to receive the money. That the fare to Shawnee Town was only $1.25. That during the same conversation in which he tendered the $5 he also told the conductor he wished to go through to Memphis. That he knew that the fare to Memphis was more than $5. That upon the conductor's refusal to accept the fare he was again removed from the train, and in accomplishing this the plaintiff in error's employees jerked him from the car. That after he had been so removed he was held by the servants of the company, and forcibly restrained from again returning to the train, and was so restrained until the train resumed its journey. That Oklahoma City was one of the regular stopping places of the train. That the usual stop was 25 minutes, but on the occasion in question the train had been delayed an hour, awaiting the arrival of another train. There was evidence tending to show that the fare from Oklahoma City to Memphis was $15.12, and that defendant in error had in his pocket at the time he was ejected from the train the sum of $18. There is no testimony showing whether defendant in error knew the exact fare or not; nor is there any evidence showing that the conductor informed defendant in error of the amount, or that he demanded it, and from the attending circumstances we infer that he did neither. The defendant in error stayed in Oklahoma City until the next day at 10 o'clock, when he boarded a train of the plaintiff in error, and proceeded to Memphis, paying his fare as a passenger. By reason of his ejection from the train, defendant in error's goods, left upon the train, were wasted or lost, to the value of about $12, for which he was compelled to account to the Van Noy News Company.

Upon these facts it is insisted, first, that, inasmuch as defendant in error was clearly in the wrong, in that he had violated a rule of the company for which the company had the right to discharge him from the service, and (as plaintiff in error insists) eject him from the trains, and for which he was so discharged and ejected, he had no right to again board the train, and then to attempt to acquire and maintain the status of a passenger by offering to pay fare. Counsel endeavor to support this contention by reference to those cases which hold that when a person upon a train, claiming the rights of a passenger, has forfeited or failed to perfect these rights by a refusal to pay fare, and the train has been stopped, and the train crew are in the act of putting him off the train, such person cannot restore his original status, and acquire and perfect his rights as a passenger, by then offering to pay the legal fare. Railroad v. Harris, 9 Lea, 180, 186, 187, 42 Am. Rep. 668; Hibbard v. N. Y. & E. R. Co., 15 N. Y. 455; State v. Campbell, 32 N. J. Law, 309; Hutchinson on Carriers, § 591. The reason assigned in support of the rule is that, if one passenger might, by his unjustifiable conduct, delay the train to put him off, another might do the same thing, and thus the utmost irregularity in the running of the trains be produced, jeopardizing the safety of the company's property, and the lives of all on board. 9 Lea, 186. But the reason of the rule would not exist, and hence the rule itself would not obtain, when the train is stopped at a regular station, as is shown in the present case. Toledo, W. & W. R. Co. v. Wright, 68 Ind. 586, 34 Am. Rep. 277. Moreover, cases of the class referred to do not furnish a fair analogy for the case we have before us. While it is true that the company had the right to discharge the defendant in error because of his violation of the rules, and, upon his failure to pay fare, also to eject him from the train, it did not have the right to eject him if he was willing and offered to pay fare to any station ahead. One reason given in many of the cases for the right of ejection even though one offers to pay fare after the ejection is begun is that the person in question has, by his previous conduct, broken the contract implied between him and the company, upon his entering the train, that it would carry him to his destination upon his paying the fare, by his refusal to pay fare in the first instance, and that, thus having broken the contract on his part, he has no status under it, and is in no position to tender a new contract, the company being in the very act of enforcing the right accrued to it upon the breach. The case, however, is different in respect of an employee being carried as this one was without payment of fare, under the terms of his service. Upon the discharge of such employee, it is true, his right to be transported without payment of fare would cease, but he would not forfeit his right to remain upon the train, and to proceed as a passenger, upon the payment of

fare. The duty of its conductor, under such circumstances, would be to demand payment of fare, and upon failure or refusal to pay he would then have the right to eject such discharged employee. So, in the present case, the company was in the wrong in both the first and the second ejection—in the first, in that the conductor did not demand fare of the defendant in error to his destination, which destination was known to the conductor, or give him the option of paying fare to any other point between Oklahoma City and Memphis that he might desire or of leaving the train; in the second, in that he removed the defendant in error, notwithstanding the fact that he tendered fare to Shawnee Town, and subsequently, before his removal, manifested a purpose to go through to Memphis, and the conductor removed him from the train without making a demand for his fare.

We need not consider what the respective rights of the company and of the defendant in error would have been if the conductor had demanded the fare, or the defendant in error had refused, or the train had been stopped for the purpose of putting him off, and he had then tendered the fare. No such case appears in the record.

It is insisted that the court below erred in giving the following instruction to the jury, viz.: "If you find for the plaintiff under the foregoing instruction, you may consider his loss of goods, if any, his loss of time, his mental and physical suffering, if any, his humiliation of feeling, and give what, in your sound discretion, would be a fair and just compensation." We do not think there was any error in this instruction. It is said that there was no evidence of the value of the time lost. If so, then under the well-known rule the error will be held innocuous, unless the court can see that some injury resulted. In the present case we are unable to see that any injury resulted.

It is said that there was no evidence to show physical suffering. There was, however, some evidence upon this subject, though slight, in the testimony of the defendant in error that he was jerked off the car.

It is said that the instruction was erroneous, in that the jury were told that they could give as damages what, in their sound discretion, would be fair and just compensation; and that this was contrary to the rule laid down in Girdner v. Taylor, 6 Heisk. 244, 246. In that case, however, it appeared that the circuit judge had instructed the jury that they could allow any amount of damages they should see proper, without directing their attention to the testimony, or indicating that they should be guided by it. In the present case the jury were referred to the testimony, and what was said in the instruction in question was said with reference to that testimony, and could not have been misunderstood.

It is insisted that the circuit judge erred in giving the following instruction upon the subject of punitive damages, viz.:

"Whenever the element of malice or oppression, or a reckless disregard of the rights of others, enters into a transaction, and when the act is done in the strict line of duty of the conductor, but done under a state of facts not justifying the act done, and in a wrongful, or perhaps careless, manner, to the injury of the plaintiff, then the law blends the interests of society with those of the aggrieved individual, and authorizes the jury in its discretion to give exemplary damages. These are allowed in addition to damages for compensation or actual damages, to punish the offender, and deter others from the repetition of like offenses." We do not consider this instruction as a model of correct expression, but there is no reversible error in it.

It is said there was no testimony to justify the court in giving a charge upon the subject of punitive damages, and that, in the absence of such testimony, no charge upon that subject should have been given: citing American Lead Pencil Co. v. Davis, 108 Tenn. 257, 66 S. W. 1129; Railway v. Lea, 90 Tenn. 574, 18 S. W. 268. But there is much evidence in the fact that the defendant in error was forcibly jerked from the train, and was then held and restrained of his liberty by the company's servants.

Objection is taken to the language, "and when the act is done in the strict line of duty of the conductor." By this language, in the connection in which it was used, the circuit judge intended to indicate to the jury (and correctly) that the act or acts complained of must have been, not of a character lying outside of the scope of the employment of the conductor as a servant of the company, but of a character falling under that employment, but not justified by the facts of the particular case; and, moreover, was done in a malicious or oppressive way, or in reckless disregard of the rights of others. Railroad v. Garrett, 8 Lea, 438, 449, 41 Am. Rep. 640.

Objection is taken to the expression "or perhaps careless manner." This expression, together with the preceding one, was copied by his honor from the opinion of this court in the case of Railroad v. Garrett, supra. The whole passage is as follows: "There is no class of cases where the doctrine of exemplary damages can be more beneficially applied than in the case of railroad corporations in their capacity as common carriers of passengers. We see no reason to go over the cases in other states to find support for this view. It is sound, in our judgment, and needs no further discussion. It is proper to say that the case of Nashville & Chattanooga Railroad v. Starnes, 9 Heisk. 53, 24 Am. Rep. 296, did not intend to announce any contrary general doctrine, and does not, when considered in connection with the facts. So far from limiting the liability of a railroad company for the acts of its servants, when an injury is done in the performance of the duties of their positions, it was extended in that case to the act of

the servant in wantonly and for mischievous purposes using the engine of the company to alarm horses in a wagon (a proposition the writer of the opinion thinks a very doubtful one). In a case like that, however, it was said the company should not be liable for vindictive damages, because, says the judge: 'The act complained of was manifestly done without the defendant's knowledge or consent, and was the willful and unauthorized act of the servant alone.' Whether that be correct or not in reference to the facts of that case, we need not now determine, but it has no application whatever to the case before us, when the act was done in the strict line of the duty of the conductor, but was done under a state of facts not justifying the act done, and in a wrongful, or perhaps careless, manner, to the injury of the plaintiff." There can be no doubt that the word "careless" here was a misprint for the word "reckless." The facts recited in the opinion in respect of which the passage above quoted was used show that the word "careless" was wholly inappropriate, and that the judge writing the opinion intended to use, and no doubt did use, the word "reckless." The word "careless," therefore, appearing in the charge in question, was not, strictly speaking, a correct word to express the meaning intended; but it could not have misled the jury, because in the connection in which it was used it must have conveyed to their minds the meaning carried by the word "reckless"; not the idea of negligent indifference, but without care of consequences or for the rights of the person ejected.

It is next insisted that the verdict was excessive. We do not think so.

We have thus disposed of the substance of all of the errors assigned, except the third, concerning the exclusion of certain evidence. We think this testimony was so clearly incompetent that we need not extend this opinion by discussing it here.

It results that the judgment of the court below must be affirmed.

DYER v. UNION R. CO.

(*Supreme Court of Rhode Island, June 4, 1903.*)

[55 Atl. Rep. 688.]

Street Railways—Injury to Pedestrian—Evidence—Previous Acts of Negligence.*

Evidence in an action by a pedestrian against a street railroad for

*As to the admissibility of evidence of other failures to give signals, see note appended to Chicago, R. I. & T. Ry. Co. v. Porterfield (Tex.), 12 Am. & Eng. R. Cas., N. S., 383.

As to the admissibility of evidence of customary care or negligence of employees, see note appended to Missouri, K. & T. Ry. Co. v. Johnson (Tex.), 12 Am. & Eng. R. Cas., N. S., 824.

injuries that defendant had failed to ring the bell on the car in question at the intersection of other streets prior to the time of the accident is improper.

Harmless Error.

Where appellant's liability is established so conclusively as to make a new trial unavailing, the admission of improper evidence is not ground for reversal.

Action by George M. Dyer against the Union Railroad Company. On petition for new trial. Denied.

Argued before STINESS, C. J., and TILLINGHAST and BLODGETT, JJ.

John W. Hogan and Philip S. Knauer, for plaintiff.
David S. Baker and Lewis A. Waterman, for defendant.

PER CURIAM. The court is of the opinion that evidence as to the failure to ring the bell on the car in question at the intersection of other streets prior to the time of the accident was not proper. Agulino v. R. Co., 21 R. I. 263, 43 Atl. 63. But a consideration of the evidence shows that the negligence of the defendant was so clearly established that a new trial would be of no avail, since it clearly appears that the plaintiff was overtaken from the rear by the car of the defendant company, which was then running at a high and excessive rate of speed. And the court fails to find that the damages awarded were excessive.

Petition for new trial denied.

BROWN v. CHICAGO, MILWAUKEE & ST. PAUL RY. CO.

(Supreme Court of North Dakota, May 16, 1903.)

[95 N. W. Rep. 153.]

Foreign Corporations—Service of Summons.

The service of summons within the state upon a managing agent of a foreign corporation is sufficient service upon the corporation.

Same—Same—Managing Agent.

A station agent for a railroad company, authorized to sell and collect for passenger tickets, and to receive and deliver freight and to collect for freight shipments, is sufficient of a managing agent, within the meaning of section 5252, Rev. Codes 1899, to make service of summons upon him, in a civil action against the railroad company, service upon such corporation.

Personal Injuries—Examination of Plaintiff's Person.*

In an action to recover damages for personal injuries alleged to be permanent, the trial court has power to require the injured party to submit her person to an examination of physicians or surgeons desig-

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*See Sambuck v. Southern Pac. Co. (Cal.), 6 R. R. R. 687, 29 Am. & Eng. R. Cas., N. S., 687; foot-note appended to Galveston, H. & S. A. Ry. Co. v. Sherwood (Tex.), 4 R. R. R. 564, 27 Am. & Eng. R. Cas., N. S., 564; notes, 14 Am. & Eng. R. Cas. 456; Aske v. Duluth & I. R. R. Co. (Minn.), 21 Am. & Eng. R. Cas., N. S., 819; Lane v. Spokane Falls & N. Ry. Co. (Wash.), 14 Am. & Eng. R. Cas., N. S., 436; Southern Kansas Ry. Co. v. Michaels (Kan.), 8 Am. & Eng. R. Cas., N. S., 764.

nated by the defendant, when, in the exercise of a sound judgment, it appears to the court that the necessity of the case demands such an examination.

Same—Same—Evidence.

To permit plaintiff and a physician of her selection, after examination of her person, to testify that her injury was permanent, and to deny the defendant the privilege of having the alleged injuries examined by competent surgeons to enable them to see from what, if any, injuries she suffered, their nature, extent, and probable duration, was an abuse of discretion, and reversible error.

Same—Same—Damages.

The plaintiff in a personal injury case, by the commencement of her action, impliedly consents to the doing of that measure of justice which she exacts. She cannot claim damages for injuries which she conceals from the reasonable inspection of witnesses when such inspection is necessary to equip them to testify on the trial concerning such injuries. She must, so far as in her power, enable the court, jury, and the adverse party to have the best evidence which can be produced in the case.

(Syllabus by the Court.)

Appeal from District Court, Stutsman County; Glaspell, Judge.

Action by Margaret A. Brown against the Chicago, Milwaukee & St. Paul Railway Company to recover for personal injuries. Verdict and judgment for plaintiff, and defendant appealed. Reversed.

H. H. Field and Ball, Watson & Maclay, for appellant.

Lee Combs, for respondent.

COCHRANE, J. The defendant, a foreign corporation, appeared specially in this case, and moved to set aside the service of the summons and complaint because W. H. Gross, the person on whom the service was made, was not a managing agent within the meaning of the statute, and, consequently, that service upon said Gross was not service upon the defendant corporation. In support of its motion, defendant presented the affidavit of one of its attorneys, setting forth that the only service of summons and complaint in this action was that made upon W. H. Gross, who, at the date of such service, was local station agent for defendant at the city of Fargo, in Cass county, N. D. That the defendant in January, 1896, pursuant to the requirements of section 3263, Rev. Codes 1899, filed its irrevocable certificate in the office of the Secretary of State, appointing such Secretary of State and his successors its true and lawful attorneys upon whom all process in any action or proceeding against it might be served, and stipulating therein that service of process upon its said attorney should be of the same force and validity as if served upon it personally in this state. That the defendant did not own any property or have any office in the county of Stutsman. That W. H. Gross, its station agent at Fargo, on whom service was made, had authority to act for it in the sale of passenger tickets for the carriage of passengers, and to collect pay for tickets so sold, to receive and deliver

freight, and to collect unpaid charges for freight carried on said railway; with necessary incidental authority for the execution of the above powers, but with no other or further authority to represent it as agent.

This motion presents the question whether the station agent of a foreign railway corporation doing business within this state is a managing agent within the meaning of subdivision 5, § 5252, Rev. Codes 1899, which provides that the summons in a civil action may be served upon a foreign corporation by delivering a copy thereof to the Secretary of State, or to the president, secretary, cashier, treasurer, a director, or managing agent thereof, if within the state, doing business for the defendant. We agree with the trial court that Mr. Gross was enough of a managing agent for defendant to sustain this service. He transacted freight and passenger business for it at its Fargo station or office. "The person who, as its agent, does tnat business, should be considered its managing agent; and more especially should that be so where the foreign corporation has an office or place of business in the state; and when that office is in charge of that person, and he there acts for the corporation, he is there doing business for it, and so manages its business." Tuchband v. Ry. Co., 115 N. Y. 440, 22 N. E. 360. "An agent who is invested with the general conduct and control, at the particular place, of the business of a corporation, is a managing agent within the meaning of the Code, which authorizes service of summons on a managing agent of a foreign corporation." Porter v. Ry. Co., 1 Neb. 14; American Ex. Co. v. Johnson, 17 Ohio St. 641; Foster v. Lumber Co., 5 S. D. 57, 58 N. W. 9, 23 L. R. A. 490, 49 Am. St. Rep. 859. Every object of the service is attained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made. The statute is satisfied if he be a managing agent to any extent. Palmer v. Pennsylvania Co., 35 Hun, 369.

Plaintiff alleged, in her complaint, permanent injury to her uterus and bladder, also the fracture of the hip bone, through the negligence of defendant's servants in bumping cars together, in one of which cars she was a passenger.

Defendant, after service of the complaint upon it, demanded of plaintiff's counsel the privilege of having plaintiff's person examined by medical experts, with a view to qualifying them to testify upon the trial as to the nature and effect of her injuries. This request was refused; whereupon one of defendant's counsel made affidavit that defendant was without knowledge as to the nature or extent of plaintiff's injuries, if any, and was without means of obtaining knowledge as to plaintiff's condition: that an examination of plaintiff's person was necessary to a correct diagnosis of her case, without which examination defendant would be without witness as to

her condition. To the end that justice should be done, defendant set out that an examination of her person by medical experts should be required and had, and moved the court, upon this showing, that plaintiff be required, before trial, to submit to an examination of medical experts as to the nature and effect of her injuries. This motion was denied.

Upon the cross-examination of plaintiff she was asked to submit her person to an examination by a physician for the purpose of enabling him to testify touching her physical condition. The question was objected to by her counsel. He stated that she was unwilling to submit to such an examination. The objection was sustained. The trial court placed his ruling upon grounds thus tersely stated in his charge to the jury, and to which instruction an exception was also reserved: "The court is of the opinion that it is without power to make or enforce such order; and if the court is in error on that point, and has such power in a proper case, yet in this case, in view of the plaintiff being a woman, and in view of the examination necessary under all the circumstances, still would the court decline to make the order, for the reason that it would in this case be an ordeal to which she ought not to be subjected." This instruction and the several rulings hereinbefore set out are assigned for error, and present, for the first time in this jurisdiction, the question as to the court's power to require the plaintiff in a proper case to submit her person to a physical examination. We are of opinion that the court possessed the power in this case, and that it was an abuse of discretion to refuse to require plaintiff to submit herself to the examination of physicians under such reasonable restrictions as the court should prescribe.

Plaintiff asserts that her injuries are permanent, but to organs of the body which, whether sound or unsound, diseased or well, temporarily or permanently impaired in the performance of their functions, cannot be made to appear to the court but through her ipse dixit, or the opinion of experts, founded upon a personal examination of the parts. Where a plaintiff claims damages from another because, from its negligence, some bodily injury has been inflicted, or the functions of any organ of the body impaired, the fact of the injury or impairment of the function, its nature, extent, and probable duration must be established by competent, and that the best, evidence of which the case is susceptible. The very nature of the injuries here complained of is such as to render it highly improbable that the plaintiff could testify as to their development, whether permanent or susceptible of immediate cure. The best evidence is that of medical experts, who, from experience and training, can testify as to the conditions, wherein abnormal, and the probable duration and effect of the injury. To enable them to so testify, a personal examination was necessary. Plaintiff should not claim damages for

an injury of which she was unwilling to furnish the best evidence.

Plaintiff was injured on the 26th of March, 1902; was examined by a physician in St. Paul, who gave her a bottle of medicine. She, on the same day, took the train for Dazey, N. D. She stayed with her son-in-law from March 27th until May 9th. No physician saw her or made an examination of her during this time. On the 9th day of May, Dr. Lang, at the request of her counsel in this case, made an examination for the purpose of qualifying him to testify upon the trial. She did not ask him to prescribe for her, and he did not prescribe for her; and she did not take any medicine or remedies of any kind for the ailments of which she complained, save the bottle of medicine before mentioned. Dr. Lang testified that he made a physical examination of her internally and externally; that he took off her clothes, and spent an hour and a half in the examination; that he did not find any fracture. He describes conditions of soreness and a retroversion of the uterus, which might have resulted from the accident complained of. The weight to be given the testimony of Dr. Lang as to what he found on this examination depends largely upon the value of plaintiff's unsworn statements to him, thus: He found tenderness near the great trochanter. She complained of great pain on the inner side. Found a tender point about one inch descending of the ramus and ischial tuberosities. This injury was very painful; it caused pain at every step, and painful abduction of the limb. The mouth of the womb was pressing against the bladder, which caused pain at micturition. She complained of pain in passing water, and difficulty in starting to pass water. It further appeared that Dr. Patton made a personal examination of plaintiff a few days before the trial, with a view to testifying in her behalf. That he was in Jamestown on the day of the trial, and was not called as a witness. Dr. Lang's examination, on which he discovered no fracture, antedated the complaint in which a fractured hip is alleged as one result of the accident. If plaintiff suffered the pains testified to by her, the fact that no physician was consulted for nearly two months, and then only to secure his testimony in her contemplated suit; that a physician of her own employment, who had examined her to qualify him as her witness, was present in town at the time of the trial, and was not called as a witness; in connection with her constant refusals to submit to an examination by physicians not in her employ—subjects her to the criticism of not having produced the best evidence of which the case was susceptible, but rather with the suspicion of having suppressed or held back something. If a court is powerless, in a case like this, to require a plaintiff to submit her injuries to the inspection of physicians, to the end that the exact truth as to their nature, effect, and possible duration may be ascertained, when she, by her suit, has made

them the subject of judicial investigation, then the law would permit her to put forward just so much and such parts of the facts as, in her judgment, would benefit her case, at the expense of her adversary, and to invoke the court's aid to compensate her for an injury, through a partial and one-sided investigation. The court, under such circumstances, would become a means of accomplishing the grossest injustice.

We subscribe to the rule, declared by the Supreme Court of Georgia and followed in many other states, that when a person appeals to the sovereign for justice he impliedly consents to the doing of justice to the other party, and impliedly agrees in advance to make any disclosure which is necessary to be made in order that justice may be done. Richmond, etc., Ry. Co. v. Childress, 82 Ga. 719, 9 S. E. 602, 14 Am. St. Rep. 189, 3 L. R. A. 808; Graves v. City, 95 Mich. 266, 19 L. R. A. 641, 54 N. W. 757, 35 Am. St. Rep. 561; Lane v. Ry. Co. (Wash.) 57 Pac. 367, 46 L. R. A. 153, 75 Am. St. Rep. 821. Plaintiff, under this rule, could not insist upon her case going on when she obstructed the investigation by her adversary which was necessary to a full consideration and correct determination of the controversy. She could not, over the objection of her adversary, withhold the best obtainable evidence as to the nature and permanency of her alleged injuries, and insist upon a verdict in her favor upon evidence of less weight. Graves v. City, 95 Mich. 266, 54 N. W. 757, 19 L. R. A. 641, 35 Am. St. Rep. 561. If impartial justice is to be administered, we see no way of its attainment in all cases, if an important source of evidence is open to one, and closed to the other, party. City v. Turner (Ind. Sup.) 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200.

The court had power to require her to submit to an examination, and it was an abuse of discretion in this case to refuse to exercise its power and require plaintiff to submit to such examination, or to submit to a dismissal of her case if she refused, because defendant was without evidence as to her condition, and without means of procuring it, excepting in so far as plaintiff made disclosure. The great weight of modern authority is to this extent. The cases vindicating this position are fully cited in the following opinions: City v. Turner (Ind. Sup.) 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200; Lane v. Ry. Co. (Wash.) 57 Pac. 367, 46 L. R. A. 153, and note; City v. Gilliland (Kan.) 65 Pac. 252, 88 Am. St. Rep. 232; note to Cleveland, etc., Ry. Co. v. Huddleston, 68 Am. St. Rep. 238 (s. c., 36 L. R. A. 681, 151 Ind. 540); Wanek v. Winona, 80 N. W. 851, 46 L. R A. 448, 79 Am. St. Rep. 354; Louisville, etc., Ry. Co. v. Simpson (Ky.) 64 S. W. 733; Belt Line Co. v. Allen (Ky.) 44 S. W. 89, 80 Am. St. Rep. 374; 16 Enc. Pl. & Pr. 483; 16 Enc. L. 810. The Supreme Courts of the United States, Massachusetts, Texas, and Delaware deny the power. Union Pacific Ry. Co. v. Bostford, 141 U. S. 250, 11

Sup. Ct. 1000, 35 L. Ed. 734; Stack v. Ry. Co., 177 Mass. 155, 58 N. E. 686, 52 L. R. A. 328, 83 Am. St. Rep. 269; Mills v. Ry. Co. (Del. Super.) 40 Atl. 1114; Galveston v. Ry. Co. (Tex. Civ. App.) 67 S. W. 776.

In so far as the majority opinion of the Supreme Court of the United States was influenced by the federal statute quoted in its opinion, the Bostford Case cannot be considered an authority here. When it is remembered that courts of the United States other than the Supreme Court possess no jurisdiction but what is given them by the Congress which created them, and that no statute gives to these courts power to order a discovery, the argument of the majority of that court that the statute of the United States prescribes the mode of proof in the trial of actions at common law, and that it shall be by oral testimony and examination of witnesses in open court, except as in the statute provided, and that the only exception provided for is the one for taking depositions, and for compulsory production of books or writings in the possession of a party which contain evidence pertinent to the issue, and therefore that the statute inhibits any other form of examination or discovery, and removes from the courts the power to require it, we find this court is treating of limitations by statute that have no binding force upon state courts. There is no limitation, either in the Constitution or statutes of this state, upon the power of the district court to order such a discovery as was demanded in this case, under the circumstances here set out. The courts of Massachusetts, Texas, and Delaware, in following the Supreme Court of the United States, did not notice the influence which the federal statute had upon the determination of the question by that court.

It was no answer to defendant's request for an examination that it would offend the modest and womanly instincts of the plaintiff to require her to submit to an examination of experts. She told a jury of 12 men of her pains; how and when they affected her. She submitted to a digital examination of her injured parts by two physicians of her own selection. It would have been no greater indignity to be examined by other doctors; but "when it becomes a question of possible violence to the refined and delicate feelings of a plaintiff, on one side, and possible injustice to the defendant, on the other, the law cannot hesitate. It was essential to the ends of justice that plaintiff should submit to this examination." Alabama, etc., Ry. Co. v. Hill, 90 Ala. 71, 8 South. 90, 9 L. R. A. 442, 24 Am. St. Rep. 764; City v. Turner (Ind. Sup.) 60 N. E. 275, 82 Am. St. Rep. 481; White v. Ry. Co., 61 Wis. 536, 21 N. W. 524, 50 Am. Rep. 154; note to Cleveland, etc., Ry. Co. v. Huddleston, 68 Am. St. Rep. 247. Neither was it an answer that one physician had examined her and testified to what he found, and was cross-examined by the defendant. Surgeons of equal learning and honesty may not diagnose an injury in the same way. They may not be

equally strong in perception, or equally accurate in observation or in measurements, and thus form different judgments of the existing conditions, which, of necessity, must constitute the basis of their scientific opinions. If a defendant must make his defense against the expert opinions of the plaintiff's chosen surgeons, without the opportunity of testing the verity of the basis of such opinions, he may be placed at a disastrous disadvantage, such as the law cannot and does not sanction. City v. Turner (Ind. Sup.) 60 N. E. 275, 82 Am. St. Rep. 481. Defendant's right was, through an examination, to test the effect and reduce the weight of the evidence introduced by plaintiff. Haynes v. Trenton, 123 Mo. 326, 27 S. W. 622. The result of the investigation asked for should have put plaintiff's claim on impregnable ground, or have destroyed it altogether. In either case there would have been an assurance that justice had been done; an assurance which finds no secure anchorage in the present record. Alabama, etc., Co. v. Hill, 90 Ala. 71, 8 South. 90, 9 L. R. A. 442, 24 Am. St. Rep. 764.

The judgment appealed from is reversed. The district court will enter an order reversing its judgment, and directing such further proceedings as may be lawful in the premises. Appellant will recover costs. All concur.

ADAMS v. CAMDEN & SUBURBAN RY. CO.

(*Court of Errors and Appeals of New Jersey, June 15, 1903.*)

[55 Atl. Rep. 254.]

Street Railroads—Accident on Track—Direction of Verdict Properly Refused.

Plaintiff's driver was driving at midnight a team of horses, attached to a loaded truck wagon, along the public road, upon the left-hand track of defendant's street railway, when he was met by one of defendant's cars moving on that track. In turning to his right to avoid that car, he drove upon defendant's right-hand track, where another of defendant's cars, approaching from the opposite direction, overtook and ran into the back of his wagon, causing injury. He testified that when he "pulled off" on the right hand track he looked back, and there was no car in sight, and that no bell was sounded, nor notice given, before the collision. The motorman in charge of the colliding car, in his testimony, made contradictory statements respecting the distance from him at which he first saw the horses "pulling over" on the track in front of him, and admitted that he gave no signal: *held*, that the trial judge properly refused to direct a verdict for the defendant.

Same—Right of Others to Use Track.

The right of street railway companies to use the highways by their cars is not superior to the rights of others in the customary use thereof, and it is not an act of negligence, per se, for the driver of a carriage, whether of burden or pleasure, in passing over the public roads of this state where the tracks of any street railway company may be laid, when either met or overtaken by the cars of such company, to keep to the right, upon other tracks of said company, even though such carriage, by turning to the left, might have

avoided both meeting, and being overtaken by the company's cars.

Same—Rights in Highway.*

The defendant was bound to take notice that the law required other carriages or vehicles using the parts of the highway covered by its car tracks, upon meeting its cars coming from an opposite direction, to keep to the right, except it was perilous to do so, and to control its overtaking cars, in anticipation that such other carriages might so turn upon its car tracks, in obedience to the law, at any instant; and it was the duty of the motorman of the colliding car in this case to use reasonable care to observe any vehicle ahead of nim, and to govern his car so as to prevent collision. Whether he used such care, or not, was a question for the jury to determine from the evidence.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Samuel T. Adams against the Camden & Suburban Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Joseph H. Gaskill and Nelson B. Gaskill, for plaintiff in error.

Henry S. Scovel and William T. Boyle, for defendant in error.

VREDENBURGH, J. The injury for which the plaintiff recovered a verdict below for compensatory damages to his property resulted from a collision with defendant's passenger car. The plaintiff's driver, who was in charge of his team of horses, attached to a loaded truck wagon, was pro-

*Mutual obligations of street railways and other users of streets, see Southern Electric Ry. Co. v. Hageman (C. C. A.), 7 R. R. R. 681, 30 Am. & Eng. R. Cas., N. S., 681; Klockenbrink v. St. Louis & M. R. R. Co. (Mo.), 7 R. R. R. 63, 30 Am. & Eng. R. Cas., N. S., 63 (street railways without exclusive right to use of track); Burns v. Metropolitan St. Ry. Co. (Kan.), 6 R. R. R. 476, 29 Am. & Eng. R. Cas., N. S., 476; Memphis St. Ry. Co. v. Norris (Tenn.), 4 R. R. R. 659, 27 Am. & Eng. R. Cas., N. S., 659 (at crossings); Adams v. Wilmington & N. Electric Ry. Co. (Del.), 4 R. R. R. 307, 27 Am. & Eng. R. Cas., N. S., 307 (company's superior right to use of tracks); note, 10 Am. & Eng. R. Cas., N. S., 726; Moore v. Charlotte Electric St. Ry. Co. (N. Car.), 22 Am. & Eng. R. Cas., N. S., 785; Traver v. Spokane St. Ry. Co. (Wash.), 22 Am. & Eng. R. Cas., N. S., 759; Brown v. Wilmington City Ry. Co. (Del.), 12 Am. & Eng. R. Cas., N. S., 439 (company's superior right to use of street); Hall v. Ogden City St. Ry. Co. (Utah), 4 Am. & Eng. R. Cas., N. S., 77; Bunyan v. Citizens' Ry. Co. (Mo.), 1 Am. & Eng. R. Cas., N. S., 246; Hicks v. Citizens' R. Co. (Mo.), 1 Am. & Eng. R. Cas., N. S., 276; Moore v. Kansas City & I. R. T. Co. (Mo.), 1 Am. & Eng. R. Cas., N. S., 254; Omaha St. R. Co. v. Duvall (Neb.), 1 Am. & Eng. R. Cas., N. S., 253; Orr v. Cedar Rapids & M. C. R. Co. (Iowa), 1 Am. & Eng. R. Cas., N. S., 239; Thatcher v. Central Traction Co. (Pa. St.), 1 Am. & Eng. R. Cas., N. S., 253; Richmond R., etc., Co. v. Garthright (Va.), 4 Am. & Eng. R. Cas., N. S., 263 (at crossings); Consolidated Traction Co. v. Haight (N. J.), 8 Am. & Eng. R. Cas., N. S., 90; Smith v. Electric Traction Co. (Pa.), 12 Am. & Eng. R. Cas., N. S., 422 (right of way at crossings); New Jersey Electric Ry. Co. v. Miller (N. J.), 6 Am. & Eng. R. Cas., N. S., 519 (right of way at crossings); North Jersey St. Ry. Co. v. Schwartz (N. J.), 22 Am. & Eng. R. Cas., N. S., 620; Potter v. Scranton Traction Co. (Pa.), 4

ceeding slowly upon the public highway called the "Moorestown Turnpike," in the direction of Camden City, at midnight on October 15, 1901, along the left-hand track of defendant, when he was met by a passenger car of defendant coming towards him on that track. In turning to his right to avoid that car, he drove upon defendant's right-hand track, and his wagon had, to use his expression, "just dropped" in that track, when another of defendant's passenger cars, moving on the latter track in an opposite direction, came swiftly up behind him, overtook him, and ran into the back of his wagon. The wagon was badly broken, one of the horses was killed, and other damage was done, as the result of the collision. The driver testified that when he "pulled off," he looked back, and there was no car in sight, and that no bell was sounded, nor notice given, before the car struck him.

The principal ground taken by the plaintiff in error (and, indeed, the only one deserving attention) for a reversal of the judgment entered upon the verdict is that the trial court should have directed a verdict for the defendant below. This contention assumes either that the evidence had demonstrated that the driver of the team was guilty of such contributive negligence as to legally defeat a right of recovery, or that defendant had been guilty of no negligence in the operation of the colliding car, productive of the injury. As to the question of the contributive negligence of the driver, it is argued by the plaintiff in error that his act in driving upon the right-hand track of defendant was conclusive evidence of such neg-

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Am. & Eng. R. Cas., N. S., 307 (company's superior right to use of street).

As to the care required of those in charge of street cars to avoid collisions with persons, animals, or vehicles, see monograph appended to Robinson v. Louisville Ry. Co. (C. C. A.), 1 R. R. R. 838, 24 Am. & Eng. R. Cas., N. S., 838; Danville Ry. & El. Co. v. Hodnett (Va.), 7 R. R. R. 170, 30 Am. & Eng. R. Cas., N. S., 170 (care required after discovery of person on track); Koenig v. Union Depot Ry. Co. (Mo.), 7 R. R. R. 655, 30 Am. & Eng. R. Cas., N. S., 655 (care required to avoid injuring pedestrian at crossing); Southern Electric Ry. Co. v. Hageman (C. C. A.), 7 R. R. R. 681, 30 Am. & Eng. R. Cas., N. S., 681 (degree of care due persons using street); Cox v. Wilmington City Ry. Co. (Del.), 7 R. R. R. 818, 30 Am. & Eng. R. Cas., N. S., 818 (duty as to signals and speed); Danville Ry. & El. Co. v. Hodnett (Va.), 7 R. R. R. 170, 30 Am. & Eng. R. Cas., N. S., 170 (duty of motorman discovering that horse is frightened by approach of car); Klockenbrink v. St. Louis & M. R. R. Co. (Mo.), 7 R. R. R. 63, 30 Am. & Eng. R. Cas., N. S., 63 (sufficiency of evidence of motorman's negligence in failing to see wagon in time); Koenig v. Union Depot Ry. Co. (Mo.), 7 R. R. R. 655, 30 Am. & Eng. R. Cas., N. S., 655 (motorman's negligence in injuring child, question for jury); Barry v. Burlington Ry. & Light Co. (Iowa), 6 R. R. R. 675, 29 Am. & Eng. R. Cas., N. S., 675 (care required of motorman to avoid injuring persons on track); Louisville Ry. Co. v. French (Ky.), 6 R. R. R. 473, 29 Am. & Eng. R. Cas., N. S., 473 (care required of motorman when approaching intersection of streets); Gorman v. Louisville Ry. Co. (Ky.), 6 R. R. R. 803, 29 Am. & Eng. R. Cas., N. S., 803 (care due children); Adams v. Wilmington & N. Electric Ry. Co. (Del.), 4 R. R. R. 307, 27 Am. & Eng. Cas., N. S., 307; Robinson v. Louisville Ry. Co. (C. C. A.), 1 R. R. R. 838, 24

ligence. But I think his act in following the "law of the road," by turning to the right, instead of to the left, in the absence of notice of particular danger on his right, cannot be said to have been negligent per se. On the contrary, he but followed the express direction of our statute. The explicit command of our road law upon that head seems to have escaped general observation. Its pertinent language is that "drivers of carriages * * * whether of burthen or of pleasure, using any of the turnpike or public roads in this state, when met by another carriage * * * shall keep to the right, and when overtaken by a carriage * * * shall likewise keep to the right, so as in both cases to permit such carriages * * * either met or overtaken to pass free and uninterrupted." Gen. St. p. 2823, § 91. A subsequent part of this law subjects the person disregarding its command to a money forfeiture in addition to an action of damages. The more specific insistment of the counsel for the plaintiff in error in this regard is that this driver was guilty of negligence, because, having room on his left hand to pass the car he met (that being an assumed place of safety), he was bound to drive there, instead of to the right (that being an assumed place of danger, because of the existence of the right-hand track). But this contention seems groundless, in

Am. & Eng. R. Cas., N. S., 838 (other vehicles); Memphis St. Ry. Co. v. Norris (Tenn.), 4 R. R. R. 659, 27 Am. & Eng. R. Cas., N. S., 659; Thompson v. Missouri K. & T. Ry. Co. (Mo.), 2 R. R. R. 832, 25 Am. & Eng. R. Cas., N. S., 832 (duty to look out for children passing between cars obstructing crossing); Gray v. St. Paul City Ry. Co.(Minn.), 5 R. R. R. 698, 28 Am. & Eng. R. Cas., N. S., 698 (duty to look out for children); West Chicago St. R. Co. v. Petters (Ill.), 2 R. R. R. 612, 25 Am. & Eng. R. Cas., N. S., 612 (duty to regulate speed at crossing); Bonham v. Citizens' St. R. Co. (Ind.), 2 R. R. R. 787, 25 Am. & Eng. R. Cas., N. S., 787 (crossings); Parkinson v. Concord St. Ry. (N. H.), 1 R. R. R. 575, 24 Am. & Eng. R. Cas, N. S., 575; Fenner v. Wilkesbarre & W. V. Traction Co. (Pa.), 2 R. R. R. 617, 25 Am. & Eng. R. Cas., N. S., 617 (failure to give crossing signals); White v. Vicksburg R., Power & Mfg. Co. (Miss.), 2 R. R. R. 596, 25 Am. & Eng. R. Cas., N. S., 596; Guinney v. Southern Electric R. Co. (Mo.), 2 R. R. R. 820, 25 Am. & Eng. R. Cas., N. S., 820 (instruction based upon motorman's lack of power to avoid collision); Baier v. Camden & S. Ry. Co. (N. J.), 3 R. R. R. 911, 26 Am. & Eng. R. Cas., N. S., 911 (failure of motorman to anticipate that boy would jump from wagon upon the track); Chicago City Ry. Co. v. Tuohy (Ill.), 4 R. R. R. 1, 27 Am. & Eng. R. Cas., N. S., 1 (negligence question for jury in action for injury to boy); Lee v. Market St. Ry. Co. (Cal.), 1 R. R. R. 578, 24 Am. & Eng. R. Cas., N. S., 578 (contributory negligence and negligence after discovering plaintiff's peril); Citizens' St. R. Co. v. Hamer (Ind.), 2 R. R. R. 9, 25 Am. & Eng. R. Cas., N. S., 9 (negligence in failing to stop car and contributory negligence of seven year old child); Birmingham Ry. & Electric Co. v. Baker (Ala.), 2 R. R. R. 17, 25 Am. & Eng. R. Cas., N. S., 17 (wilfulness and wantonness where collision with another vehicle, question for jury); Sample v. Consolidated Light & Ry. Co. (W. Va.), 1 R. R. R. 380, 24 Am. & Eng. R. Cas., N. S., 380 (care required in looking out for children); Louisville Ry. Co. v. Will (Ky.), 2 R. R. R. 826, 25 Am. & Eng. R. Cas., N. S., 826.

view of the above-quoted law and of the decisions of our courts. If the driver had turned to the left, he would have taken the risk of other carriages, which in the night he might have been unable to discern, meeting and colliding with him while they were rightfully on that side. The recent decision of this court of Hughes v. The Camden & Suburban Railway Company, reported in 65 N. J. Law, 203, 47 Atl. 441, where the facts resemble the case at bar, makes extended reasoning upon this subject here uncalled for. There the driver, who was on the right-hand track when overtaken by a car on that track, turned to the left, instead of to the right, and was struck by an inbound car and injured, and a judgment of nonsuit below had been rendered against the injured plaintiff. This court, upon error brought, reversed that judgment, and, in the opinion written by the present chancellor, in dealing with this feature of the case, he said: "If it was perilous to go to the right, and reasonable prudence required, he could go to the left, notwithstanding the inbound track of the defendant was there maintained. For reasons of safety, a traveler may use any part of a highway. * * * If he uses a highway, he may assume that others using it, including trolly car companies, will use it with a due regard to his rights. Upon the evidence, it was for a jury to say whether there was danger in turning to the right, such as a traveler, in the exercise of reasonable prudence, would avoid." In the case at bar the trial judge committed no error in leaving the question to the jury. In giving expression to this rule—so important to the public under the dangerous conditions of travel now existing—he instructed the jury as follows, viz.: "Each user of the highway must use reasonable care to avoid accidents. * * * Therefore the plaintiff, or his son, who was driving this team, was also obliged to use reasonable care to avoid this or any other accident. Whether that implies that he should turn out to the left or to the right; whether it implies that he should have stopped and looked around to have seen the motor car; whether it was coming; whether he would be apt to get in the way of it—are all matters of fact to which you must apply the law." The plaintiff in error certainly has no reason to complain of this instruction. It was, it seems to me, more favorable to the company than the judge might, without error, have expressed it. The motor car company was bound to take notice that the law required other carriages using the parts of the highway covered by its tracks, upon meeting its cars coming from an opposite direction, to keep to the right, except it was perilous to do so, and to expect that such other carriages might so turn upon its right-hand tracks at any moment, in obedience to the law. It was the duty of the motorman to use reasonable care to govern the speed and motion of his car in accordance with the necessities which such a situation

might at any instant create. The relative rights of the users of the public road, in which street cars are liable to be swiftly propelled by electricity, were fully and learnedly considered by the present chancellor in this court in the case of Newark Passenger R. Co. v. Block, 55 N. J. Law, 611, 27 Atl. 1067, 22 L. R. A. 374, and he there concludes that the right of such street railways to use the highway by their cars is not "paramount to the rights of others in the customary use thereof," and that such use must be "in a manner consistent with such rights of others." Under these and other approved deliverances of this court, and the directions of our statutes, the plaintiff's driver was justified in keeping to the right, upon the unoccupied tracks of defendant, after exercising reasonable prudence to observe and avoid any overtaking car moving so dangerously near to him that it could not be controlled effectively by a motorman using reasonable care in its operation. See, also, cases of Camden, etc., Ry. Co. v. Preston, 59 N. J. Law, 266, 35 Atl. 1119; Consolidated Traction Co. v. Haight, 59 N. J. Law, 580, 37 Atl. 135; Shelly v. Brunswick Traction Co., 65 N. J. Law, 644, 48 Atl. 562. It is evident that this part of the case belonged to the province of the jury, and that the judge properly left it there.

As to the second branch of the contention of the plaintiff in error, it will be sufficient to add that it is clear that the question of the negligence of this company was also properly left to the jury to determine. The long settled rule of law in this state is that if, from the facts established, negligence may reasonably and legitimately be inferred, it is for the jury to say whether from these facts negligence ought to be inferred, and that if the real facts have not been established by the evidence, but remain in substantial dispute, the trial judge must submit them, and the inferences to be drawn from those which the jury find established, to the determination of the jury. The motorman who had charge of the colliding car, in one portion of his evidence, admitted that he first saw the team of horses "pulling over on the track in front of him when they were a square away" from him. Subsequently he testified that he was about a "car and a quarter's" length away when he first saw the horses, and that he gave no signal at any time before the collision, because he had not time to give any signal. Which of these two contradictory statements should be relied upon was a problem for the jury alone to decide. If the jury believed the former, they were justified in finding that he had been negligent not only in failing to give a signal of the coming of his fast-moving car, but also, and whether he signaled or not, had been clearly negligent in not keeping his car under efficient control when he first saw the team ahead of him, a square distant, turning upon his track.

The judgment below should be affirmed.

NORTH CHICAGO ST. R. CO. *v.* COSSAR.

(*Supreme Court of Illinois, June 16, 1903.*)

[68 N. E. Rep. 88.]

Appeal—Jurisdictional Amount.

In an action for injuries, where the damages sought to be recovered are speculative and not susceptible of direct proof, and the judgment appealed from is for $1,000 or more, an appeal lies from the judgment of the Appellate Court to the Supreme Court without a certificate of importance.

Injury to Cyclist—Collision with Street Car Conductor—Contributory Negligence.

In an action for injuries to plaintiff while riding a bicycle along a city street, evidence reviewed, and *held*, that plaintiff's failure to turn out a sufficient distance from a street car to permit her to pass the conductor in safety was the proximate cause of the injury, and that she was, therefore, not entitled to recover.

Same—Same—Same—Instruction.

In an action for injuries, an instruction that by ordinary care is meant such a degree of care under the circumstances and in the situation in which the plaintiff was placed, so far as they may be shown by the evidence, as an ordinarily prudent and cautious man would exercise under like circumstances and in the same situation for his own safety to avoid apparent danger, was objectionable as authorizing the jury to infer therefrom that, if plaintiff was in the exercise of due care at the instant the accident occurred, she might recover, though she was guilty of negligence in having placed herself in the position she was at the time of the collision.

Same—Same—Care Required of Cyclist.*

A bicycle is a vehicle subject to the rules of law governing other vehicles, and its rider is required to use the same degree of care to avoid injury as the driver of a team.

Same—Same—Same.

Where a bicycle rider attempted to pass the conductor of a standing street car, who had alighted to assist a passenger to the ground, such bicycle rider was bound at her peril to turn out a sufficient distance to avoid a collision with the conductor.

Magruder, J., dissenting.

Appeal from Appellate Court, First District.

Action by Frances L. Cossar against the North Chicago Street Railway Company. From a judgment in favor of plaintiff, affirmed by the Appellate Court, defendant appeals. Reversed.

John A. Rose and Louis Boisot (W. W. Gurley, of counsel), for appellant.

James Smith, for appellee.

HAND, C. J. This was an action on the case to recover damages for a personal injury. The declaration contained one count, which averred, in substance, that on the 17th day of August, 1897, the defendant was possessed of and operating a street car, going west, in Fullerton avenue, in the city of Chicago; that while the plaintiff was riding a bicycle in the same direction on said avenue, at a point near Oakley

*See preceding case and foot-note.

avenue, in the exercise of due care for her own safety, the conductor who was then and there in charge of said car, and who knew of the approach of the plaintiff, or by the exercise of reasonable care might have known of her approach, negligently and without warning suddenly jumped off the car immediately in front of the plaintiff, so that the bicycle upon which she was riding struck him, whereby she was thrown to the ground and injured. The general issue was filed, and upon the trial the jury returned a verdict in favor of the plaintiff for $1,000, which, on appeal, was affirmed by the Appellate Court for the First District, and a further appeal has been prosecuted to this court.

A motion has been made to dismiss the appeal on the ground of want of jurisdiction in this: that no more than $1,000 is involved and no certificate of importance has been granted by the Appellate Court. This is an action in which the damages sought to be recovered are speculative and not susceptible of direct proof, and the judgment appealed from is for $1,000. The question raised here has been before this court repeatedly, and the rule announced by the decided cases is that in actions ex contractu or ex delicto, if the damages sought to be recovered are speculative in character and not susceptible of direct proof, and the damages are $1,000 or more, as shown by the judgment, an appeal lies from the judgment of the Appellate Court to this court without a certificate of importance. Baber v. Pittsburg, Cincinnati & St. Louis Railroad Co., 93 Ill. 342; Hankins v. Chicago & Northwestern Railway Co., 100 Ill. 466; Umlauf v. Umlauf, 103 Ill. 651; Bank of Commerce v. Miller, 66 N. E. 1039. This appeal falls within the rule above announced, and this court has jurisdiction thereof without a certificate of importance. The motion to dismiss will be denied.

There was but little conflict in the evidence, from which it appeared the plaintiff, a young woman about 20 years of age, on August 17, 1897, started with her mother and aunt to go from their home on the north side, in the city of Chicago, to Maywood, a suburb of said city. Her mother and aunt were upon the street car, and she rode a bicycle. When upon Fullerton avenue, which runs east and west, the plaintiff at times was in front and again in the rear of the car upon which her mother and aunt were passengers. When the car stopped at Oakley avenue, which runs north and south, the conductor was upon the front platform. At that point he left the car to assist a lady passenger in alighting, and just as he stepped upon the ground the plaintiff, who was riding near the car and a few feet to the rear of the platform, upon the same side upon which he alighted, ran against him with her bicycle. He was knocked down, and she was thrown from the bicycle and her arm broken. The car stopped at a usual stopping place to receive and discharge passengers, the conductor left the car in his usual manner, the plaintiff

was accustomed to riding a bicycle upon the streets of the city, the accident occurred about 11 o'clock in the forenoon, the street was free from teams, her view was unobstructed, the pavement was in good repair, the plaintiff was riding at the rate of five or six miles per hour, and the car was standing still at the time of the collision.

At the close of all the evidence the defendant moved the court to take the case from the jury, which the court declined to do. We are of the opinion the motion should have been allowed, and the jury instructed to find for the defendant. The plaintiff knew the car was accustomed to stop at the further side of cross streets for the purpose of receiving and discharging passengers, and that the conductor usually left the car at such stops. While the plaintiff had the right to ride a bicycle upon the streets, the defendant had the right to stop its car at that place, and the conductor had a right to be upon the street; and it was the duty of plaintiff, she knowing the car was apt to stop, to watch for and guard against striking passengers who were entering or leaving the car, or the servants of the defendant who had alighted for the purpose of assisting persons to leave or enter the car. The evidence shows the conductor was standing from two to five feet from the car at the time he was struck. He had the right to be in the street near his car at that place while it was standing still. The plaintiff was aware of that fact. The street was of sufficient width to have permitted the plaintiff to pass in safety, and, if she desired to go ahead of the car while it was standing still, it was her duty to keep far enough away from the car to avoid striking persons getting off or on the car in the usual way, or the servants of defendant while performing their duties of assisting passengers to enter or leave the car. This she failed to do, but kept on her course at so high a rate of speed and so close to the car that she was unable to stop her wheel in time to avoid a collision when the conductor alighted, the result of which was her bicycle struck him with so much force as to knock him down and to throw her off upon the ground and inflict upon her the injuries complained of. It is plain from the undisputed evidence that her failure to turn out a sufficient distance from the car to permit her to pass in safety was the proximate cause of the injury. It was not the duty of the conductor to warn the plaintiff that the car would stop at the further side of Oakley avenue, at its intersection with Fullerton avenue, to receive and discharge passengers, and that he would alight from the car at that point. She was aware of such facts. It is clear from the evidence that the conductor was looking west at the time he alighted, and did not see the plaintiff until he was struck by the bicycle and thrown down.

Complaint is also made that the court erred in giving to the jury, upon behalf of the plaintiff, the following instruction: "The court instructs the jury that by ordinary care

the law means such a degree of care, under the circumstances and in the situation in which the plaintiff was placed; so far as they may be shown by the evidence, as an ordinarily prudent and cautious person would exercise, under like circumstances and in the same situation, for his own safety, to avoid apparent danger." The criticism made upon this instruction is that it assumes that an ordinarily prudent and cautious person might find himself in the situation that plaintiff was in at the time of the accident, and assumes that she was not guilty of contributory negligence in being in the position in which she found herself at the time of the injury. In personal injury cases it has been repeatedly held by this court that it is improper to give an instruction which limits the question of due care to the conduct of the plaintiff at the time of the injury, regardless of his conduct in placing himself in a place of danger. The claim of defendant was that plaintiff was guilty of contributory negligence in riding her bicycle, at the rate of speed at which she was going, so close to the car that when it stopped to let off a passenger an accident would be likely to occur in case a passenger or the conductor should step from the car. We think this instruction subject to the criticism made, and that the jury might well have inferred therefrom that, if the plaintiff was in the exercise of due care at the instant when the accident occurred, then she might recover, although the evidence showed she was guilty of negligence in having placed herself in the position in which she found herself at the time of the collision. In Chicago, Milwaukee & St. Paul Railway Co. v. Halsey, 133 Ill. 248, 254, 23 N. E. 1028, 1030, in discussing the question now under consideration, the court said: "Nor should the inquiry in regard to contributory negligence by the deceased have been directed only to the evidence of what the deceased did at the time of receiving the injury. The claim of appellant is, not that he then failed to do what a man of ordinary caution would have done to avoid injury, but that he failed to do what a man of ordinary caution, under like circumstances, would have done to avoid placing himself in a position from which he could not escape without being injured. One who, failing to observe due care, blindly walks into a danger that the observance of due care would have enabled to avoid, is no less guilty of contributory negligence than he who by the observance of due care could extricate himself from danger fails to make any effort for his personal safety, and because thereof is injured."

The authorities agree that a bicycle is a vehicle, subject to the rules of law governing other vehicles (State v. Collins, 16 R. I. 371, 12 Atl. 121; Holland v. Bartch, 120 Ind. 46, 22 N. E. 83, 16 Am. St. Rep. 307; Swift v. Topeka, 43 Kan. 671, 23 Pac. 1075, 8 L. R. A. 772; Thompson v. Dodge, 58 Minn. 555, 60 N. W. 545, 28 L. R. A. 608, 49 Am. St. Rep. 533; Elliott on Roads and Streets [2d Ed.] § 852); and it has

been held that the rider of a bicycle is required to use the same degree of care as the driver of a team of horses hitched to a wagon (Peltier v. Bradley, 67 Conn. 42, 34 Atl. 712, 32 L. R. A. 651); and that the driver of a vehicle who attempts to pass another vehicle on a public road does so at his peril (Avegno v. Hart, 25 La. Ann. 235, 13 Am. Rep. 133); and it was ruled by the New York Court of Appeals, in Adolph v. Central Park, North & East River Railroad Co., 76 N. Y. 530, 533, that "one person may choose to go at a slow pace along the way, and has a right so to go; another may choose to go at a faster pace, and has a right so to go; yet each must exercise his right so as not unnecessarily to abridge the use by the other of his right. The one choosing to go fast may turn out and go past the one choosing to go slow, but must keep clear of him in doing it;" and by the Supreme Court of Tennessee in Young v. Cowden, 98 Tenn. 577, 40 S. W. 1088, that it is the duty of the driver of a vehicle following another to give warning to the vehicle in front before attempting to pass, where it is dangerous to pass, and then not to attempt to pass unless he can do so safely.

We think the contributory negligence of the plaintiff in this case was such as to bar a recovery. In Beidler v. Branshaw, 200 Ill. 425, 430, 65 N. E. 1086, 1088, we said: "Although it is true that the question of contributory negligence is ordinarily a question for the jury, yet when there is no conflict in the evidence, and the court can clearly see that the injury was the result of the negligence of the party injured, it should not hesitate to instruct the jury to return a verdict for the defendant. In Lovenguth v. City of Bloomington, 71 Ill. 238, it is said (page 241): 'A party has no right to knowingly expose himself to danger and then recover damages for an injury which he might have avoided by the use of reasonable precaution.' In Werk v. Illinois Steel Co., 154 Ill. 427, 432, 40 N. E. 442, 444, the court say: 'While questions of negligence or of contributory negligence are ordinarily questions of fact, to be passed upon by a jury, yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict in opposition to it, the court may withdraw the case from the consideration of the jury and direct a verdict.'"

The judgments of the superior and appellate courts will be reversed.

Judgment reversed.

MAGRUDER, J. (dissenting). I cannot concur in this decision. The car was traveling west upon Fullerton avenue, and the accident occurred when the car reached the crossing of Fullerton avenue by Oakley avenue; the latter running north and south. The plaintiff, who was injured, was riding her bicycle at the time of the accident, going west in the same direction in which the car was going. At the time the accident occurred, she was on the north side of the car, between

the car and the sidewalk, upon Fullerton avenue, which was a public street. There are circumstances going to show that the conductor was guilty of gross negligence, which resulted in the injury to the appellee. But, if he was not guilty of gross negligence, the evidence tends to show that he was guilty of negligence, and that appellee was in the exercise of due care for her own safety. This being so, the judgment of the superior court of Cook county in her favor, awarding her $1,000 damages, and the judgment of the Appellate Court affirming the judgment of the superior court, are a final determination of the facts, so far as this court is concerned.

When the car, going west, reached Oakley avenue, the conductor, who was upon the front platform of the car, jumped off the car into the street at a distance of from two to five feet from the car. There is as much evidence tending to show that the distance to which he jumped from the car into the street was four or five feet, as that it was a less number of feet. The car at the time was full of passengers. His object in jumping from the car to the street was to catch the rear platform of the car, as it should come up to him while he was standing in the street. It makes no difference whether, when the car should come up to him, he was going to help a passenger alight or not. His real object in jumping into the street was to jump upon the car at the rear, when the rear should come up to where he was. The conductor himself says in his testimony: "Every conductor has a different way of working his car. If I am on the front end of the car, in order to save time, I will always jump back, and catch the back as it comes up." One of the witnesses says that the conductor was collecting fares, and that she saw him get off the car many times, "because there were many passengers." Is it correct to say that the conductor had a right to be upon the street under the circumstances here stated? The street car company appropriates to its use the middle of the street between the rails of its track, and, in addition, such portion of the street as is under the sides of its cars, where they project over the rails. The streets belong to the people. They are public highways, upon which every citizen has a right to travel. The street car companies have no right to use any more of the public street than is thus occupied by their tracks and the projecting sides of their cars. If the doctrine of the majority opinion is to prevail, then the street car companies have a right to occupy, in addition to the portion of the street thus named, an additional portion for the transaction of their business. When the conductor jumps from the platform of a car four or five feet into the street, on the side of the car, for the purpose of standing there and getting on the car when the rear of the car reaches him, then he is using the street to that extent for the business of the company. He has no right to do that. If it is necessary for him to go from the front to the rear of the car, he should go

upon the car, either through the car, or by way of the aisle in the middle of the car, or on the footboard on the side of the car, whether he goes there for the purpose of seeing that a passenger alights properly or not. He has no right thus to appropriate a part of the public street, outside of that occupied by the car tracks and the cars themselves.

But, if it should be conceded that he has such right, it would be his duty so to dismount from the car as not to injure persons passing along the public street. The testimony tends to show that this young lady was riding upon her bicycle about half way between the side of the car and the sidewalk; that is to say, about in the center between the north side of the car and the north side of the street running west. The evidence tends to show that the conductor knew that she was following the car, or riding near the side of the car, as she had been doing for some time; her mother and aunt being upon the car, while she was riding upon her bicycle. The testimony shows that she passed the car several times. The motorman saw her riding upon her bicycle, and several of the passengers testified that they saw her riding there. When he jumped from the car, his back was turned toward her while she was riding her bicycle. His face was directed to the west. In addition to this, the testimony shows that he was engaged in conversation with the motorman just before he jumped from the car. His conduct in thus jumping from the car into the public street to a distance of four or five feet, knowing that the appellee was riding upon her bicycle, and without directing his look in the direction in which she was riding, shows a great degree of negligence. At almost the instant at which he thus jumped from the car, she ran into him, and was thrown down, and suffered the injury for which this suit is brought. If he had any right thus to jump from his car into the street, it was his duty to look and see that the public street was not occupied by travelers, and that he would not collide with any of such passing travelers; but the evidence tends to show that he took no pains, nor exercised any care, to look to see what there was in the street, or what was passing along the street. As a result, the collision with the bicycle was inevitable. The evidence leaves it doubtful whether the car had actually stopped when he jumped off or not. He himself is unable to say in his testimony whether the car had actually stopped, or not. Thus there is evidence tending to show that the conductor, the servant of the appellant company, was guilty of negligence in causing the injury. The evidence also tends to show that appellee was in the exercise of due care. She was on the public street. She had a right to ride upon the street on her bicycle. She had a right to ride in the space between the moving car and the north side of the street. When the accident occurred, she was in the exercise of her rights. She could not know whether the car was going to stop at the crossing or not. It

is true that these cars stop at the further side of the crossing to let passengers on and off. But they do not so stop unless some passenger is going to alight or board the car. The conductor knows, or is supposed to know, whether any one is going to alight or board the car. A person traveling on the street upon the right side of the car, or in the rear of the car, is not bound to take notice that the car will actually stop at the crossing, even though such person knows that there is a rule or ordinance requiring the car to stop at the further side of the crossing. Therefore it cannot be said that it was the duty of the plaintiff, she knowing that the car was about to stop, to wait for and guard against striking passengers, who were entering or leaving the car, or the conductor, who alighted for the purpose of assisting persons to leave or enter the car. Here there was no question of striking a passenger. The person with whom the bicycle collided was the conductor of the car, and not a passenger. It is the conductor's duty to stop the car, in order that every person who desires to alight or board the car may do so. The question whether appellee was in the exercise of due care or not was, under all the circumstances, a question to be determined by the jury; and is it not invading the province of the jury to say that "the evidence showed she was guilty of negligence in having placed herself in the position in which she found herself at the time of the collision"?

The instruction, given for the appellee, which is criticised in the opinion of the majority, cannot be said to contain serious error. The doctrine, announced in Chicago, Milwaukee & St. Paul Railway Co. v. Halsey, 133 Ill. 248, 23 N. E. 1028, has no application here, as there was no evidence tending to show that appellee walked into a danger which the observance of due care would have enabled her to avoid. Moreover, the appellant asked, and the court gave, several instructions, which were the same, in effect, as the instruction so given for the appellee. By the ninth instruction, given for the appellant, the jury were told that they must find by a preponderance of the evidence "that the plaintiff was not at the time of the accident guilty of any failure to exercise ordinary care for her own safety proximately contributing to her own injury." By instruction 10, given for the appellant, the jury were instructed as follows: "If the jury believe from the evidence that the plaintiff failed to exercise ordinary care for her own safety, which failure, if any, proximately helped in any way to bring about the accident which resulted in the injuries herein complained of then they should return a verdict of not guilty." By instruction 15, given for the appellant, the jury were told that "if, after such consideration of all the evidence," etc., "you are unable to say that the plaintiff has proved by a preponderance of the evidence that the defendant was guilty of the negligence alleged in the plaintiff's declaration, and that the plaintiff was exercising

ordinary care for her own safety, then the jury should find the defendant not guilty." The jury were also told by the fifth instruction given for the appellee that if they believed, from all the evidence, "that the injuries complained of were caused by the negligence or carelessness of the servant of the defendant, then the North Chicago Street Railway Company, in the course of his employment as such servant, as charged in the declaration, and without any fault on the part of the plaintiff, which contributed to the injury complained of, then the defendant is liable in this action." In view of these instructions, it cannot be said that the appellant was in any way injured by the giving of the instruction which is said to be erroneous.

A careful examination of the testimony will show that it was conflicting as to the distance of the conductor from the car when the collision occurred, as to the distance from the car the appellee was riding on the street, as to the fact whether or not any passenger alighted from the rear of the car, as to whether the car had actually stopped when the collision occurred, and as to whether the conductor jumped from the car while it was moving. The evidence shows that appellee's arm was broken, and that her injuries are permanent and serious. She was studying music at the time of her injury, and the proof is that thereafter she was unable to use her arm so as to play the piano. The damages awarded her were moderate.

HOLT v. PENNSYLVANIA R. CO.

(*Supreme Court of Pennsylvania, May 25, 1903.*)

[55 Atl. Rep. 1055.]

Railroads in Streets—Use of Streets—Duties of Trainmen and Drivers of Vehicles.*

Where the tracks of a steam railroad company are laid in a street, though a wagon on the track is required to get out of the way of an approaching train, the railroad company is required to give full warning of its approach, and is bound to keep the train under such control as not to injure a traveler in a wagon going in the same direction with the train.

Accident on Track—Question for Jury.

Evidence in an action for injuries to a person on wagon by a train on the track of a steam railroad company occupying a public street reviewed, and *held* that the question of plaintiff's contributory negligence and defendant's negligence was for the jury.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Thomas E. Holt against the Pennsylvania Railroad Company. From an order refusing to take off a nonsuit, plaintiff appeals. Reversed.

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*See preceding case and foot-note.

Argued before MITCHELL, FELL, BROWN, MESTREZAT, and POTTER, JJ.

William G. Keir, for appellant.

John Hampton Barnes and George Tucker Bispham, for appellee.

POTTER, J. It appears from the evidence in this case that, upon a portion of Richmond street in Philadelphia, two tracks for a street railway and one track for a steam railroad are laid. The street railway tracks are in the center, and the railroad track is at one side. All the tracks are so laid with respect to the paving as not to impede the use of the street by vehicles and the general public. The railroad track is used for the movement of freight trains only. The plaintiff was familiar with the locality, having driven over it frequently. Upon the afternoon of January 9, 1901, he was driving a horse and wagon loaded with iron, going north upon the easterly track of the trolley road. When near Huntingdon street a trolley car behind him rang its bell for him to clear its track. A south-bound trolley car was approaching him upon the other trolley track, and several wagons were in the space between the trolley tracks and the west side of the street. He therefore turned to the right, and over upon that portion of the street where the railroad track of the defendant company was laid. He continued to drive along the street, with one wheel of his wagon between the rails of the railroad track, until the trolley cars behind him had passed. In this way he consumed about four minutes of time, and traveled about 120 feet. He was beginning to turn again to the left, in order to get back into the trolley track, as the way was then open for him to do, when his wagon was struck in the rear by a locomotive engine of the defendant company. The shock was not very severe, but it was sufficient to drive an iron shaft which lay in the wagon with considerable force against the plaintiff's back. To recover for resulting injuries, this action was brought.

Upon the trial, the learned judge of the court below was of the opinion that the plaintiff was guilty of contributory negligence in driving upon the part of the street where the railroad track was laid, and in continuing there until his wagon was struck in the rear by the approaching engine. He therefore entered judgment of compulsory nonsuit, and his subsequent refusal to take it off is here assigned as error. This is not a case of one turning into the track in front of an approaching train, and being immediately struck. If it were, the court below would unquestionably have been right in pronouncing it contributory negligence. The plaintiff was occupying the portion of the street included between the rails for several moments before the accident, and was driving slowly along, and was in the act of turning back into the trolley track when his wagon was struck by the engine. The

case was tried in the court below, evidently, upon the theory that the rights of the defendant to the use of the railroad track at the place of the accident were precisely the same as, and no less, than they are where laid upon its own right of way, purchased or condemned by it, and appropriated to its exclusive use. If the place in question was the exclusive roadway of the company, in which the public had no right of passage, then the defendant would not be liable to one who drove upon it, unless the injury were willfully or intentionally inflicted. But if it was a street which the public had a right to use, then, even if it were occupied in part by the track of the railroad, no one driving upon it, and making such use of the street as it is ordinarily and manifestly intended for, could be considered as a trespasser. It is true that such a one might be guilty of contributory negligence in the manner in which he made use of the street and drove upon the track, but he could not, from the mere fact of being upon the track as laid in the street, be considered a trespasser, and held to forfeit his right to exact from the railroad company a reasonable degree of care in the running of its trains.

In the present case it is admitted that the accident occurred upon a public street, and nothing appears in the evidence to show that the defendant company had anything more than a right to lay down a railroad track therein, and run cars thereon. The track was not raised above the level of the street, but was laid in the same manner as the street car tracks, and was paved in with Belgian blocks. All this indicated that the street retained its character as a public highway for the use of all kinds of vehicles. Under these circumstances, it could not be considered negligence, in itself, for a citizen to drive over or along the track.

At this particular point the street was occupied with two tracks of a street railway, and one track of a steam railroad, and it is not apparent that the rights of the latter to the use of the street differed in any degree from those of the street railway. In fact, the argument of the appellee is in part directed to the application to this case of the decisions in street railway cases upon contributory negligence. And if the facts justified their application here, such authorities would certainly be appropriate and controlling. But in none of the cases cited do we find sufficient similarity in the facts to those now under consideration to make them available to sustain the action of the court below. In Winter v. Federal St., etc., Pass. Ry. Co., 153 Pa. 26, 25 Atl. 1028, 19 L. R. A. 232, the doctrine was carried to the extreme, but there the plaintiff turned his wagon squarely across the track, and left it there while he was unloading, and depended upon the defendant company to avoid a collision by stopping its car in time while approaching upon a down grade. In Gilmore v. Federal St., etc., Pass. Ry. Co., 153 Pa. 31, 25 Atl. 651, 34

Am. St. Rep. 682, there was like gross negligence upon the part of the plaintiff. The cases of Gilmartin v. Lackawanna Valley Transit Co., 186 Pa. 193, 40 Atl. 322, and Penman v. McKeesport, etc., Ry. Co., 201 Pa. 247, 50 Atl. 973, were those in which the plaintiffs were struck while walking at night longitudinally on the tracks. There is a manifest difference in the rule which should properly be applied to pedestrians who make an unfitting use of the streetway in converting it into a footway, and that which is appropriate to drivers of teams, who have a right to use, with due care, any portion of a public driveway. Each has its appropriate purpose—the street for the use of the horse and vehicle; the sidewalk, for the pedestrian. When either is found in the place set apart for the other, it is manifestly out of the ordinary. In the present case the plaintiff was making a proper and legitimate use of the street. The conditions under which the railroad company laid and used its tracks at that point made it incumbent upon it to operate its trains with due regard to the safety of other people who were also rightfully using the street, at the same time.

The testimony shows that, when it became necessary for the plaintiff to turn out of the trolley track and to pass over to the railroad track, he did not drive immediately in front of the approaching train. On the contrary, he drove steadily along the street for a distance of perhaps 140 feet; occupying, as was estimated, about four minutes of time before his wagon was reached and struck by the engine. The latter in the same time had run only about 340 feet, so that it is difficult to see why the engine, running so very slowly, might not have been stopped before striking the wagon of the plaintiff. However, that was a matter of defense, which might have been satisfactorily explained to the jury. But it was for them, rather than for the court. If the plaintiff was lawfully using the track in front of the approaching train, while it was his duty to give way to it and not obstruct its progress, yet he was entitled to reasonable warning and reasonable time to get out of the way. The employees of the railroad were bound to keep the train under proper control, and they had no right to run into plaintiff, either upon the track, or while in the act of leaving it. They were bound to use every reasonable effort to avoid a collision. Whether or not they did so, was a question of fact; and this, as well as the question of any contributory negligence upon the part of the plaintiff, should, under proper instructions, have been left to the jury. It was certainly not so clear as to justify the court in pronouncing upon it as a matter of law.

The assignments of error are sustained, and the judgment is reversed, and a venire facias de novo is awarded.

KOTILA *v.* HOUGHTON COUNTY ST. RY. CO.

(*Supreme Court of Michigan, Sept. 15, 1903.*)

[96 N. W. Rep. 437.]

Street Railways—Injuries to Stock—Contributory Negligence—Proximate Cause.*

Where plaintiff's cow was killed by a street railway car, plaintiff was not entitled to recover, notwithstanding his negligence in permitting the cow to be at large, on the ground that the cow stood on the tracks in plain sight of the motorman of the approaching car while it was going 150 feet down grade at great speed, which was not lessened until after the collision, and that the car went nearly 100 feet after it struck the cow before it was stopped, in the absence of evidence to show whether or not the car could have been stopped within the 150 feet under the circumstances, or showing how much its speed could have been checked in that distance by the appliances at hand.

Same—Stopping Car—Distance—Presumptions—Common Knowledge.

In an action for injuries to a cow in collision with a street car, it could not be assumed, as a matter of common knowledge, that the car could have been stopped, or its speed so checked as to prevent the injury, within 150 feet.

Error to Circuit Court, Houghton County; Albert T. Streeter, Judge.

Action by John L. Kotila against the Houghton County Street Railway Company. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Gray, Haire & Rice, for appellant.
W. A. Burritt, for appellee.

CARPENTER, J. A cow belonging to the plaintiff was struck by a car operated by defendant, and killed. Plaintiff recovered a judgment of $65 in the court below. The case was tried by plaintiff upon the theory that he was himself guilty of negligence in permitting his cow to be at large. He was permitted to recover on the theory that the negligence of defendant's motorman was such that he was entitled to a verdict, notwithstanding his own negligence. Defendant contends that the evidence did not warrant a recovery on this theory. Plaintiff's testimony tended to prove that his cow stood on defendant's track, in plain sight of the approaching car in charge of the motorman, while the car was going 150 feet; that the car was going down grade with great speed; that the speed was not lessened until after the collision; and that the car went nearly 100 feet after it struck the cow before it was stopped. There was no testimony tending to show whether or not the car could have been stopped in this 150 feet under the circumstances, or tending to prove how much its speed could have been checked in that distance by

*As to the care required of those in charge of street cars to avoid collisions with persons, animals, or vehicles, see Adams *v.* Camden, etc., Ry. Co. ante, p. 790, and foot-note; North Chicago St. R. Co. *v.* Cossar, ante, p. 796; Holt *v.* Pennsylvania R. Co., ante, p. 804.

the appliances at hand. If this had been the case of a collision between the defendant's car and a person of mature years crossing its track, there would be no opportunity of applying the law which permits plaintiff to recover, notwithstanding his own contributory negligence. In such a case, the motorman, as this court has held (see Lyons v. Bay Cities Consolidated Railway Company, 115 Mich. 114, 73 N. W. 139), would be warranted in acting upon the assumption that the person crossing the track would by due diligence escape injury. When, however, the motorman sees upon the track an animal like plaintiff's cow, he cannot act upon that assumption. He cannot assume that the animal will use diligence for its own protection. Nevertheless, the motorman cannot be held bound to anticipate danger to such an animal until it has reached, or at least approached, the path of the car. Therefore, in this case, to warrant the jury finding a verdict for the plaintiff notwithstanding his contributory negligence, we think the evidence should have warranted the inference that the motorman, after he discovered, or by the exercise of due care should have discovered, the cow in the position of danger, could, by the use of the appliances at hand, have either stopped the car, or so checked its speed as to prevent the injury which actually occurred. This statement of the law, as applied to this case, is, we think, warranted by the following cases: Richter v. Harper, 95 Mich., at page 225, 54 N. W. 768; Frost v. Railroad Co., 96 Mich. 470, 56 N. W. 19; Montgomery v. Lansing City Elec. Ry. Co., 103 Mich. 46, 61 N. W. 543, 29 L. R. A. 287; Fritz v. Detroit Citizens' Street Ry. Co., 105 Mich. 50, 62 N. W. 1007; Lyons v. Bay Cities Consolidated Ry. Co., 115 Mich. 114, 73 N. W. 139; Finnegan v. Michigan Central R. R. Co. (Mich.) 86 N. W. 395; Merritt v. Foote (Mich.) 87 N. W. 262. Under this rule, no verdict could be rendered for the plaintiff unless the jury could, without testimony to aid them, assume that in going this 150 feet the car could be stopped, or its speed so checked as to prevent the injury which occurred. Plaintiff's counsel says in his brief: "It is a matter of common knowledge that an electric car can be stopped within much less than 150 feet." We cannot agree with this statement. Counsel asked too much when he asked the jury to assume, without any testimony whatever, that this car, going down grade at a great speed, could, by the use of ordinary appliances, be stopped in 150 feet. Clearly, this could not be assumed. Neither could it be assumed that in going that distance the speed of the car could be so checked that the cow would not have received injuries which, so far as damages are concerned, would have been equivalent to its destruction.

The judgment of the court below must therefore be reversed, and a new trial granted. The other Justices concurred.

BIRMINGHAM RY. & ELECTRIC CO. *v.* JACKSON.

(*Supreme Court of Alabama, Feb. 13, 1902.*)

[34 So. Rep. 994.]

Evidence—Conclusion of Witness.

Plaintiff's testimony, in an action against a street car company for injuries at a street crossing, that he had to get on the electric car track, or right at it, in order to cross a railroad track that an engine was on, is objectionable as a conclusion.

Same—Statement of Concrete Fact.

The testimony of witness that he was not aware the car was moving towards him before it struck him is not the statement of a conclusion, but of a concrete fact.

Same—Irresponsive Answer.

The answer, "He was doing all he could to stop," is not responsive to the question, "Did you see him do anything to stop?" and therefore may be excluded, though no objection was made to the question.

Accident at Crossing—Wanton Conduct of Motorman—Liability.*

Though a motorman is not aware of the peril of one on the track in time to avoid injuring him, yet the company is liable if the motorman was guilty of wantonness in running his car over the crossing at the time and under the circumstances.

Harmless Error.

In an action for injuries, admission of plaintiff's conclusion is harmless; it tending merely to show he was not negligent, and the case being tried on the theory, and the jury being charged, that he was negligent.

Appeal from City Court of Birmingham; Chas. A. Senn, Judge.

Action by A. B. Jackson against the Birmingham Railway & Electric Company for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

The complaint contained three counts. In the first count it was alleged that the defendant was engaged in operating a line of street cars on Twentieth street, between First Avenue and Avenue A, in the city of Birmingham, which street was a much-frequented public thoroughfare; that on November 21, 1898, the plaintiff was upon said street at or near where the tracks of the said street railway cross certain railroad tracks, when the defendant, "through its servant or agent in charge or control of said car, negligently caused or allowed said car to run upon or over plaintiff, and, as a proximate consequence thereof, plaintiff's leg was broken, his back was injured," etc. In the second count the negligence alleged was that on said day and at said place, as specified in the first count, "defendant, through it servant or agent in charge or control of said car, negligently failed to properly and sufficiently notify plaintiff of the approach of said car by ringing the gong or otherwise, and, as a proximate consequence of said negli-

*As to the care required of those in charge of street cars to avoid collisions with persons, animals, or vehicles, see preceding case and foot-note.

gence, said car ran upon plaintiff and caused the injuries complained of." In the third count the negligence alleged was that the "defendant, through its servant or agent in charge or control of said car, recklessly and wantonly or intentionally caused the injuries and damages to plaintiff set out in the first count in the manner following, viz.: Said agent recklessly and wantonly or intentionally caused or allowed said car to run upon plaintiff." The defendant pleaded the general issue, and by special plea set up the contributory negligence of the plaintiff, and upon these pleas issue was joined. In the trial of the case it was shown that the accident to the plaintiff occurred on Twentieth street, between First avenue and Avenue A, in the city of Birmingham; that defendant's street car tracks at this place crossed the tracks of several railroad companies, and the defendant's tracks are upon the same grade as the sidewalk; that just before the accident a switch engine on the track of the Alabama Great Southern Railroad had blocked up the crossing; that, upon the said engine moving back from across the street, the flagman who was stationed there gave a signal to the street car and the pedestrians who had been stopped by reason of the street being blocked by the engine to come on across the railroad tracks; that said engine did not entirely clear the street, but was only from three to six feet away from the track of the defendant; that as the plaintiff was walking around the engine, going in the same direction in which defendant's car was going, he stepped upon the track of the defendant, and was run over by one of the cars operated thereon by the defendant company. The evidence for the plaintiff tended to show that said car was running from four to six miles per hour, that the gong on the car was not sounded, that the engine was only three to four feet away from the track of the defendant, and that in going around the engine it was necessary for the plaintiff to step upon the track of the defendant. The evidence for the defendant tended to show that the engine was removed from defendant's tracks six or eight feet; that there was plenty of space between the defendant's tracks and where the engine was standing for pedestrians to pass without stepping on the track of the defendant; that the motorman who was operating the car which ran over the plaintiff was ringing the gong continuously while passing over the railroad tracks, and that as the plaintiff started towards the track of the defendant the motorman on said car rang the gong violently; and that when the motorman discovered that plaintiff was going to step upon the track he put on the brakes and stopped the car as quickly as he could, the current having been previously turned off. It was shown by the evidence that the place where the accident occurred was in constant and frequent use by pedestrians in crossing said street.

During the examination of the plaintiff as a witness in his

own behalf, he was asked the following question: "Tell the jury whether or not you had to get on the electric car track, or right at it, in order to cross the A. G. S. track that that switch engine was on?" The defendant objected to the question on the ground that it called for a conclusion of the witness. The court overruled the objection, and the defendant excepted. Witness answered, "Yes, sir." During the further examination of the plaintiff he was asked the following question: "Had you become aware that it was moving on you or moving towards you before it struck you?" The defendant objected to the question as calling for a conclusion of the witness, and a question that should be left to the jury. The court overruled the objection, and the defendant excepted. Witness answered the question, "No, sir." During the examination of one W. E. Ayers, who testified that he was foreman in charge of the switch engine, and that he saw the accident, he was asked the following question: "Did you see the motorman do anything to stop?" Witness answered: "Yes, sir; he was doing all he could to stop." The plaintiff moved to exclude this answer. The court sustained the motion, and the defendant duly excepted.

Among the charges asked by the defendant, to the court's refusal to give each of which the defendant separately excepted, were the following: "(2) If the motorman did all he could, after the peril of the plaintiff became manifest to the motorman, to prevent injuring the plaintiff, and you so find from the evidence, you must find your verdict for the defendant. (3) If the motorman did all a prudent and careful and skillful motorman could have done, under the circumstances of the situation, after he discovered the plaintiff's peril, and you so find from the evidence, your verdict must be for the defendant. (4) If you believe the evidence, you cannot find for the plaintiff under the first count of the complaint. (5) If you believe the evidence, you cannot find that the motorman, when he discovered plaintiff's peril, or was charged with a knowledge of such peril, was indifferent as to the consequences. (6) If you believe the evidence, you must find that the motorman was not guilty of reckless and wanton misconduct. (7) If you believe the evidence, you must find that the plaintiff was guilty of negligence which proximately contributed to his injury." "(10) If you believe the evidence, you must find that the plaintiff was guilty of negligence which proximately contributed to his injury, and your verdict must be for the defendant." "(12) If you believe the evidence, you cannot find for the plaintiff under the third count of the complaint. (13) The undisputed evidence shows that after the plaintiff last looked at the street car, and before he went upon the street car track, there was injected into the situation, then manifest to him, an element of danger, in this: that before he attempted to get upon the street car track the

street car was started or put in motion, and was running towards the place where he went upon the track; and the undisputed evidence shows that before the collision the plaintiff was unaware of this new element of danger, and that before going upon the track he exercised no care or diligence to discover this new element of danger; and I charge you the plaintiff's failure to exercise such care and diligence was negligence which proximately contributed to the injury to the plaintiff, and because of such contributory negligence the plaintiff cannot recover on the first and second counts of the complaint. (14) You cannot find that the motorman was guilty of willful or intentional wrong unless you believe from the evidence that the motorman intended to injure the plaintiff." "(16) The court charges the jury it was the duty of the plaintiff, when he approached the street car track for the purpose of going upon it, to look for approaching cars upon such track, and the omission of this duty by the plaintiff while he was proceeding ten or fifteen feet towards the track, and immediately preceding his going upon the track, which the undisputed evidence shows is, as a matter of law, negligence on the part of the plaintiff, so contributing to the injury of the plaintiff as to defeat his action counting on the injury as having been produced by the simple negligence of the defendant or its motorman, and you cannot find for plaintiff on either the first or second counts of the complaint. (17) The court charges the jury that if the jury believe the evidence the jury must find that after the motorman discovered the plaintiff's peril he was guilty of no negligence which proximately contributed to the plaintiff's injury. (18) The undisputed evidence shows that after the motorman discovered the plaintiff's peril he did all he could to avert his injury. (19) If from the evidence you believe that the last time plaintiff looked for approaching cars he was ten or fifteen feet distant from the track upon which the car which struck him was running; that without looking again for the approaching cars he stepped on the track upon which the car which struck him was running; that as soon as he stepped upon said track the motorman immediately applied the brake on the car, and did all that he could do to stop the car—I charge you that you must render you verdict in favor of the defendant." "(23) I charge you, gentlemen of the jury, if you believe the evidence, you must find that the plaintiff was guilty of negligence that proximately contributed to his injury, and you must find for the defendant, unless you believe from the evidence that when the peril of the plaintiff became manifest to the motorman he consciously failed to use preventive effort to save the plaintiff from harm, when by the exercise of such preventive effort he could have saved him from harm." There were verdict and judgment for the plaintiff, assessing his damages at $2,000. Defendant appeals, and

assigns as error the several rulings of the trial court to which exceptions were reserved.

Walter Turner and Campbell & Foster, for appellant.
Bowman, Harsh & Bedsole, for appellee.

McCLELLAN, C. J. The testimony of the plaintiff that he "had not got on the electric car track, or right on it, in order to cross the A. G. S. track, that that street engine was on, was open to the objection interposed to it by the defendant. It was, in form and substance, a mere conclusion of the witness upon facts which were capable of being fully laid before the jury. The court's action in allowing it to be adduced was erroneous. Bullock v. Wilson, 5 Port. 338; Gibson v. Hatchett, 24 Ala. 201; Jones v. Hatchett, 14 Ala. 743; Cris v. Tyson, 23 Ala. 669, 58 Am. Dec. 303; Tanner's Executor v. Louisville & Nashville Railroad Co., 60 Ala. 621, 626, 643; Birmingham Ry. & Elec. Co. v. Baylor, 101 Ala. 488, 13 South. 793; E. T., V. & G. R. Co. v. Watson, 90 Ala. 41, 7 South. 813; Reeves v. State, 96 Ala. 33, 11 South. 296; McCutchen v. Loggins, 109 Ala. 457, 19 South. 810; A. G. S. R. Co. v. Tapia, 94 Ala. 226, 10 South. 236; Baker v. Trotter, 73 Ala. 277; Carney v. State, 79 Ala. 14.

The testimony of the plaintiff that he had not become aware that the car was moving on or towards him before it struck him was not the statement of a conclusion, but of a concrete fact. It was not subject to the objection made to it, if to any.

The testimony of Ayers that the motorman was "doing all he could to stop" was illegal. It was not responsive to the question, and hence plaintiff had the right to have it excluded, though the question was not objected to. And even had it been responsive to the question, the court committed no error in excluding it, though for want of such objection the plaintiff would not have been entitled to have the answer excluded.

The foregoing are the only rulings on evidence assigned as errors and discussed in the brief for appellant. There were other exceptions to rulings upon the competency of testimony, but, of course, we have not considered them.

The rulings of the court in refusing charges 2, 3, 4, 5, 6, 7, 10, 12, 13, 14, 16, 17, 18, 19, and 23 requested by defendant are assigned as erroneous, and these assignments are insisted upon in appellant's brief. On the issues of fact presented by the pleadings, and upon which there was evidence pro and con, we are of opinion that the trial court committed no error in any of these rulings. Those issues were, first, whether the motorman was guilty of negligence in respect of efforts to avert the disaster after he became aware of the peril of the plaintiff; second, whether the motorman consciously failed, after he became aware of plaintiff's peril, to use all means in his power to avoid running over him; and, third, whether the motorman, though not aware of plaintiff's peril in time to

have avoided injuring him, was guilty of reckless and wanton or willful misconduct in running his car onto that crossing in the manner and under the circumstances some of the evidence tends to show. The crossing appears to be just such a one as is referred to in Ga. Pac. Ry. Co. v. Lee, 92 Ala. 262, 271, 9 South. 230; and it was open to the jury to find, on the evidence, that the motorman was guilty of wantonness in running his car across there at the time and under the circumstances at and under which he attempted to run it, though he may not have been at any fault after he discovered the position of plaintiff and realized the peril of it. Further than is involved in what we have said, we deem it unnecessary to discuss the charges referred to.

Reversed and remanded.

On Application for Rehearing.

(July 10, 1903.)

On application for rehearing the court has reached the conclusion that the error committed by the trial court in allowing the plaintiff to answer the question: "Tell the jury whether or not you had to get on the electric car track, or right at it, in order to cross the A. G. S. track that that switch engine was on?" was without injury to the defendant, since that evidence merely tended to show that the plaintiff was not guilty of negligence, and the case was tried upon the theory that he was guilty of negligence, and charges were given for the defendant declaring that he was guilty of negligence. Upon this consideration, the judgment of reversal is set aside, and the judgment of the city court will be affirmed.

MOCK v. LOS ANGELES TRACTION CO.

(*Supreme Court of California, July 17, 1903.*)

[73 Pac. Rep. 455.]

New Trial.

An order granting a new trial will not be disturbed, being general in its terms, and one of the grounds of the motion being insufficiency of the evidence, and the testimony being substantially conflicting.

Street Railways—Appliances—Care Due Pedestrians.*

Ordinary prudence requires that a street railway company, for the safety of pedestrians, exercise great care to keep its appliances for stopping cars in good condition.

Commissioners' Decision. Department 2. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by George B. Mock against the Los Angeles Trac-

*As to the care required of those in charge of street cars to avoid collisions with persons, animals, or vehicles, see preceding case and foot-note.

tion Company. From an order granting a new trial, plaintiff appeals. Affirmed.

John M. Miller, Herbert Cutler Brown, Frank G. Bryant, and Miller & Brown, for appellant.

E. H. Lamme, E. E. Milliken, and R. H. F. Variel, for respondent.

GRAY, C. Action to recover damages for the death of plaintiff's son, seven years of age, caused by his being run over by one of the defendant's electric street cars in the city of Los Angeles. Plaintiff obtained a verdict and judgment, and now appeals from an order granting the defendant's motion for a new trial.

One of the grounds of the motion was insufficiency of the evidence to justify the verdict. The order granting the motion was general, as shown by the transcript, and did not specify upon what ground it was based. The testimony was substantially conflicting, both as to the negligence of the employees of the company and as to the contributory negligence of the child. In this condition of the record, it was for the trial judge to say where the preponderance of evidence lay. The rule is well settled that the order granting a new trial, being general in its terms, will not be disturbed "if it could have been properly granted upon any of the grounds assigned." Tibbetts Bros. & Sons v. Bower, 121 Cal. 7, 53 Pac. 359.

In support of the order appealed from respondent further contends the court erred in the giving of instructions. As the order must be upheld on the ground already suggested, it is perhaps not essential that this latter contention should be considered. It may be well, however, as a new trial is to be had, here to say that, as to the first instruction, the objection to it can be easily obviated on a new trial by adding to it such words as will imply the condition of the motorman having seen the boy "in a position of danger" in time to avoid injuring him.

The second instruction objected to reads as follows: "You are instructed that defendant was under no obligation to supply the safest or most effective brakes that could be obtained, or to use the utmost care in keeping the brakes on its cars in repair, but was bound to use only ordinary care in the selection of its brakes and in maintaining and keeping the same in repair; but ordinary care in such a case requires the care usually exercised in the operation of electric street car lines, and it is the duty of a party, in operating an electric car, to use the best appliances in common use and the best brakes in common use, and to exercise great care in keeping its appliances for stopping cars in good condition." We think the law should be, and is, as stated in this instruction. Of course, a street car cannot be operated upon the public streets of a great city, with any degree of safety to

pedestrians and others, except by "keeping its appliances for stopping cars in good condition." Therefore ordinary prudence requires that "great care" should be exercised in this direction.

Upon the ground first stated, we advise that the order appealed from be affirmed.

We concur: SMITH, C.; HAYNES, C.

SOUTHERN RY. CO. v. CRENSHAW.

(Supreme Court of Alabama, Jan. 22, 1903.)

[34 So. Rep. 913.]

Railroads in Streets—Right of Public to Use Whole Street.*

In that part of a street in which a railroad track is laid subject to the reciprocal duty of being diligent to avoid probable danger, the public has a right to use the whole of the street or highway, and the railroad company has the right to operate its trains.

Accident at Highway Crossing—Plaintiff Not a Trespasser.

Counts in a complaint which alleged that plaintiff's intestate was killed by being struck by a train at a crossing formed by the railroad track and the public highway, described in one count as a street in an incorporated town and in another as a public road near the town, showed that the intestate was not at the time a trespasser on defendant's track.

Same—Pleading.

A complaint in an action for killing a pedestrian at a railroad crossing need not negative contributory negligence.

Same—Willfulness and Wantonness—Pleading.

Counts in a complaint for the killing of plaintiff's intestate while at defendant's railway crossing, which charged defendant with "willfully and wantonly striking" plaintiff's intestate at a highway crossing, and which alleged that defendant's employees in charge of its train "did recklessly and wantonly propel said engine and cars against plaintiff's intestate, who was in the act of crossing" a highway crossing, and killed her, sufficiently averred that the injury was willfully and wantonly inflicted.

Same—Same—Speed of Train—Sufficiency of Complaint.

Counts in a complaint for the death of plaintiff's intestate while crossing defendant's railway track at a highway crossing, which averred that the intestate was struck and killed by a locomotive, and that the "injury was inflicted * * * through the willful, reckless, and wanton acts" of defendant's servants; that, though the servants knew that the crossing was one at which a great number of people were continuously passing, they approached and crossed the crossing at a speed of about 40 miles an hour, without ringing the bell or blowing the whistle—were not demurrable.

Appeal—Review.

In the absence of a bill of exceptions, the court's action on motions to strike out a pleading, or parts thereof, is not reviewable on appeal.

Negligence in Operation of Train—Wantonness—Pleading.

Replications to special pleas to counts in a complaint in an action against a railway company for the negligent killing of a pedestrian

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*As to the mutual rights of street railway companies and citizens, see foot-note appended to preceding case.

at a highway crossing, which alleged that defendant's engineer and fireman saw plaintiff's intestate after her peril, but that they failed to stop the train or check its speed, charged negligence in the operation of the train, and did not import that the killing was wanton or intentional.

Appeal from Circuit Court, Morgan County. H. C. Speake, Judge.

Action by A. J. Crenshaw, as administrator of Caroline Turner, deceased, against the Southern Railway Company, to recover damages for the death of the deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

The complaint, as amended, contained seven counts, but the sixth count was subsequently withdrawn. The averments of negligence in the remaining counts of the complaint, as amended, were as follows: In the first count, after averring the operation by the defendant of a railroad on the line of road in and through the incorporated town of Courtland, it was averred that over and across a street in said town the agents and servants of the defendant ran a passenger train "at a high rate of speed without first having given warning of the approach of said locomotive and train of cars by blowing the whistle or ringing the bell thereof, as the law requires, and that while crossing said street in said manner said agents or servants negligently and carelessly ran said locomotive upon and against plaintiff's intestate," inflicting the injuries from the results of which she died. In the second count of the complaint it was averred that "at a public road crossing near the eastern boundary of the town of Courtland" the agents or servants of the defendant ran the passenger train along its road, which was crossed by said public road, and "negligently failed to blow the whistle or ring the bell at least one-fourth of a mile before reaching said crossing, and to continue blowing the whistle or ringing the bell at short intervals until it had reached and passed said crossing, and by reason of such negligent failure of defendant's agents and servants to so blow the whistle or ring the bell said locomotive was carelessly run upon and against said Caroline Turner at said public road crossing," inflicting the injuries from the effects of which plaintiff's said intestate died. In the third count of the complaint it was averred that the plaintiff's intestate was willfully and wantonly killed "within a suburb of the town of Courtland where a street, road, or way much traveled and thronged by the public crossed defendant's track at or nearly on a level with the adjacent territory, and where defendant's employees knew that travelers, pedestrians, and the public generally were accustomed to pass and repass from one to another part of the town, suburbs, and adjacent territory," and it was averred that "the defendant, by its agents and servants, with a reckless disregard of the probable consequences of its acts, failed to blow the whistle or ring the bell within one-fourth of a mile of said crossing,

and to continue the blowing of the whistle or ringing of the bell at short intervals until it had been reached and passed, and willfully and wantonly, or with a reckless indifference as to probable consequences, rushed and drove an engine with cars attached over said crossing at a reckless rate of speed of 35 or 40 miles an hour, and willfully and wantonly struck plaintiff's intestate, Caroline Turner, at and on said crossing," inflicting the wounds from the effects of which she died. In the fourth count of the complaint the plaintiff claimed damages "for the willful and wanton killing of plaintiff's intestate, Caroline Turner, at a public road crossing near the eastern corporate limits and in a suburb of the town of Courtland"; and it was averred in said count that while the plaintiff's intestate was attempting to cross defendant's railroad track at a public road crossing just outside the corporate limits of said town she was struck by a locomotive, receiving the wounds from which she died, and that "said injury was inflicted upon said Caroline Turner through the willful, reckless, and wanton acts of defendant's agents and servants, in this: that the said public road crossing was one at which great numbers of people were, and had for several years been, continuously passing on foot, horseback, and in vehicles, and was at a populous locality, all of which was well known to defendant and to its agents and servants, and with such knowledge defendant's agents and servants, without ringing the bell or blowing the whistle, approached and crossed said crossing at a highly dangerous rate of speed, to wit, about forty miles per hour, and with a reckless disregard of the peril of said Caroline Turner, and of such of the community in general as might be approaching or traversing said crossing, ran said locomotive at such rate of speed upon and against said Caroline Turner while crossing said railroad track at said public road crossing, inflicting upon her wounds from which she then and there died." In the fifth count of the complaint the place of the killing was alleged as in the fourth count of the complaint, and it was then alleged that while the plaintiff's intestate was attempting to cross defendant's railroad track at a public road crossing just outside of the corporate limits of said town she was struck by a locomotive, receiving the wounds from which she died, and that said injury was inflicted upon said Caroline Turner "through the willful, reckless, and wanton acts of defendant's agents and servants, in this: that the said public road crossing was one at which great numbers of people were, and had for several years been, continually passing on foot, horseback, and in vehicles, and was at a populous locality, all of which was well known to defendant and to its agents and servants, and with such knowledge defendant's agents and servants, without ringing the bell or blowing the whistle, approached and crossed said crossing at a highly and dangerous rate of speed, to wit, about forty miles per hour, and with a reckless disregard of

the peril of said Caroline Turner, and of such community in general as might be approaching or traversing said crossing, ran said locomotive at such rate of speed upon and against said Caroline Turner while crossing said railroad track at said public crossing, inflicting upon her wounds from which she then and there died. And defendant's agents and servants then and there knew, and were presently conscious of the fact, that it was probable and likely that some person or persons were exposed to peril at said crossing, and were conscious of the fact that they were omitting to take usual and proper precautions to avoid injuring or slaying such persons, and with a full consciousness of such facts as aforesaid ran said train against plaintiff's intestate, so that she died." In the seventh count of the complaint it was averred "that said killing was occasioned by a passenger train under control of certain of defendant's employees, agents, and servants, which was propelled along its track and over a crossing of said railroad at a high and dangerous rate of speed, at, to wit, from 30 to 40 miles per hour, without the ringing of a bell or the blowing of a whistle; that said crossing was, and had been for, to wit, more than 20 years, largely and frequently used by the public generally without let or hindrance; that for more than 20 years it had been maintained as a crossing for the public generally; that persons were accustomed to cross the railroad track there at all hours of the day on foot, horseback, in wagons, and in buggies; that said crossing was just outside the corporate limits of the town of Courtland, Alabama; that all these facts were known to those in charge of the train; that those so in charge of the train knew that it was likely or probable that some one was then on, or in dangerous proximity to, said track, and exposed to peril; that said employees, so knowing the likelihood of peril to some persons thus in jeopardy, did recklessly and wantonly propel said engine and cars against plaintiff's intestate, who was in the act of crossing at said crossing, without signal or warning of approach, in the open daylight, at said high and dangerous rate of speed, and did then and there by such means bruise, mangle, maim, and crush the said Caroline Turner so that she died."

To the first and second counts of the complaint the defendant separately demurred upon the following grounds: (1) That it was not shown or averred. that the intestate was rightfully on the track at the time and place where she was alleged to have been killed. (2) It is not shown or averred whether the plaintiff's intestate was crossing said track at the time she was struck, or was standing thereon or walking along it. (3) That it appears from said counts that the plaintiff's intestate was a trespasser on the defendant's track at the time she was killed. To the third, fourth, and fifth counts of the complaint the defendant separately demurred upon the following grounds: (1) It is not shown or alleged that said

Caroline Turner was willfully or wantonly killed. (2) It is not shown or alleged that the trainmen in charge of said train knew that said Caroline Turner was on said track, or had knowledge of facts which would charge them with notice that she was thereon. (3) Because the failure to blow the whistle, as shown by the averments of said count, was not negligence. (4) Because the requirements of the statute to blow the whistle or ring the bell one-fourth of a mile before reaching a public road crossing does not apply to a road crossing in a city, town, or village. (5) It does not appear therefrom but that the plaintiff's intestate was a trespasser upon said track. To the seventh count of the complaint the defendant demurred upon the grounds as were interposed to the third, fourth, and fifth counts, and also upon the following grounds: (1) The facts alleged in said count did not show wantonness or willfulness on the part of defendant's employees in the infliction of the injuries complained of. (2) Said count is repugnant and inconsistent, in that the facts alleged therein constitute simple negligence only, but are alleged to be reckless and wanton. (3) Said count fails to allege that the employees at the time were acting within the scope of their employment. These demurrers to each of the counts of the complaint were overruled, and thereupon the defendant pleaded the general issue, and filed several special pleas to each of the counts of the complaint, setting up contributory negligence in that she failed to stop, look, and listen before going upon the track of defendant on the part of the plaintiff's intestate. The court sustained the plaintiff's motion to strike said special pleas as answers to the counts of the complaint averring willful and wanton injury. To the special pleas as to the first and second counts of the complaint the plaintiff filed the following replications: "(1) That defendant's engineer saw plaintiff's intestate after her peril, and failed to use all the means known to skillful engineers to stop or check the speed of said train, and, if said means had been used, the life of plaintiff's intestate would have been saved. (2) The fireman saw the peril of plaintiff's intestate after she got upon the track, yet no effort was made to stop the train or check its speed, and, if such effort had been made, the fatal injuries would not have been sustained." To the first and second replications the defendant demurred upon the following grounds: (1) Because it does not appear therefrom how or in what way plaintiff's intestate was in peril. (2) It does not show that such failure to use means to stop the train occurred after the intestate's peril was discovered. (3) Said replication is a departure from the first and second counts of the complaint. Demurrers to these replications were overruled. Issue was joined upon the pleadings, and upon the hearing of the cause there were verdict and judgment for the plaintiff, assessing his damages at $1,133. The defendant appeals, and

assigns as error the several rulings of the trial court upon the pleadings.

Humes, Sheffey & Speake, for appellant.
E. W. Godbey and W. W. Callahan, for appellee.

SHARPE, J. In such part of a street or public road as may comprise the bed of a railroad neither the railroad company nor the public have any exclusive right of occupation. Subject to the duty of being diligent in avoidance of probable danger—a duty which, as between them, is reciprocal—the public has a right to use the whole of the highway and the railroad company has the privilege of operating its trains. Elliott on Streets and Roads, §§ 810, 811; Highland Ave. & Belt R. Co. v. Robbins, 124 Ala. 113, 27 South. 422. By averments of the first count, and likewise by averments of the second count, of this complaint, it is shown that plaintiff's intestate received her injuries and death through being knocked by defendant's train off a crossing formed by the railroad and a public highway, which highway is in the first count described as a street in the incorporated town of Courtland, and in the second count is alleged to have been a public road near Courtland. Thus it appears from each of those counts that the intestate, when struck by the train, was not a trespasser on defendant's track. H. A. & B. R. Co. v. Robbins, supra. It was not necessary for the complaint to negative that she was at fault in the manner in which she conducted herself while on the track in the highway, since such fault, if it existed, was defensive matter.

Count 3 of the complaint, after making certain allegations as to existing conditions, and as to happenings which preceded the injury, charges the defendant with "willfully and wantonly striking plaintiff's intestate, Caroline Turner, at and on said crossing, inflicting a fatal wound upon her, from which she then and there expired"; and count 7 avers, among other things, that defendant's employees, who were elsewhere averred to have been in charge of its train, "did recklessly and wantonly propel said engine and cars against plaintiff's intestate, who was in the act of crossing, * * * and crush the said Caroline Turner so that she died." The averments we have quoted are not qualified by the other averments, and each characterizes the count in which it appears as sufficiently charging that the defendant willfully or wantonly caused the intestate's death. See M. & C. R. Co. v. Martin, 117 Ala. 367, 23 South. 231.

Counts 4 and 5 each make a case within the doctrine declared in Ga. Pac. Ry. Co. v. Lee, 92 Ala. 271, 9 South. 230, and expressly reaffirmed in Haley v. K. C. M. & B. R. Co., 113 Ala. 640, 21 South. 357, which is that: "To run a train at a high rate of speed and without signals of approach at a point where the trainmen have reason to believe there are persons in exposed positions on the track, as over an un-

guarded crossing in a populous district or a city, or where the public are wont to pass on the track with such frequency and in such numbers, facts known to those in charge of the train, as that they will be held to a knowledge of the probable consequences of maintaining great speed, without warning, so as to impute to them reckless indifference in respect thereto, would render their employer liable for injuries resulting therefrom, notwithstanding there was negligence on the part of those injured, and no fault on the part of the servants after seeing the danger." The several counts of the complaint are each free from the objection taken by demurrer.

There being no bill of exceptions, the court's action upon motions to strike out pleadings and parts of pleadings is not reviewable.

Replications 1 and 2 do not import that the injury was inflicted wantonly or intentionally (A. G. S. R. Co. v. Burgess, 116 Ala. 509, 22 South. 913; Id., 114 Ala. 587, 22 South. 169; L. & N. R. Co. v. Anchors, 114 Ala. 492, 22 South. 279, 62 Am. St. Rep. 116); nor do they otherwise depart from the causes of action averred in counts 1 and 2 of the complaint. Read, as they must be, in connection with the pleadings, to which they were sequential, it is seen that those replications aver, in effect, that there was negligence in the operation of the train after those who were running it saw the intestate was in peril by reason of its movements, all of which might have been proved under the averments of the last-mentioned counts. Central of Ga. R. Co. v. Foshee, 125 Ala. 199, 27 South. 1006; M. & C. R. Co. v. Martin, 131 Ala. 269, 30 South. 827; Id., 117 Ala. 367, 23 South. 231. These replications were unnecessary, but they were not objectionable on the grounds specified in the demurrers, and grounds not so specified cannot be considered.

Affirmed.

NORTH PENNSYLVANIA R. CO. *et al.* v. INLAND TRACTION CO. *et al.*

(*Supreme Court of Pennsylvania, May 4, 1903.*)

[55 Atl. Rep. 774.]

Street Railways—Rights of Abutter—Injunction.

A landowner is entitled to an injunction to protect his own land to the center line of the road from the burden of street railroad tracks, though his neighbors on the opposite side have consented to the use of their lands by such company.

Same—Right to Enjoin Use of Street.

A street railroad company obtained the consent of a turnpike company and of the township authorities to use the turnpike road and of the abutting owners on one side of the road: *held*, that an owner on the other side of the road, who had not consented, and whose property was not touched, could not enjoin the construction of the railroad.

Same—Same.

Where the tracks of a railroad company are crossed by an overhead bridge, such company has no standing to enjoin the construction of

a street railway, where the street railroad company offers to rebuild the bridge so as to make it strong enough for the passage of its cars, though the railway company owns the land on which the foundations of the bridge rest, and originally erected the bridge.

Same—Same.

A railroad company cannot enjoin the construction of a street railroad on a public road which crosses its track and on which lands owned by it abut, under the provisions of Act June 19, 1871 (P. L. 1360), where none of the rights or franchises of the railroad company are injured or invaded.

Appeal from Court of Common Pleas, Montgomery County.

Bill by the North Pennsylvania Railroad Company and another against the Inland Traction Company and another. From a decree, plaintiffs appeal. Affirmed.

The court below (Weand, J.) filed the following opinion:

"The plaintiffs by this bill seek to restrain the defendants from building their street passenger railway in front of plaintiffs' lands, which abut on a turnpike road, and from crossing an overhead highway bridge where plaintiffs' road intersects said highway.

"Findings of Fact.

"(1) The North Pennsylvania Railroad Company is a duly chartered corporation, leased to and operated by the Philadelphia and Reading Railway Company.

"(2) The North Pennsylvania Railroad Company is the owner in fee of several tracts of land abutting on the east side of Chestnut Hill and Springhouse Turnpike Road south of the point where the railroad crosses said turnpike, and is also the owner of land where the railroad crosses said turnpike.

"(3) The turnpike was built and in operation many years before the construction of the North Pennsylvania Railroad.

"(4) The railroad, as it crosses the turnpike, runs through a deep cut, over which is erected a bridge built by the railroad company, and which is part of the turnpike, accommodating its travel.

"(5) The Philadelphia & Lehigh Valley Traction Company, into which the Inland Traction Company and the Lehigh Valley Traction Company were merged, has fixed and determined its route, beginning at Mountainville, Lehigh county, Pennsylvania, to the dividing line between the county of Montgomery and the county of Philadelphia at Chestnut Hill Park. Part of its route is on the said turnpike.

"(6) Said defendant company has obtained consent of the townships and municipalities through which it has located its route, and also the consent of the Chestnut Hill and Springhouse Turnpike Company.

"(7) The defendant company does not propose to lay, construct, maintain, or operate its road on that side of the turnpike road on which plaintiffs' property abuts, except where it crosses plaintiffs' right of way.

"(8) The owner of land in front of which defendants' road is proposed to be located have consented thereto; i. e., the abutting owners on the opposite side of the highway to plaintiffs' property have consented to the construction of the road as proposed by defendants.

"(9) Part of defendants' road as located is an extension from the borough of Lansdale to the terminus of the road at Chestnut Hill, a distance of about twelve miles, all of which extension is actually constructed, save about one and three-quarters miles.

"(10) The construction of the road as proposed opposite plaintiffs' property will be wholly beyond the center line of the turnpike, and on no part of plaintiffs' land.

"From the above findings of fact we conclude as a matter of law:

"(1) The defendants are lawfully engaged in the construction of their road.

"(2) That plaintiffs have no standing to object, as no part of their property is taken or encroached upon. Their ownership of the fee extends only to the middle of the turnpike, and defendants have the consent of the owners of the land on the opposite side, and also of the township authorities and of the turnpike company, which gives them the rights claimed.

"(3) That plaintiffs' bill must be dismissed, with costs.

"The only standing plaintiffs have to contest is by virtue of their ownership of land along the proposed route of defendants' company. Their rights, however, are not superior to those of the opposite owners, and therefore, when a passenger railway is proposed to be built so as not to touch or encroach upon A.'s land, it is difficult to see why he should object when his opposite neighbor is willing to have it upon his land. Apart from his ownership, plaintiffs have no greater rights in the road than the rest of the community, and, if they sustain no peculiar damage, their right to object does not exist. In Penna. R. R. Co. v. Montgomery County Pass. Ry. Co., 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. Rep. 659, the court said (and this is the keynote of all subsequent rulings upon subject): 'It is not easy to see how such a company can protect itself in the use of country roads, except by contract with every owner of property along the roads they wish to occupy.' We adhere to that ruling, but decide that plaintiffs are not owners of property which defendants wish to occupy.

"Electric passenger railways in the country have become a public necessity. They have increased the value of property, built up villages and towns, afford conveniences otherwise not obtainable, and are a benefit especially to those whose means do not admit of other methods of travel. The law should, therefore, be liberally construed in their favor, without infringing upon the rights of others. Where captious, technical, or other objections are made for reasons not

based upon equitable or strictly legal principles, a court should not restrain what appears to be a great public improvement. What injury can be done to plaintiffs' property which is owned for railroad purposes it is difficult to see, but these are matters to be decided hereafter. We are fortified in our conclusions by the opinion of Judge Yerkes in Phila. & Trenton R. R. Co. v. Phila. & Bristol Pass. Ry. Co., 6 Pa. Dist. R. 487, and Minnich v. Lancaster, Mechanicsburg & New Holland Ry. Co., 24 Pa. Co. Ct. R. 312.

"The bridge over the railroad is part of the public highway, no matter by whom erected or maintained, and, if the defendants can occupy the turnpike, they can also occupy the bridge as part of the highway. They have expressed a willingness to reconstruct and strengthen it, and, unless they do so before using it, application can be made for an injunction. The question may also arise as to whether the bridge should not be widened, but this is a matter to be determined when the plans are submitted for approval. So far as the crossing of plaintiffs' right of way is concerned, we refer to Penna. R. R. Co. v. Greensburg, etc., Street Ry. Co., 176 Pa. 559, 35 Atl. 122, 36 L. R. A. 839, where it was said, 'In respect to a mere crossing, a railroad company is not an abutting landowner to a passenger railway.'"

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

Charles Heebner, Montgomery Evans, and James Boyd, for appellants.

N. H. Larzelere and R. E. Wright, for appellees.

BROWN, J. Part of the route of the Philadelphia & Lehigh Valley Traction Company, the real appellee, is on the Chestnut Hill & Springhouse Turnpike Road. The North Pennsylvania Railroad Company is the owner in fee of several pieces of land abutting on the east side of the said turnpike road, and owns the land where its railroad crosses the turnpike, which was built and in operation long before the construction of the railroad crossing it. At the point of crossing the railroad runs through a deep cut, over which there is a bridge, erected by the railroad company as a part of the turnpike for the accommodation of travel. This bill was filed by the appellants, as owner and lessee, respectively, of the land at the bridge crossing and of the lots abutting on the turnpike, to enjoin the construction of the electric passenger railway on it. The traction company did not propose to construct its road on the east side of the turnpike, on which the lots of the North Pennsylvania Railroad Company abut, but on the west side, beyond the middle of the way, and had obtained the consent of the owners of the fee on that side to do so. Except where the railroad crosses the turnpike, its face extends no further than to the center of the road. Though the appellees are styled traction companies, the court below re-

garded them as street railway companies in determining the questions before it, and on this appeal the appellants so treat them. Their charters are not before us, but it is conceded by counsel for appellants that whatever rights and franchises they possess were conferred by the general street railway act of May 14, 1889 (P. L. 211). It may be—as can fairly be gathered from the ninth paragraph of the answer of the defendants—that the rights and franchises which they are exercising were originally conferred upon a street railway company or companies, and passed to them as their successors. Be this as it may, we must, under the circumstances, regard the appellees as possessing and undertaking to exercise the rights and franchises of a street railway company.

By section 17 of the act of May 14, 1889 (P. L. 217), it is provided that: "Any passenger railway company incorporated under this act shall have, and is hereby granted, power by its officers and servants to ascertain and define such route as they may deem expedient, over, upon and along any turnpike or turnpikes, not however exceeding sufficient width for two tracks to be laid down on, over and along such turnpike or turnpikes, and thereupon, on, over and along such turnpike or turnpikes, to lay down, construct and establish a track or tracks for its use in the transaction of its business, and thereupon to use the same in its general business: provided, that before such passenger railway company shall enter upon and use any such turnpike or turnpikes in the laying of tracks and use of the same, it shall make compensation to the owner or owners thereof for such occupation and use of said turnpike or turnpikes, in the mode provided in section fourteen thereof." The right to occupy the turnpike having been given to the appellee, the compensation to which the turnpike company was entitled was evidently amicably adjusted, for the finding of the learned court was that the turnpike company had consented to the construction of the passenger railway on its road. But, as it is settled by Pennsylvania R. R. Co. v. Montgomery Co. Pass. Ry. Co., 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. Rep. 659, and Penna. R. R. Co. v. Greensburg, etc., Street Ry. Co., 176 Pa. 559, 35 Atl. 122, 36 L. R. A. 839, that the laying of railway tracks on a country road is an additional servitude on the fee, which cannot be imposed upon it against the will of the owner of the land, the appellants insist that the same rule should protect them as owners of land abutting on a turnpike which is occupied by a street railway company with its tracks. Assuming this to be true, the answer is that the statute gives the appellee the right to occupy the turnpike, and in occupying it the property of the appellants has not been affected. There is no evidence of any obstruction to plaintiffs' ingress and egress to and from their property, or of the slightest interference with their enjoyment of it. No additional servitude has been imposed upon their land, which extends only to the middle of the highway. The route of the

appellee along the turnpike is over the lands of others, who have consented to its location there. In the case of the occupation of a township road maintained by supervisors the rule goes no further than that while an injunction, if applied for in time, will issue at the instance of an abutting owner to protect his own land from an additional burden on it, it is none of his concern that his neighbors on the opposite side of the road consent to the use of their lands by a passenger railway company, so long as, from such use, no injury results to him. The protection by injunction to which each landowner is entitled is confined to his own property.

Though the appellants are landowners on each side of the turnpike where their railway crosses it, they are not at that point abutting landowners having a right to complain of the appellee's imposition of an additional servitude upon their land. The crossing of the turnpike by their tracks made the bridging of a deep cut necessary, and the bridge became a part of the highway; but the railroad company is not, at that crossing, "an abutting landowner to the passenger railway, as the plaintiff was in Penna. R. R. Co. v. Montgomery Co. Pass. Ry. Co., supra." Penna. R. R. Co. v. Greensburg, etc., Street Ry. Co., 176 Pa. 559, 35 Atl. 122, 36 L. R. A. 839. In view of the expressed readiness and willingness of the appellee "to so reconstruct and strengthen the said bridge as that it shall be amply safe for the transportation and carriage of the traffic of the respondent and its cars over and across the same," the only objection that the appellants could make to the use of the turnpike at that point disappears.

Under his findings of fact, the learned judge below properly concluded that the defendants were "lawfully engaged in the construction of their road." Even if they were not, the act of June 19, 1871 (P. L. 1360), is not intended for such a case as the appellants present, and cannot be invoked by them, for none of their rights or franchises are injured or invaded. The decree can well be affirmed upon the learned court's second conclusion of law: "Plaintiffs have no standing to object, as no part of their property is taken or encroached upon. Their ownership of the fee extends only to the middle of the turnpike, and defendants have the consent of the owners of the land on the opposite side, and also the township authorities and of the turnpike company, which gives them the rights claimed."

Appeal dismissed, and decree affirmed, at appellants' costs.

CHICAGO, B. & Q. R. CO. *v.* DOUGLAS COUNTY *et al.*

(*Supreme Court of Nebraska, June 19, 1901.*)

[95 N. W. Rep. 339.]

Section Road—Opening—Payment of Damages.

Before a section-line road can be opened and worked, the damages suffered by the owners whose lands are taken must be ascertained and paid.

Commissioners' Opinion. Department No. 3. Appeal from District Court, Douglas County; Scott, Judge.

"Not to be officially reported."

Action by the Chicago, Burlington & Quincy Railroad Company against the county of Douglas and others. Judgment for defendants, and plaintiff appeals. Reversed.

Greene, Breckenridge & Kinsler, for appellant.

H. H. Baldrige and G. W. Shields, for appellees.

DUFFIE, C. On the 2d day of March, 1889, a petition signed by John Weise and 25 other electors was filed with the county clerk of Douglas county, asking for the establishment of a road. The petition commences as follows: "To the Board of County Commissioners of Douglas County, Nebraska: We, the undersigned electors, residing within five miles of the following road proposed to be made, ask that a public road be made as follows: Commencing at the ¼ corner on the west side of Sec. 12, T. 14, R. 12 E., and running thence north one mile, more or less, to intersect section-line road, Sec. 1 and 2, T. 14, R. 12." On the 4th day of March following, Charles H. Howes was appointed a special commissioner to view and examine the expediency of locating said road according to the above petition, and who, according to the terms of the order, was to file his report on or before April 4, 1889. Nothing further appears to have been done in the matter until the 25th of February, 1890, when the following was entered in the road record: "C. H. Howes, the Commissioner appointed to view and examine the expediency of the location of said road, has reported in favor of the location thereof." A plat and the field notes of the survey follow. On the 26th of March, 1890, the county clerk gave notice through the Omaha World-Herald as follows: "Notice to landowners. Road Number 58 D. To All Whom It may Concern: The commissioners appointed to view a road, commencing at ¼ corner between Sec. 11 and 12, T. 14 N., R. 12 E., in Douglas precinct, Douglas county, Nebraska, running thence north on section line one mile, terminating at ¼ corner between Sec. 1 and 2, T. 14 N., R. 12 E., has reported in favor of the location thereof, and all claims for damages must be filed with the county clerk on or before noon of the 24th day of May, A. D. 1890, or said road will be located without reference thereto. P. O'Malley, County Clerk." On the 29th of November, 1890, the following, under head of "Resolutions," appears on the Commissioners' Record I, p. 482: "By Corrigan: That said road, known as 'Road 58 D.' be and is hereby located as per field notes and description on road record D, as per publication dated March 20, 1890, and no damages awarded for same. Ayes: Corrigan, O'Keeffe, Turner. Nays: Berlin. Adopted." Road Record D, p. 58, shows the following: "Nov. 29, 1890. The above road came up for final action this day, and, after viewing all the proceed-

ings heretofore taken, it is the opinion of this board that road known as 'Road Number 58' be located, and no damages paid on account of same." No further proceedings appear to have been had by said commissioners relating to said road until April 25, 1896, when the following appears on Commissioners' Record O, at page 877: "Resolved, that the county clerk be, and is hereby, instructed to advertise for bids for the grading of road 58 D, to a 6 per cent. grade, So. Mo. Pac. Ry., according to plans and specifications on file in the office of the county surveyor. Ayes: Hoctor, Kierstead, Stenberg, Williams, Mr. Chairman." On the 13th of June, 1896, a contract for the grading of said road was let to J. Ettinger. As appears from the Commissioners' Record, p. 53, the road in question crosses the track of the appellant, and on the 4th day of July, it filed its petition asking that the defendants, county of Douglas and the board of county commissioners, be enjoined from further prosecuting the work upon said road, or from interfering with that portion of the road within the limits of the right of way of appellant. An amended petition was filed on the 27th of August. A restraining order was issued. The appellee filed an answer on the 9th of July, 1896, and refiled the same May 21, 1897. The trial was had on the 20th of May, 1897, and judgment entered May 27, 1897, and the plaintiff's petition was dismissed. A motion for a new trial was made and overruled, and the plaintiff has taken an appeal to this court.

In the judgment dismissing the plaintiff's bill, the following finding was made by the court: "That the said road, from the opening and working of which the defendants sought to be enjoined herein, was and is a section-line road. But it appears by the recitals in the records of the proceeding by the board of county commissioners, in evidence, that the county board determined that the public good required the road in question should be opened; that notice of the location and establishment of said road was duly published and declared, and that due notice was given this plaintiff and all other claimants to present their claims for damages caused by the establishment of said road pursuant to the law in force at the time when the location and establishment of said road was declared by the board of county commissioners of Douglas county; that no claim for damages and no protest or remonstrance of any kind was filed by this plaintiff or any one else, within the time prescribed and limited by said notice, against the establishment of said road; that the subsequent action of these defendants in the grading and opening to public use the said section line road recognize, refer to, and are based upon said declaration and notice of the establishment of said road, and the notice then duly given to this plaintiff and all claimants to file their claim for damages."

The road in question is a section-line road, and could have been opened and worked without any preliminary steps, except the assessment of damages in favor of the owners whose

lands were taken or damaged thereby, and the perpetuation of such government corners as would be obliterated by its working and use. The board of county commissioners and the district court proceeded upon the theory that the owners whose lands were taken for the road should file their claims for damages for allowance by the board of commissioners, and that, failing to do so, the road might be opened and worked without reference thereto. In this they were mistaken. The precise point was before this court in Livingston v. Johnson County, 42 Neb. 277, 60 N. W. 555, and it was held that "the just compensation required to be made for taking private property for public use by section 21 of article 1 of the Constitution must, before such taking, be ascertained, and payment made accordingly, whether the appropriation of such property is by a municipal or other corporation." That case is decisive of the questions presented, and, following it, we recommend that the judgment of the district court be reversed, and the injunction prayed by the plaintiff allowed.

ALBERT and AMES, CC., concur.

Reversed, and the injunction prayed by the plaintiff allowed.

DENNIS v. MOBILE & M. RY. CO. *et al.* MOBILE & M. RY. CO. *et al.* v. DENNIS.

(*Supreme Court of Alabama, June 30, 1903.*)

[35 So. Rep. 30.]

Depot across Street—Injuries to Property—Remedies.

An obstruction of a street by the erection of a freight depot across it, diminishing the value of a boarding house thereon, by interfering with travel, does not work an irreparable injury to such house, but, being permanent, and there being no question of insolvency, a single action at law for damages furnishes full remedy, so that resort may not be had to equity by the house owner for abatement of a nuisance.

Same—Same—Eminent Domain—Damages—Injunction.

The building of a depot across a street 400 feet from a dwelling, requiring persons going between the dwelling and a point beyond the depot to go around it by other streets, is not such a taking of, or proximate injury to, the dwelling as entitles its owner to compensation or injunctive process under the constitutional provisions relating to eminent domain.

Plea to Bill without Equity.

The sufficiency of a plea to a bill which is without equity is not determinable.

Appeals from Montgomery City Court, Montgomery County; A. D. Sayre, Judge.

Suit by J. M. Dennis against the Mobile & Montgomery Railway Company and another. From the decree both parties appeal. Reversed in part.

The defendants filed three pleas. By the first two of these pleas the respondents set up that complainant was estopped from maintaining the present suit, and in the third plea the

respondents set up that the construction of a freight depot across Lee street was under rights granted by ordinance passed by the city of Montgomery, and that said ordinance was likewise ratified and confirmed by an act of the Legislature, and that, therefore, such structure was legal, and that neither the complainant nor the court had power to abate the same. To each of these pleas the plaintiff filed separate exceptions. The respondents demurred to the bill upon several grounds, among which were the following: "(1) The bill fails to show when complainant became the owner of the property on Lee street, nor of facts set forth in the bill showing how or in what manner the erection of said freight depot injured or damaged, or will injure or damage, the property of complainant, or his rights in the premises. (2) The bill joins with complainant any other citizen having the same right as complainant, and it makes no case which entitles any other person than complainant to join in his said bill. (3) Complainant does not show by his bill that he suffers any injury other than that common to the public and other persons owning property on Lee street. (4) Complainant does not show by his bill any special injury to himself apart from that common to the public generally. (5) That complainant does not show in and by his bill that any of the peculiar rights pertaining to him as an abutting proprietor on the street have been in any way injured or impaired, nor does complainant show that his easement of access, air, and light in Lee street has been substantially impaired or injured, or that any substantial or practical injury has been done him in these respects by the erection of the freight depot, and the use of a part of Lee street, complained of in the bill. (6) The bill shows that the elements of the alleged injury and damage to complainant are remote and speculative, and furnish no ground of complaint. (7) The bill shows that the elements of the alleged injury and damage to complainant are remote and speculative, and furnish no ground of complaint, and do not furnish grounds for granting the relief prayed by complainant, or any other relief that can be afforded him under the prayer for general relief. (8) Because upon the facts stated by the bill it does not appear that any property of complainant's has been taken, damaged, destroyed, or injured by the erection of said freight depot, or the use of said part of Lee street, as complained of in the bill." On the submission of the case upon the demurrers to the bill and exceptions to the pleas the chancellor rendered a decree overruling the demurrers and sustaining the exceptions to the first and second pleas and overruling the exception to the third plea. From this decree there were cross-appeals.

O. C. Maner and A. L. Tyson, for Dennis.

J. M. Falkner and Chas. P. Jones, for railway company.

SHARPE, J. In April, 1896, the city council of Montgomery adopted an ordinance embodying an agreement with

the defendants wherein it was stipulated, among other things, that the defendant the Mobile & Montgomery Railroad Company should erect a freight station building not less than 535 feet long and two stories high on a strip of land which extended across what had to that time been a part of Lee street at or near the north end of that street, and also to erect on the north side of the freight building, and parallel therewith, a passenger depot building 309 feet in length, and to maintain a private street not less than 35 feet wide along the south side of the freight building, so as to intersect an alley at that building's east end, and a street at its west end, and also to maintain a private street extending past and between the two buildings; and it was further stipulated that in consideration of those and other specified undertakings Lee street should terminate where it intersects the property of the Mobile & Montgomery Railroad Company, and that the portion of it extending northward beyond that point of intersection including the site of the proposed freight building should be discontinued and abolished as a street. The foregoing and some other statements to be herein made are condensed from the amended bill, including exhibits thereto, which comprise the ordinance referred to and maps of the locality. Words we use to indicate directions are to be understood as only approximately correct.

The bill alleges, in substance, that one or the other of defendants has caused to be erected a magnificent and imposing structure along Water street immediately at the head of Lee street along the Alabama river, known as the "Union Depot," and that one or the other of the defendants has caused to be built a two-story freight warehouse across Lee street, and that these buildings are controlled and operated by the defendant the Louisville & Nashville Railroad Company. The map shows this Union Depot building occupied the site designated for the passenger depot in the ordinances mentioned, and that the freight warehouse is where, according to the ordinances, the freight building was to be. The bill further alleges, in substance, that the city council had no power to abolish Lee street, or to authorize the maintenance of the freight building or the standing of cars in that part of the street, and that the freight building prevents Lee street from being used as a means of connection and travel from any part of the city to the Union Depot, and that complainant owns a lot which fronts on the west side of Lee street. We quote from the bill that this lot is "situated about 600 feet from said Union Depot, and is located in such manner as to make it very valuable for the purpose of a modern hotel and retail stores, and that the house now on said lot is used as a boarding house for the accommodation of the traveling public as well as the people residing in the city, and that by reason of said freight depot destroying the access on Lee street between the Union Depot and the property of complainant

travel is diverted from Lee street to the other streets, and, as a result thereof, complainant's property is irreparably damaged, and will never be valuable for the purposes above stated as long as said depot remains across said street, and his boarding house is now damaged in that a great portion of the traveling patronage of boarding houses is diverted to other streets and to other boarding houses"; and "that the loss and injury to the orator in diminishing the value of his property facing and abutting on and along said street cannot be estimated in money, nor adequately compensated for by pecuniary damages, and that such occupation and appropriation by said railroad companies of said street is a daily and continuing nuisance of special and particular injury to your orator beyond the injury which the public generally has sustained thereby, and now greatly injures orator, and will continue to be more injurious and damaging to him in the near future; that said structure, as well as closing up Lee street, greatly impairs not only your orator's personal right to use and enjoy the street, but the right of the general public as well to use and enjoy the same." The bill also alleges that the freight warehouse was built "without orator's consent, and without condemning or otherwise assessing the damages he has sustained," and that it is a "private nuisance, as well as an invasion of the vested rights of orator and the public generally." The prayer for relief is, in substance, that defendants be enjoined from keeping in possession the part of Lee street now closed up by the warehouse, and from standing cars or locomotives on or near that street, and from making other use of that street than what is reasonable in moving cars and engines, and that they be required to remove the freight depot from across the street, and to abate the nuisance occasioned thereby, and for general relief.

The jurisdiction which exists in equity for the restraint of public nuisances at the suit of a private individual is not original, but is supplementary to remedies at law. It is exercised only where the individual has a legal right and is without adequate remedy for its enforcement. Hence a bill filed by a private individual for such purpose must not only show the complainant will sustain injury distinct from that he will suffer in common with other members of the public, such as would furnish the basis for an action at law, but it must go further, and show that the injury from the nuisance will be irreparable, or will be such that complete compensation therefore cannot be obtained in a single action at law. Wood on Nuisances, § 820; Pom. Equity Jr. §§ 1347, 1349; Elliott on Roads and Streets, § 665; 14 Encyc. Pl. and Pr. 1122 et seq.; 1 High on Inj. § 739. This principle also inheres in the law relating to private nuisances. Rouse v. Martin, 75 Ala. 510, 51 Am. Rep. 463; Nininger v. Norwood, 72 Ala. 277, 47 Am. Rep. 412; Pom. Eq. Jr. § 1350. The injury will be considered irreparable where the resulting damage will be in-

capable of being measured by a pecuniary standard, and generally where, without assistance in equity, the injured party must suffer invasion of his substantial rights without compensation. Elliott on Roads and Streets, § 665. And there is inadequacy of legal remedy when reparation, if sought in the law forum, would involve a multiplicity of suits by the same plaintiff (Nininger v. Norwood, supra; Pom. Eq. Jr. § 243); and also where a judgment, if obtained, would be uncollectible (High on Inj. § 717). The averment of a mere conclusion as to such inadequacy or as to the irreparable character of the injury, without the averment of facts to support the conclusion, is insufficient. Kellar v. Bullington, 101 Ala. 267, 14 South. 466; Bowling v. Crook, 104 Ala. 130, 16 South. 131. For an injury to real property of a permanent character, without other special damage, the depreciation of the market value of the land furnishes the measure of damages, and such damages are in a case proper in other respects recoverable in a single action at law. H. A. & B. R. R. Co. v. Matthews, 99 Ala. 24, 10 South. 267, 14 L. R. A. 462; Wood on Nuisances, 869; 3 Sedgwick on Damages (8th Ed.) 465, 476; Nashville v. Comar, 88 Tenn. 415, 12 S. W. 1027, 7 L. R. A. 465; Ottenot v. N., etc., R. R. Co., 119 N. Y. 603, 23 N. E. 169.

The averments of the bill concerning the adaptation of complainant's property for hotel and boarding house purposes, and the alleged diversion of patronage from the house, go no further than to show an impairment of the property's value as resulting from the hindrance of a particular use. They raise no question as to a loss of profits of business, and do not show even that the complainant is conducting the boarding house. Besides an interference with rights of travel common to him and the general public, the alleged diminution in the property value by reason of the situation of the freight warehouse constitutes the sole basis of complainant's claim of injury.

If it be assumed that the city council was without power to authorize the erection of the warehouse on the site it occupies, and that the same forms an obstruction in Lee street, and a nuisance, public or private, causing actionable injury to complainant's property, yet, the obstruction being permanent, and no insolvency of defendants being shown, a single action at law for damages would furnish a full remedy for such injury, and hence a resort to equity for the mere purpose of abating a nuisance is unwarranted. This case is unlike that of First National Bank v. Tyson, 133 Ala. 459, 32 South. 144, 59 L. R. A. 399, 91 Am. St. Rep. 46, wherein the defendant in the bill was enjoined from projecting columns of its building into the sidewalk so as to obstruct the light, air, and view about the entrance of an adjoining building owned by the complainant in that suit. It is also unlike Douglass v. City Council of Montgomery (Ala.) 24 South. 745, where, at the suit of one held to be an adjacent proprietor

entitled to have view of and light and recreation from grounds dedicated to public use as a park, a bill was entertained to prevent the city from diverting the park to another use. That which will deprive of light, air, or view about a building in the manner complained of in these two last-mentioned cases may or may not impair the value of a building thereby affected; but it may also produce and threaten damage in the form of continuous or recurrent discomfort, which would be incapable of measurement by any pecuniary standard, and which, therefore, could not be recovered for in an action at law. In Webb v. City of Demopolis, 95 Ala. 116, 13 South. 289, 21 L. R. A. 62, the suit was brought by the municipality, and not, as here, by a private individual. Complainant's lot, being, according to averments of the bill, 600 feet from the Union Depot, is shown by the map exhibited in the bill to be more than 400 feet from the warehouse, which distance locates the lot southward of the warehouse, and southward of the point where Tallapoosa street, running east and west, crosses at right angles Lee street and the streets which run next to and parallel with Lee on the east side and those which run next to and parallel with Lee on its west side. Thus the bill discloses that over the space between complainant's lot and the Union Depot and the warehouse access to and egress from Lee street and complainant's lot is afforded not only by way of the private streets, which the defendants agreed with the city council to keep open along the warehouse, but by way of Tallapoosa street and its connections. Such being the situation of the lot, condemnation of it for purposes of the freight house would not have been authorized by our statutes relating to the exercise of the right of eminent domain (New and Old Decatur R. Co. v. Karcher, 112 Ala. 676, 21 South. 825), nor has there been had or threatened such taking of, or proximate injury to, the lot as entitles complainant to compensation or injunctive process under the constitutional provisions relating to eminent domain (Lewis on Em. Dom. § 134; Buhl v. Fort St. Union Depot Co. [Mich.] 5 N. W. 829, 23 L R. A. 392; Chicago v. Union Bldg. Ass'n, 102 Ill. 379, 40 Am. Rep. 598; East St. Louis v. O'Flynn, 119 Ill. 200, 10 N. E. 395, 59 Am. Rep. 795; McGee's App., 114 Pa. 477, 8 Atl. 237; Glasgow v. St. Louis, 107 Mo. 204, 17 S. W. 743. The bill lacks equity, and was subject to the demurrer. The sufficiency of a plea to a bill which is without equity is not determinable.

The decree overruling the demurrer to the bill will be reversed on the appeal of defendants, and, in so far as a review thereof is sought on complainant's appeal, the decree will be affirmed.

TYSON and DOWDELL, JJ., not sitting.

SOUTHERN PACIFIC RAILROAD COMPANY *et al.*, Appts., *v.* UNITED STATES OF AMERICA.

(*Argued March 9, 10, 1903. Decided April 6, 1903.*)

[23 Sup. Ct. Rep. 567.]

Railroad Land Grants—Excepted Lands.

Land within the 20-mile limit of the grant to the Texas Pacific Railroad Company by the act of March 3, 1871, chap. 122, § 91 (16 Stat. at L. 573), was excepted from the grant, by § 23 of that act, to the Southern Pacific Railroad Company, by the proviso therein that such section "shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company or any other railroad company."

Same—Forfeiture—Indemnity Lands.

Indemnity selections cannot be made by the Southern Pacific Railroad Company from lands within the indemnity limits of the grant to it by the act of March 3, 1871, chap. 122, § 23 (16 Stat. at L. 573), which are also within the forfeited place limits of the grant to the Texas Pacific Railroad Company by § 9 of the same act.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the Northern District of California in favor of the United States in a suit to quiet title. Affirmed.

See same case below, 48 C. C. A. 712, 109 Fed. 913.

The facts are stated in the opinion.

Messrs. Maxwell Evarts and L. E. Payson for appellants.

Mr. Joseph H. Call for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court:

This is a bill to quiet title, brought by the United States against the plaintiff in error. It comes here by appeal from a decree of the United States circuit court of appeals (48 C. C. A. 712, 109 Fed. 913), affirming a decree of the circuit court (94 Fed. 427), in favor of the United States. The United States claims under forfeiture of a grant made to the Texas Pacific Railroad Company in its charter, and the Southern Pacific Railroad Company under words in the same charter which are construed to make an incidental grant to it. The principal land in controversy is land within the place limits of the Southern Pacific under the said grant, and within the 20-mile limit of the Texas Pacific, being land situated where the road of the former company and the contemplated track of the Texas Pacific met at Yuma on the Colorado river in the southeastern corner of California. The United States contends that this land was excepted from the Southern Pacific grant.

The charter is the act of March 3, 1871, chap. 122 (16 Stat. at L. 573). By § 9 it grants to the Texas Pacific by words in the present tense "ten alternate sections of land per mile on each side of said railroad in California, where the same

shall not have been sold, reserved, or otherwise disposed of by the United States," etc. By § 12, "said company, within two years after the passage of this act, shall designate the general route of its said road, as near as may be, and shall file a map of the same in the Department of the Interior; and when the map is so filed, the Secretary of the Interior, immediately thereafter, shall cause the lands within 40 miles on each side of said designated route within the territories, and 20 miles within the state of California, to be withdrawn from pre-emption, private entry, and sale." The Texas Pacific filed its map of general route in August, 1871, and in October, 1871, the Secretary of the Interior withdrew the odd sections according to the statute, including the land in question.

By § 23 of this same charter, for the purpose of connecting the Texas Pacific Railroad with San Francisco, the Southern Pacific was authorized to construct a line to the Texas Pacific road at or near the Colorado river, "with the same rights, grants, and privileges, and subject to the same limitations," etc., as in the act of July 27, 1866, "Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company." It was decided in United States v. Colton Marble & Lime Co., 146 U. S. 615, 36 L. Ed. 1104, 13 Sup. Ct. Rep. 163, that this proviso excluded the indemnity lands of the Atlantic & Pacific road, and that the Southern Pacific took nothing in them, even after a forfeiture of the Atlantic & Pacific grant. But it is said that the Atlantic & Pacific had filed a definite location, and it is contended on several grounds that there is not a similar exception in this case.

In the first place, it is denied that the Texas Pacific is included under the words last quoted: "or any other railroad company." But we think it too plain for extended argument that it is included by those words. It was called into being, and was an "other railroad" at the moment when the proviso took effect. In fact, it was the only other railroad, so far as has been suggested to us, to which the words could apply. It received a grant for its main line, while that to the Southern Pacific was for a branch. By the contemplated junction of the latter with the former there would arise a conflict for which it was proper to provide, and natural to provide as the statute did.

Next, it is said that the Texas Pacific had no prospective rights at the moment when the act was passed, and that is said to be the moment when her priorities were fixed. We cannot take the words of the proviso so narrowly. The Atlantic & Pacific had not fixed its definite location when the act was passed, and yet in the decision which we have cited its indemnity lands were held excepted from the Southern Pacific grant. See United States v. Southern P. R. Co., 146

U. S. 570, 573, 36 L. Ed. 1091, 1093, 13 Sup. Ct. Rep. 152, 57 Am. & Eng. R. Cas. 316; Southern P. R. Co. v. United States, 183 U. S. 519, 522, 46 L. Ed. 307, 22 Sup. Ct. Rep. 154. As to the phrase "prospective rights," no doubt it is inartificial. The adjective changes the very nature of the substantive. A prospective right is not yet a right. It is only an expectation having a certain intensity of reasonableness. But it is plain, for instance, that when the lands were withdrawn along the general route of the Texas Pacific under § 12, that road had a prospective right to the whole of its place lands which the Southern Pacific could not affect by anything which it might do later. The statute is not governed by the ordinary rule as to contemporaneous grants. The Southern Pacific was not intended or allowed to interfere with what the Texas Pacific might take.

The strength of the appellant's case is in a somewhat attenuated line of reasoning. The Texas Pacific act refers to the act of July 27, 1866, for the rights conferred on the Southern Pacific. 14 Stat. at L. 292, chap. 278. The last-mentioned statute is an act incorporating the Atlantic & Pacific Railroad Company. By § 18 the Southern Pacific is authorized to connect with the Atlantic & Pacific, and is to have similar grants of land with that company. By § 6 there is a provision for the withdrawal of lands along the general route of the Atlantic & Pacific somewhat like that which has been mentioned as contained in § 12 of the Texas Pacific charter. It may be argued that it is implied by § 18 of the Atlantic & Pacific charter that there is to be a similar withdrawal of the land there granted to the Southern Pacific, and that this implied provision is carried over by a further implication to the grant to the Southern Pacific in § 23 of the Texas Pacific charter. The Southern Pacific filed the location of its general route in April, 1871, before the filing by the Texas Pacific, and, as the grant to the Texas Pacific by § 9 was only of lands not sold, reserved, or otherwise disposed of by the United States, it may be said that the Southern Pacific has got a preference, much as the Texas Pacific would have got one had the Southern Pacific done nothing before the Texas Pacific filed the location of its general route.

It must be admitted that if this argument is correct in its premises it puts a good deal of a strain on the proviso in favor of the prospective rights of the Texas Pacific. For at the time when the Southen Pacific filed the location of its general route the prospective rights of the Texas Pacific were not determined otherwise than by its incorporation and the indications and promises in its charter. Nevertheless, we are of opinion that the argument cannot prevail. It is only by a stretch that the provision for withdrawal of lands along the general route of the Atlantic & Pacific could be extended to the grant to the Southern Pacific in the Texas Pacific charter, and if it be so extended it is such a remote and probably unconsidered consequence of a reference to a reference that it

cannot be allowed to outweigh the plain intent of the proviso in § 23, reinforced by the express arrangement for withdrawal in favor of the Texas Pacific in § 9. Assuming that proviso to refer to the Texas Pacific, it indicates a plain intent to except from the grant to the Southern Pacific the land that in the natural course of events would be covered by the location of the former road. The conflict of interest naturally would be limited to the point of connection at Yuma. There might be no other. As to that land, the plain object of the proviso was to avoid a race of diligence by giving priority to the main line of the chartered road over the connecting branch. Our decision is in accord with the settled construction and practice in the Department of the Interior following a ruling of the late Mr. Justice Lamar when Secretary of the Interior. Texas P. R. Co. and Southern P. R. Co., 4 Land Dec. 215.

The Texas Pacific grant was declared forfeited by the act of February 28, 1885, chap. 265 (23 Stat. at L. 337), and this forfeiture inured to the benefit of the United States. United States v. Southern P. R. Co., 146 U. S. 570, 36 L. Ed. 1091, 13 Sup. Ct. Rep. 152. It is argued further, however, that if the Southern Pacific did not get the lands in question under its primary grant, it may take a part of them as indemnity lands. It is said that the company has a right to take them for that purpose if the status of the lands at the time of selection permits it. Ryan v. Central P. R. Co., 99 U. S. 382, 25 L. Ed. 305. That contention seems to be disposed of by Southern P. R. Co. v. United States, 168 U. S. 1, 47, 66, 42 L. Ed. 355, 376, 382, 18 Sup. Ct. Rep. 18, and the practice of the Land Department for many years has been inconsistent with it. Southern P. R. Co. v. Moore, 11 Land Dec. 534; Moore v. Kellogg, 17 Land Dec. 391; Smead v. Southern P. R. Co., 29 Land Dec. 135. When it is decided that the company got no title to the land within its 20-mile limit, it would be contrary to the intimations of the cases to allow it to take the adjoining strip outside under a claim of indemnity. See Bardon v. Northern P. R. Co., 145 U. S. 535, 545, 36 L. Ed. 806, 811, 12 Sup. Ct. Rep. 856; Clark v. Herington, 186 U. S. 206, 46 L. Ed. 1128, 22 Sup. Ct. Rep. 872. It is not clear that the language of the statute does not forbid it. The indemnity to the Atlantic & Pacific, by § 3 of its charter adopted for the Southern Pacific by § 18, is to be other lands "in alternate sections, and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections, and not including the reserved numbers." It might be argued that the last-quoted words dispose of the matter. Without going into further reasons for our decision, we are of opinion that the decree appealed from was right. We deal only with the questions argued in this court.

Decree affirmed.

Mr. Justice Brewer and Mr. Justice Day took no part in the decision of this case.

CITY OF WILLIAMSPORT *v.* WILLIAMSPORT PASS. RY. CO.

(*Supreme Court of Pennsylvania, May 4, 1903.*)

[55 Atl. Rep. 836.]

Street Railroads—Paving.

A charter of a street railway company provided that in constructing its road it should conform to the grades used in the several streets traversed by it, and keep the same in good repair at the expense of the railway company: *held* that, where it had done so, it could not be required to pay for repaving them with a new kind of pavement adopted by the city.

Appeal from Court of Common Pleas, Lycoming County.

Action by the city of Williamsport against the Williamsport Passenger Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

John J. Reardon and F. P. Cummings, City Sol., for appellant.

C. La Rue Munson, Seth T. McCormick, and Addison Candor, for appellee.

BROWN, J. The Williamsport Passenger Railway Company was incorporated by act of April 15, 1863 (P. L. [1864] 1080). It was authorized to construct a railway in the borough of Williamsport, now the city of Williamsport, and to lay its tracks on the streets of the borough. At that time there was no general act relating to the incorporation of street railways, and the powers, privileges, duties, and obligations of each particular company were defined in the act creating it. The right of this company to use the streets of the town was absolute, and depended upon no municipal consent. The only conditions annexed to the power given it to occupy the streets were "that no freight or burden trains, or locomotives, shall be permitted to pass over the same," and "that said company, in constructing said road, shall conform to the grades now used, or hereafter to be by law used, of the several streets, roads and avenues traversed by said road, and keep the same in good repair, at the proper expense of said company." In the construction of its railway the appellee occupied, among other streets, East Third, West Fourth, and Basin. Until the present controversy arose between the railway company and the city of Williamsport, East Third street, from the curb line to the railroad tracks, was paved with what is known as "Telford macadam," and the appellee had the same kind of pavement between its tracks. West Fourth street was paved with a wooden block pavement, except the space between the tracks of the railway company, which was paved with mountain stone, laid on a broken stone foundation; and Basin street had not been paved at all, except between the tracks of the railway company, where, as

on West Fourth street, it was paved with mountain stone, laid on a broken stone foundation. In the summer of 1900 the city of Williamsport repaved East Third street from the curb line to the railway tracks with the best quality of vitrified brick laid on a hydraulic cement foundation, and notified the defendant to put in suitable order that part of the street occupied by the railway, and that the engineering department of the city would, upon application, furnish it with the proper grade. This grade was furnished by the city. In order to adjust its tracks to the grade, the macadam pavement between the tracks was removed by the defendant company, the tracks were brought to grade, and the company then proceeded to relay the space between its tracks with a good quality of macadam, which, when completed, as shown by the city's own evidence, would have been done "as well as that kind of work could be done." When the company had completed a portion of the repaving between its tracks with macadam in the manner just stated, the city gave notice to it to stop repaving in that manner, removed the macadam which it had placed between the tracks, and replaced the same with vitrified bricks on a concrete foundation, in conformity to the pavement from curb to curb. During the same summer the city paved Basin street with vitrified brick, and repaved West Fourth street with sheet asphaltum, laid on a concrete foundation. What occurred between the city and the railway company on East Third street was substantially what took place as to these two other streets; and, after the city had repaved the space between the tracks on the three streets named, this suit was brought against the railway company to recover the cost of doing so.

The appellee raises no question as to its duty, made known to it by the express words of its charter, to keep "in good repair" those portions of the streets occupied by its railroad; but it does insist that, as its declared duty is only to keep them in "good repair," it cannot be required to repave them with a new and different kind of pavement adopted by the city. The streets of the city are occupied by the railway company, not with its consent, but without it. The Legislature, which was supreme in its authority over the streets of the borough of Williamsport, gave to this passenger railway company the right to occupy them. In the grant of that right, and nowhere else, must be found what conditions, if any, are imposed upon it. No power was delegated to the municipality to make conditions, but the Legislature, reserving that power to itself, imposed, as the only conditions, those already stated; and the duty of the railway company is, therefore, manifestly only to keep "in good repair" those portions of the streets occupied by its tracks.

There is no finding that the appellee had failed to keep the space between its tracks in good repair. On the contrary, the findings are that on East Third street the space between

the tracks had been paved with Telford macadam paving, and that the railway company was about to repave between its tracks, and to make a paving therein "with macadam of good condition, and as well as it could be done, and equal to the pavement which had been previously laid on that portion of the street," when it was prevented from completing said repairs by the police force of the city of Williamsport, acting under the direction of the mayor; that there was no evidence in the case that the portion of the street between the tracks on Basin street was out of repair, or not in suitable condition; that there had been a pavement on West Fourth street between the tracks of the defendant, and that it was in better condition than the remainder of the street, and that when the railway company was about to repair the said space between the tracks by replacing the kind of pavement thereon in a good and substantial condition it was prevented from doing so by the police force of the city of Williamsport, under the direction of its mayor. The city, however, was not satisfied that the space between the tracks, as maintained up to the year 1900, should be kept "in good repair" by the railway company, but, when it determined to pave one of the streets and repave the other two, it assumed the right to shift from itself to the appellee the burden of paving and repaving those portions of the streets occupied by the railway. As the borough of Williamsport had no right, when the railway company first went upon its streets, to confront it with any conditions, the city of Williamsport, its successor, has no right to do so now by imposing any burden upon it. The city's sole right is to ask that the railway company be compelled to perform the duty which the Legislature said should rest upon it. Under the findings of the learned court, it has not failed to perform that duty. The measure of its duty, as read in the act, is to keep its portion of the streets "in good repair." The measure that the appellant would mete out to it is not only to repair, but to repave, by substituting for an old pavement that had been kept in good repair a new one, adopted by the city. By this latter measure the duty of the appellee is not to be gauged, and the judgment of the court below was rightly that it had not been in default. Its duty to repair is a continuing one, and hereafter will be to keep in repair the new pavement laid by the city.

There is nothing in the charter of the railway company requiring it to put the streets in repair. The duty is simply to keep in repair. In Williamsport, to Use, etc., v. Williamsport Pass. Ry. Co., 203 Pa. 1, 52 Atl. 51, the judgment of the court below was affirmed on the opinion refusing a new trial, in which it was very properly said: "It must be borne in mind that under the charter of the defendant it is not liable for paving or repaving streets occupied by its tracks, or any portion of them, but only for keeping the streets in repair." Philadelphia v. Ridge Ave. Pass. Ry. Co., 143 Pa.

444, 22 Atl. 695, and Philadelphia v. Thirteenth and Fifteenth Streets Ry. Co., 169 Pa. 269, 33 Atl. 126, are cited in support of the contention of the appellant that the appellee's duty to repair includes the duty to replace an old pavement with a new and improved one; but of these two cases we said in Philadelphia v. Hestonville, etc., R. R. Co., 177 Pa. 371, 35 Atl. 718: "In neither of these cases was the question involved. In the latter case the company was subject to the ordinance of 1857, which expressly required it 'to be at the cost and expense of maintaining, paving, and repairing' the streets occupied by it. The same is true of the former, or Ridge Ave. Case. The Girard College Pass. Ry. Co. was by the act of April 15, 1858 [P. L. 300], made subject to the ordinance of 1857. It was merged into the Ridge Ave. Co. and this provision became a part of the law of the consolidated company, and was held to be binding upon it. The question was presented in Norristown v. Norristown Pass. Ry. Co., 148 Pa. 87 [23 Atl. 1060], and decided in favor of the position of the appellant by the affirmance of the judgment appealed from in a short per curiam." In Reading v. United Traction Company, 202 Pa. 571, 52 Atl. 106—another case upon which the appellant seems to place great reliance—the street railway company had placed its tracks upon streets of a city with the municipal consent, and on condition that it pave its right of way, and keep the same in good repair, or that it pave the said right of way in a specified manner superior to the then construction of the streets, and keep the said paving in good repair. The question raised on this appeal was settled in favor of the appellee in Philadelphia v. Hestonville, etc., R. R. Co., supra, and further discussion of it is not now needed.

Judgment affirmed.

GREGG v. METROPOLITAN TRUST CO. *et al.*

(Circuit Court of Appeals, Sixth Circuit, July 18, 1903.)

[124 Fed. Rep. 721.]

Railroads—Foreclosure—Preference—Diversion of Earnings—Reimbursement.

The gross earnings of a railroad company are reimbursed for a diversion to the benefit of mortgagees, so that the current operating expense creditors are not entitled, on account of the diversion, to a preference from the proceeds of the corpus of the mortgaged property when sold on foreclosure, where the company borrows money on its notes, secured by its mortgage bonds, and the proceeds are passed to its general credit in the banks making the discount, and then checked out to pay current expenses, the money not being borrowed to pay any particular debts.

Same—Current Income—Sale of Mileage.

Where a railroad company sells to brokers and others mileage in bulk, and at a discount, over other railroads, for whom it acts in issuing the same, the proceeds not accounted for to them, but used

for its own purposes, are not part of its current income, as respects the rights of its current operating expense creditors and mortgagees relative to the questions of diversion from and reimbursement of its gross earnings.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

This is a second appeal. In the former case we decided that preferential six months' claimants had no preference over mortgagees in the proceeds of the corpus of the mortgaged railroad property, unless there had been a diversion of the current earnings which the mortgagees should equitably restore, and that the burden was upon such claimants to show such diversion. We reversed the former decree, denying a preference to Greggs and certain other claimants who had established debts entitled to preference of payment out of current income, upon the ground that the master, in reporting that there had been no diversion of income during the six months preceding the receivership, had erred in treating car trust debts as debts of the income, and properly payable out of current income, and remanded the case for a re-reference, with leave to take further evidence. Gregg v. Mercantile Trust Co., 109 Fed. 220, 48 C. C. A. 318. The master has again reported that there was no diversion for which the mortgagees could be made accountable. Exceptions by appellant were overruled, and preference again denied to the appellant. From this decree an appeal has been prosecuted.

Harlan Cleveland, for appellant.
Morrison R. Waite and Herbert Parsons, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

There is no surplus income arising from the operation of the receiver applicable to the payment of this or any other debt, nor is it claimed that there was any diversion of income by the receiver, by which the mortgage creditor profited, upon which to found an equity against the bondholders. Burnham v. Bowen, 111 U. S. 776, 782, 4 Sup. Ct. 675, 28 L. Ed. 596; International Trust Co. v. Townsend Brick Co., 95 Fed. 850, 37 C. C. A. 396, 405. The proceeds of the sale of the mortgaged property are insufficient to pay the mortgage debts, and, if the appellant is to be paid at all, he must be paid at the expense of the mortgage creditors out of the proceeds of the sale of the mortgaged property. Before the mortgage creditors can be displaced in respect of the corpus of the property, it must appear that the current earnings which accrued during the period shortly before the receivership were not applied to the payment of current operating expenses incurred within the same period, but were used in the permanent improvement of the property mortgaged, or

for the payment of the mortgage debt, and that, as a consequence of this misapplication, current expense creditors have been disappointed. This is the well-settled rule in respect of the payment of these so-called preferential debts of the income. Central Trust Co. v. East Tenn., V. & G. Ry. Co., 80 Fed. 624, 26 C. C. A. 30; International Trust Co. v. Townsend Brick Co., 95 Fed. 850, 37 C. C. A. 396; Rhode Island Locomotive Works v. Continental Trust Co., 108 Fed. 5, 47 C. C. A. 147. This was the law as declared in the opinion upon the former appeal and as such is the law of the case. Gregg v. Mercantile Trust Co., 109 Fed. 220, 227, 48 C. C. A. 318.

For the sole purpose of permitting certain creditors of the income to establish, if they could, that there had been a diversion of current earnings by which the mortgagee had profited, and the extent of such diversion, we remanded this case, that additional evidence might be heard by the special master, and a report made. Upon this second reference the master reported that during the six months next preceding the appointment of a receiver claims aggregating $99,215.49 had been paid by the railroad company, which had inured to the benefit of the mortgage creditors. The items were as follows:

Car Trust notes	$88,209 31
Interest on bonds	5,504 53
Sidings	3,045 45
Land purchased	2,257 20
	$99,215 49

The appellant excepted, because he did not report two other items, which he claimed were of like character, viz.:

For car couplers to replace couplers in use, to comply with act of Congress	$2,712 54
Expenditure on Union Depot viaduct	442 44

The master did not report the aggregate earnings during that period, and it is not possible, from the report alone, to know whether the gross current earnings of the company were sufficient, if properly applied, to have paid the current operating expenses, and leave a net income which was sufficient to have authorized the expenditure for permanent improvements and equipment and the payment of interest upon the mortgage debt shown to have been made during that period. But the master also reported that during the same period of time the company received from sources other than current earnings the following amounts:

Money borrowed	$127,781 25
Money collected from sale of mileage books	98,712 54
Old earnings collected (not current)	2,148 47
	$228,642 26

But, if it assumed that the gross earnings were insufficient

to pay current operating expenses and leave a surplus which might be properly applied to the permanent improvement of the property and interest upon the mortgage debt, than the master has reported that gross earnings were more than reimbursed by the money derived from other sources. In Central Trust Co. v. East Tenn., V. & G. R., 80 Fed. 624, 26 C. C. A. 30, 32, it was shown that during the period covered by the creation of the preferential claims under consideration the net earnings were insufficient to justify the payment of interest on the mortgage debts and to make certain improvements which had been made. In determining whether a case had thereby been made for compelling a restoration by the mortgagees, this court said:

"But it is also shown that during the same period money was borrowed on open account more than sufficient to equal the diversion complained of, which went into a common treasury, from which operating expenses, preferential claims, interest, and improvements were paid, without any definite showing as to whether the borrowed money was applied to the payment of interest and improvements or to current income debts. Under this system of bookkeeping, the addition of borrowed money to the income arising from operation showed a substantial surplus after payment of the great mass of income debts, and all disbursements on account of interest upon the two mortgages foreclosed, as well as upon improvements in the roadway. Prior to the period covered by the maturity of appellant's claims, there was a surplus of gross earnings over all operating expenses; but it cannot be contended that the company was under any obligation of future creditors to accumulate a surplus to meet possible deficiencies in the income to meet future income debts, or that it was improper to apply such surplus in payment of interest. St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. Ry. Co., 125 U. S. 658-675, 8 Sup. Ct. 1011, 31 L. Ed. 832. Whatever diversion there may have been of income to payment of debts or liabilities not properly debts of income, seems to have been more than reimbursed by the money borrowed. The burden is upon complainants to show that there has been a misappropriation of earnings to the improvement of the mortgaged property, or to the payment of interest, before the mortgagees can be justly called upon to reimburse the fund applicable to debts of the income in consequence of such diversion. If interest was paid or improvements made out of borrowed money, then there was no diversion; or, if made out of gross earnings, and the latter was reimbursed by borrowed money, the diversion was made good. The abstracts showing income from all sources and disbursements upon all accounts are somewhat complicated, in consequence of the mode of bookkeeping adopted. The commissioner and court below concurred in reporting that

here was no diversion shown. In the absence of the very cogent evidence of mistake of fact, or of some error of law, the finding of fact by the commissioner must be accepted as final. Emil Kiewert Co. v. Juneau, 78 Fed. 708, 24 C. C. A. 294; Kimberly v. Arms, 129 U. S. 512–524, 9 Sup. Ct. 355, 32 L. Ed. 764; Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Turley v. Turley, 85 Tenn. 256, 1 S. W. 891."

In reversing this case upon the former appeal we affirmed what has been said in the case cited, and in directing a reference we said:

"It is said, in support of the report, that money was received from the sale of bonds, and from sources other than current earnings, which more than made good any income applied to contract obligations. If that is true, the appellant cannot complain." 109 Fed. 220, 227, 48 C. C. A. 318.

But it is contended that no such reimbursement of "gross earnings" has been shown in this case as was shown in the case cited above. To make the distinction, the appellant excepted to the item of $127,781.35, money borrowed as a reimbursement of the gross earnings fund, because only $430.17 of the money so borrowed was in fact paid into the "common treasury," the remainder being paid out upon certain specific debts of the company without reaching the treasury. He also excepted to the item of $98,712.54, realized from the sale of mileage on account of other railroads, and not accounted for to them, upon the ground that this was not money derived from a source other than current earnings, and should have been so treated.

First, as to the money borrowed during the period under inquiry. The master reports that this was money borrowed from banks on the promissory notes of the company at different dates, and secured by first mortgage bonds of the company, deposited as collateral security. By a stipulation filed in this court it is agreed that these notes were never paid, and that the bonds constitute a part of the bonds secured by the mortgage herein foreclosed, and that these bonds will share equally with the other bonds secured by the mortgage, which appellants seek to displace. Thus this so-called borrowed money has been, in effect, contributed by the mortgagees against whom appellant asks equitable relief. This borrowed money is shown to have been checked out for the following purposes:

To pay Car Trust notes	$22,629 83
To the payment of current pay roll	70,370 17
Upon general debts of the company, not beneficial to the bondholders, and not current operating expenses entitled to preferential payment	33,569 44
To the treasury of the company	430 17
	$126,999 61

The item of $22,629.83 was used in payment of Car Trust notes constituting part of the $88,208.31 charged in the report as a diversion. It is very plain that the alleged diversion must be cut down to this extent, for to that extent it is demonstrated that there was no misapplication of the fund arising from current operating receipts, which is the only fund chargeable in equity with current expense debts. If we deduct this amount from the reported aggregate of apparent or possible diversions, we have $76,585.66 as the sum which has been paid out to the mortgage creditors, or for their benefit. But it is further shown that of this money, raised at the direct expense of the mortgage creditors, $70,370.17 was paid in reduction of existing current expense claims, viz., labor claims constituting current pay rolls. If the right of the creditors of the class to which Gregg belongs to displace prior fixed liens be a purely equitable right bottomed upon the theory that the mortgagee has received something which he connot equitably retain, it would seem most inequitable that the payment of current labor claims by money borrowed through an enlargement of the mortgage debt should be disregarded in the adjudgment of the equities of the two classes of creditors solely because the money so borrowed is shown to have been directly applied to their payment without first having been paid into what is figuratively called "the common treasury." But for this payment of the current pay rolls with money in effect contributed by the mortgage creditors, the unpaid debts of the income would now be $70,000 greater than they are. That such payments did not directly profit Gregg, as his debt is still unpaid, is no answer.

We must deal with the creditors of the income and the creditors by mortgage, for the purpose of such a proceeding as this, as constituting two classes of creditors. It is only upon this plan that Gregg has any standing whatever, for his debt was created during the month immediately preceding the receivership, and was not payable until after the date of the appointment of the receiver. If his rights are to be dealt with separately and apart from other creditors of his class, he would have no standing, for there is no pretense of a diversion after his debt was made. We must also treat "gross earnings" for the period of six months preceding the receivership as a single fund, and all debts made for current operating expenses during that time as equally payable out of that fund before any part of it is justly applicable for other purposes. But, if we do this, we must also regard all contributions made to that fund, during the same period, from sources other than income from operation, as a reimbursement pro tanto on account of payments therefrom either for permanent improvements or mortgage interest. The remainder of the borrowed money was paid out upon general debts, debts which were not debts to the income nor of advantage to the mortgage creditor.

Now, it is conceded that if this borrowed money had been paid into what is called the "common treasury," of the company, and then paid out in usual course, that the gross earnings fund would thereby have been reimbursed, and the case brought precisely within the facts of St. Louis, etc., R. Co. v. Cleveland, etc., Ry. Co., 125 U. S. 658, 675, 8 Sup. Ct. 1011, 31 L. Ed. 832, and Central Trust Co. v. East Tenn., V. & G. R. Co., 80 Fed. 624, 26 C. C. A. 30, 32. But what is the "common treasury"? Money which is subject to the disposition of the financial agents of the company may be said to be money in the common treasury, although it may be in different banks and arise from many sources. There is no evidence of any special method of keeping the funds, and the proceeds of these discounted notes seem to have been passed to the general credit of the company in the bank making the discount, and then checked out to pay such obligations as the company saw fit to pay. The mere circumstance that the money is deposited to the credit of the company in one or several banks, if the deposits were alike subject to the checks of the company, is of no significance, for it is in the common treasury of the company in as full a sense as if but one account had been kept. There is no evidence that any part of this money was borrowed to pay the particular debts to which it was in fact appropriated, and the fair inference is that the fact that the proceeds of these discounted notes were paid out upon particular debts was only accidental. But it is said that the reimbursement for gross earnings improperly applied to improvements or mortgage interest by money arising from other sources only operates to relieve the bondholders from liability to restore because the mingling of money arising from current earnings with such other money makes it impossible to say whether in fact current earnings have been misapplied, for it may be that the mortgage interest paid or the permanent improvements made were in fact paid from the fund which arose from such other sources. This fact that general debts to the extent of about $33,000 were paid out of borrowed money, and not out of the "gross earnings fund," is a fact which does distinguish this case from the two cases in which that fund was held to be reimbursed by borrowed money, and is a fact of some significance in the administration of this equity in favor of preferential debts of the income; for it cannot be said that the gross earnings depleted in favor of the bondholders has thereby been made good. We shall therefore ignore this item of $33,000 borrowed money as not a reimbursement of the current earnings fund, because it was never in fact paid into that fund, nor applied in easing that fund by the payment of claims which were an equitable charge thereon.

Excluding this part of the money borrowed, the account between the two classes of creditors stands thus:

Diversion reported by the master	$99,215 49
Reimbursements of that fund:	
Borrowed money applied to pay Car Trust notes	$22,629 83
Borrowed money applied to pay pay rolls	70,370 17
Old collections not current income	2,148 47
Borrowed money paid to company treasury	430 15
Total reimbursements	$95,578 62
Balance of diversions	3,636 87
	$99,215 49

There, however, remains as an additional reimbursement the sum of $98,712.54, which was paid into the current income fund from the sale of mileage books sold on account of other railroads, and not accounted for to them. This item was excepted to upon the ground that it did not represent money derived from a source other than current earnings. The exception was overruled, and it is now assigned as error. The contention is that this was in fact current earnings, and should be treated and regarded as a fund primarily appropriated to the payment of current income debts. If this were conceded, the result would be to enlarge the current income fund to that extent. If that fund was $98,712.54 larger than shown by its exclusion, it may be that the gross earnings thus swelled would be large enough to provide a fund sufficient to pay current operating expenses and leave a net income ample to make the improvements and pay the interest by which bondholders have profited. To ascertain how this would leave the matter would require a recasting of the master's report, for we have already referred to the fact that he has failed to report whether the gross earnings were insufficient to justify the payments which he has reported as diversions. But we are of opinion that this item of receipt was properly reported as an extraordinary item, not properly to be regarded as current income. Mileage books were sold in bulk, and at a discount, to brokers and others, aggregating $128,000. These books represented mileage over the C. S. & H. R. Co. and other railroads for whom it acted in issuing such books. Of this, $98,712.54 represented the price of mileage sold and collected on account of other railroads, and as such constituted a part of the traffic balance due to such roads. Concerning the transaction, the master, who had all the witnesses and books before him, reports as follows:

"This money was never treated as current earnings by the accountants of the company. It was carried in a suspense account. The mileage books were sold at a discount (about $16 per book; price about $20). The transaction, apparently, amounted to the borrowing of that much money by the railroad company on the security of the mileage books, the money to be repaid in the future in the services of the C. S. & H. Railroad Company by the carrying of passengers, or in similar services of other railroad companies, who were to be reimbursed by the C. S. & H. Railroad Company for such serv-

ices. Could a sale of bonds to raise money be distinguished, in principle, from such sale of mileage books, made in quantities to brokers, and at such discounts as to preclude any probability that the transaction was a mere selling of tickets in the usual course of business? It appears to have been resorted to as a means of raising money on the general credit of the railroad company after all ordinary means of doing so had been practically exhausted. The mileage books were promises to render services on presentation, and sold as they were, in the way they were, in bulk, and on the faith of the general credit of the railroad company, and it appears to this amount not accounted for, the proceeds seem distinguishable from earnings."

It is difficult to see why money derived from such a source should be regarded as ordinary current income, such as is primarily devoted to ordinary current operating expenses. By the transaction the company created a debt to each of the companies upon whose lines such mileage was sold. The company itself did not regard it as current earnings, and did not carry the income in that account. Merion, the auditor, testified that the money thus raised was "paid out for anything we had to pay; it went direct to the treasurer." Now, it is evident that, if these proceeds had been used to pay mortgage interest, the current operating expense creditors could not complain, and equally evident that, if the payments claimed to be diversions were paid out of the fund thus swelled, that fund was thus reimbursed to the full extent of this fund from a source other than current income.

We see no error in the decree, and it is accordingly affirmed.

WEST v. LOUISVILLE & N. R. CO.

(Supreme Court of Alabama, June 18, 1903.)

[34 So. Rep. 852.]

Private Alley—Right to Have Kept Open—Stations—Ingress and Egress.

A railroad owned a lot on which was located its freight depot. The lot abutted on an alley way, which had been established several years before by the then owners of the property. The alley ran from a public street by the freight depot to a private road, used as a means of approach to the passenger station, which itself did not abut on the alley: *held*, that the railroad was not entitled to have the alley kept open for use by the public in going to and from the passenger station.

Bill in Equity—Motion to Dismiss.

A motion to dismiss a bill in equity will be overruled if equity is apparent on its face, though the facts be illy pleaded, and the bill be demurrable on that ground.

Appeal from City Court of Montgomery.

Bill by the Louisville & Nashville Railroad Company against D. P. West. Decree for complainant. Defendant appeals. Reversed.

The facts averred in the bill were as follows: The complainant is a railroad corporation engaged in the business of a common carrier in the city and county of Montgomery, state of Alabama, and is the owner of a piece or parcel of land situated in Montgomery, upon which is located its freight depot, and a portion of which is devoted to a private street. Said lot abuts on Gilmer alley, which alley runs from Tallapoosa street, parallel with Commerce street, to a private roadway used as a means of approaching the Union Passenger Station in the city of Montgomery. Gilmer alley was established by the then owners of the property on either side of it by a deed executed on December 26, 1888, which deed in made an exhibit to the bill. The complainant's property, which was included in said deed, lies on the opposite side of Gilmer alley from the side occupied by the building known as the "Windsor Hotel." After the establishment of Gilmer alley, and after the recording of the deed establishing it, the defendant, D. P. West, became the owner of the building known as the "Windsor Hotel," which is on the opposite side of Gilmer alley from the complainant's property; and, at the time West purchased, he took with notice of the existence of said Gilmer alley, and of the contract by which it was made and laid off. West has for some years conducted the business of a hotel in said Windsor Hotel building. The Union Passenger Station in the city of Montgomery, into which the complainant and other railroads in the city of Montgomery operate many trains daily, is near the end of Gilmer alley; and said alley, which is 40 feet wide, is a short and expeditious route by which persons can go to and come from said Union Passenger Station, and also to the freight depot owned and used by the complainant for the purpose of receiving and delivering freight. The defendant West has erected in said Gilmer alley, immediately adjoining and in the rear of said Windsor Hotel, an inclosure, in which he has placed and is now operating a boiler and other machinery. This inclosure or structure is about 60 feet long and 8 feet wide, and greatly obstructs the free passage over that part of Gilmer alley on which complainant's property abuts. Said obstruction causes "injury and damage to complainant different and separate from that suffered by the public, and is a private nuisance, and the damage thereby sustained is not susceptible to accurate ascertainment in money, and is constantly recurring from day to day." Complainant has demanded of the defendant, West, that he move said obstruction from said alley, but West has refused, and still refuses, to do so. It was then averred in the bill that the complainant is informed by counsel, and believes, and, upon such information and belief, states, that said D. P. West has no right to maintain said structure in said alley, and complainant is entitled to have said Gilmer alley kept open for the passage of said freight and persons, and free from any obstructions

throughout its entire length and width. The prayer of the bill is that a decree be rendered "commanding and requiring said D. P. West to remove and abate said structure hereinabove described from said Gilmer alley, and forever enjoining and restraining him from erecting any structure in said Gilmer alley, or from obstructing the same, without the consent of all holders and owners of the property abutting on said Gilmer alley." There was also a prayer for general relief. The defendant West demurred to the bill upon the following grounds: "(1) The bill shows that the only obstruction caused by said structure in said alley is the obstruction of the alleged right of complainant to have said alley used for public purposes. (2) The bill fails to allege, as a predicate for relief, that said alleged obstruction interfered with complainant's rights as owner of land abutting on said alley. (3) The bill alleges no injury to complainant as an abutting proprietor on said alley. (4) The bill alleges, as the only ground of complaint, the obstruction of the public in the use of said alley, when it appears the public have no right to use the same." The defendant also moved to dismiss the bill for the want of equity. On the submission of the cause upon the demurrer and the motion to dismiss for the want of equity, there was a decree rendered overruling both the demurrer and the motion to dismiss for the want of equity.

A. A. Wiley and J. M. Chilton, for appellant.
Chas. P. Jones, for appellee.

DOWDELL, J. The facts averred in the bill show a joint easement in the complainant and respondent in a private alleyway. Yet the theory of the bill, and its purpose, according to its averments, when construed more strongly against the pleader, as the rule of pleading requires, is evidently one for the abatement of a public nuisance. The bill alleges that the complainant has an interest different from that of the general public. This is an averment essential in a bill by an individual for the abatement of a public nuisance, but it is altogether unnecessary in a bill to abate a private nuisance. While the bill avers that the complainant is the owner of a lot which abuts on said alley, and upon which is located its freight depot, still one of the main objects of the bill, if not its principal object, in removing the alleged obstruction in the private alleyway, is to open up the same to afford free passage to persons going to and from the Union Passenger Station, through which the complainant railroad company and other roads operate many trains daily. The allegations of the bill, we think, show that the real purpose of the complainant is to have the alley opened for the use of the public in approaching the Union Passenger Station, which is located upon a lot not abutting on said alley, but is wholly separate and disconnected. The easement in question is one appurtenant to property abutting on the alley, the benefits of which are limited to the uses of

abutting property owners, as such. "One having a right of way appurtenant to certain land cannot use it for the benefit of other land." Davenport v. Lamson, 21 Pick. 72. "If a man have a private way to a close, he must not enlarge it to other purposes." Albert v. Thomas, 73 Md. 189, 20 Atl. 912. "Private ways are confined in their use to the purposes for which they are granted, and cannot be extended by the grantees. When intended to give access only to particular premises, they cannot be used thereby to reach other lands. Where one has a right of way to a three-acre close, he cannot use it to pass over such close from or to closes beyond, and is a trespasser if he enter upon the three-acre close for such purpose." Greene v. Canny, 137 Mass. 64; Redemptorists v. Wenig, 79 Md. 348, 29 Atl. 667; Hoosier Stone Co. v. Malott, 130 Ind. 21, 29 N. E. 412. See, also, Goddard's Law of Easements, 321, 324. We think the demurrer sufficiently raised the above questions, and the court erred in overruling the same.

The rule as to the office of a motion to dismiss a bill for want of equity was laid down in the case of Blackburn v. Fitzgerald et al., 130 Ala. 584, 30 South. 568, following the principle stated in Seals v. Robinson & Co., 75 Ala. 368. If equity is apparent on the face of the bill from the facts stated, though such facts be illy pleaded, and for that reason rendering the bill demurrable, on motion to dismiss for want of equity the same will be considered as amended as to such defective pleading, leaving the respondent to his remedy by demurrer. In accordance with the above rule, the motion to dismiss the bill for want of equity was properly overruled. See, also, Gardner v. Knight, 124 Ala. 273, 27 South. 298.

For the error in overruling the demurrer, the decree will be reversed, and one will be here rendered sustaining the demurrer. Reversed and rendered.

CEDAR RAPIDS CANNING CO. v. BURLINGTON, C. R. & N. RY. CO.

(*Supreme Court of Iowa, May 27, 1903.*)

[95 N. W. Rep. 195.]

Railroads—Right of Way—Presumption as to Width—Evidence.

The presumption that a railroad company acquired, as grantee in a deed conveying to it a strip of land 50 feet wide on each side of the center of its main track as definitely located, a right of way of the maximum statutory width of 100 feet, is overcome by proof that a third person as grantee in a deed conveying land adjacent to the railroad right of way, erected a fence 30 feet from the center of the company's main track, and occupied the land up to the fence for more than 25 years, without objection from the company.

Appeal from District Court, Linn County; W. N. Treichler, Judge.

Action to quiet title to a strip of land. Defendant claimed

it as a part of its right of way. On hearing, the petition was dismissed, and plaintiff appeals. Reversed.

Redmond & Stewart, for appellant.

J. C. Leonard, S. K. Tracy, Carroll Wright, and John I. Dille, for appellee.

LADD, J. This is a controversy concerning a strip of land about 20 feet wide and 200 feet long. It is either a part of defendant's right of way, or of land fenced in by plaintiff. The defendant's railroad was built in 1871. In October, 1872, one Hull conveyed the adjacent land to the Star Wagon Company. This land was measured and staked out, and, as described in the deed, extended to within about 30 feet as from the center of defendant's main track, though the west boundary was mentioned as the right of way. The plaintiff claims under the wagon company, through mesne conveyances, with practically the same descriptions. In the summer of 1874 the wagon company erected a tight board fence, 8 feet high, on the line supposed by it to be the boundary between the land purchased from Hull and the right of way; the same being a part of the inclosure about all its ground and works. This remained until about three years before the trial, when it was replaced by a new one of like description. In April, 1901, plaintiff was about to construct a warehouse near the fence, when it was advised that the defendant claimed that its right of way extended 50 feet from the center of the main track, as originally located; and on the same night a side track farther east on plaintiff's premises was removed to the disputed strip, and covered with cars. The only evidence of title introduced by defendant was a deed dated February 11, 1874, from Hull to defendant's predecessor, of "a strip of land fifty feet in width on each side of the center line of said railroad as now definitely located over and across that part of the tract of land conveyed by Myron L. Pardee, executor of L. B. Crocker and John Bertram, to said Hull," and another from John Bertram to Hull, dated December 26, 1872, describing land including this, "except that the Chicago & Northwestern Railway Company and the Burlington, Cedar Rapids & Minnesota Railway Company have each the right to use for a right of way that portion of the above granted and described premises now so used and occupied by them respectively."

Neither party traces its title back to the government, but appellant opens its argument by saying: "The facts in this case are that prior to 1872 one Bertram and others owned the land in controversy—a strip about 20 feet wide and about 200 feet long. A sale of this property, together with land and lots east and west of it and north and south of it, also, was made by the owners about this date to O. N. Hull, now deceased; and Hull became the owner of the fee over which the railroad track referred to in the evidence as the original

main line of the B., C. R. & N. ran; also of the land over which the C. & N. W. Ry. track was laid. Being the owner of all, negotiations were opened between Hull and the Star Wagon Company, then located further north, to sell a site south of what is now Twelfth avenue, formerly Shearer street, and east of the B., C. R. & N. tracks." From this admission it is to be inferred, in defendant's favor, that its road was laid across a body of land owned by Bertram and others, subsequently conveyed to Hull. The validity of its claim to a right of way is not put in issue. The only controversy is as to whether such way extends 50 feet east of the center of the main track, as originally located, or but 30 feet, to the fence. The defendant insists that, from the laying of its track and operation of the road, the presumption arises that it acquired a right of way of the maximum statutory width, of 100 feet. It cites Drake v. Ry., 63 Iowa, 302, 19 N. W. 215, 50 Am. Rep. 746; but, while the easement was there presumed, its width is not mentioned. In Campbell v. Ry., 110 Ind. 490, 11 N. E. 482, the father of the plaintiff had permitted defendant to lay its track through his farm in 1868, and to occupy and improve the right of way until 1881, when the son brought action for possession; and it was held that as the company had entered the land with the license and consent of the father, under whom the plaintiff claimed, and expended its money on the faith of such license, a right of way was acquired, in the absence of any limitations thereon, to the full statutory width. But the right to any way, rather than that of a particular breadth, was in issue. In Prather v. Western Union Tel. Co., 89 Ind. 501, the railroad was constructed across plaintiff's farm, and he neglected to claim damages within the statutory period. The telegraph company, by permission of the railroad company, and on condition that the latter might use one wire, placed its poles 29 feet from the center of the track; and the court held, in an action against it for trespass, that, in the absence of any record evidence of the width of the right of way, it would be presumed to be 60 feet, as authorized by statute. In Jones v. Ry. (Pa.) 23 Atl. 251, the track appears to have been constructed in the street within 30 feet of plaintiff's lot, and he asked damages. The court held that, in the absence of proof to the contrary, the company will be presumed to intend to appropriate all the statute will allow, saying: "The lines of a street on which a railroad company locates the center line of its road and lays its tracks are not necessarily, nor presumed to be, the boundaries of its right of way. These may be within, beyond, or upon the lines of the street, but in either case it is the duty of the company to designate them by some appropriate and decisive act. A company which refuses, when requested by the lot owner, to define its right of way by marking the outside lines, may be expected, when its

necessities or interests require it, to claim an appropriation of the full width of sixty feet, and to invoke the presumption already mentioned in support of the claim." It is clear from these decisions that defendant's predecessor must be presumed to have acquired a right of way 100 feet wide, in establishing the road. That was prior to the conveyance by Hull to the wagon company. The tract of land owned by him was servient to the easement of the railroad company, and, of course, he could not deprive it of any part of the right of way by sale to others. But a railroad company is not bound to acquire a right of way of any particular width, nor to lay its main track in the center of that which is acquired. While ordinarily it is to be presumed to have obtained a way of the maximum width, and to have intended to have its track in the center, this is merely a naked assumption, casting the burden of proof on any one asserting the contrary, and may be overcome by evidence rebutting the inference. As to width, this must necessarily be so, for ordinarily a small portion of the right of way is at first made use of, and the remainder only as necessity demands. Hence actual possession of the portion of the way farthest from the track was seldom taken prior to the construction of fences. But this very fact should make courts cautious in fixing such boundaries, and exact satisfactory proof in order to defeat the assumption. The right of way immediately north of this is but 60 feet wide. The precise width of that to the south is not disclosed, but seems to be somewhat less than 100 feet. This fence was placed on what the wagon company supposed to be the boundary line in 1874, within three years of the laying of the track. It was a part of the enclosure of its entire grounds. It was such a structure as usually marks a division line, and of its location and the occupancy of the disputed strip the defendant was charged with notice. The continuance of this fence and the occupancy of the land up to it for more than 25 years, without any objection on part of defendant, we think sufficient to overcome the presumption that the railroad had acquired an easement in a strip of land 50 feet wide east of the center of its main track, and leads to the conclusion that it had either obtained a right of way less than 100 feet in width, or else that the greater part lies west of the center of the track. In Barlow v. Ry., 29 Iowa, 276, and Slocumb v. Ry., 57 Iowa, 675, 11 N. W. 641, the extent of the right of way was fixed. Here the disputed land had been conveyed by Hull to the wagon company, and the defendant necessarily relies solely on the presumption arising from the location of its tracks. Reversed.

MERCANTILE TRUST CO. *v.* CHICAGO, P. & ST. L. RY. CO. *et al.* SAME *v.* TRUSTEES OF ILLINOIS COLLEGE.

(*Circuit Court of Appeals, Seventh Circuit, April 14, 1903.*)

[123 Fed. Rep. 393.]

Vendor's Lien—Removal of Machinery from Building—Liability of Receiver.

The president of four different railroad companies, whose roads were operated together as one line under an arrangement in the nature of a partnership and a common management, purchased in his own name, but for the use of such line, certain shops containing machinery, which were used as machine shops by the consolidated lines. He took a deed, which was not recorded, but which reserved a vendor's lien for an unpaid portion of the purchase money. Subsequently the machinery from the shops was removed to another location, which was owned by one of the constituent companies, where it was used in the same way, and later passed into the hands of a receiver for such company: *held*, that such company was not a purchaser for value, but was chargeable with notice of the vendor's lien, and the receiver should be required to pay to the holder of the purchase-money notes the value of the machinery so taken to the extent of such notes.

Same.

In such case there was no sale or transfer of the machinery, such as required the lienholder to first exhaust the real estate, it being at all times in equity the property of the associated lines, nor was the receiver entitled to replace it, after it had been used for a number of years since its removal.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

The Chicago, Peoria & St. Louis Railway Company executed three several mortgages upon its railway, one to the Mercantile Trust Company, one to the Central Trust Company, and one to the Metropolitan Trust Company, dated, respectively, March 1, 1888, July 15, 1889, and June 1, 1891, which were immediately thereafter duly recorded, to secure certain bonds issued by that company. Three separate suits were brought in the court below to foreclose these mortgages. The causes were consolidated, and an order was entered appointing Charles H. Bosworth, one of the appellants, and E. Ellery Anderson, who subsequently resigned, receivers of the road, who took possession and operated the road under the order of the court. For some years prior to the receivership, the Chicago, Peoria & St. Louis Railway Company, the Jacksonville Southeastern Railway Company (later the Jacksonville, Louisville & St. Louis Railroad Company), the Litchfield, Carrolton & Western Company, and the Chicago, Greenville & Southern Railway Company were operated under a common management known as the "Jacksonville Southeastern Line." This arrangement was in the nature of a partnership, common books of account being kept, known as "Line Books," the earnings of all the roads being deposited in a common account, and the expenses of all the roads were paid from this common fund. William S. Hook was the

president and general manager of each of these railway companies and the common administrator of the fund. The Chicago, Peoria & St. Louis Railway Company of Illinois, one of the appellants, succeeded to the property and rights acquired by the purchasers of the Chicago, Peoria & St. Louis Railway Company, sold in September, 1895, under a decree in the consolidated suit.

On October 9, 1886, Archibald C. Wadsworth by deed of that date conveyed and granted to William S. Hook, in consideration of $2,000 then paid and the further sum of $4,000, payable one-half in one year and one-half in two years from that date, with interest as expressed in two certain notes, certain real estate in the county of Morgan, Illinois, with the buildings, tracks, switches, switch stands, machinery, etc., thereon formerly belonging to the Jacksonville Car Company. This deed reserved a vendor's lien upon the granted premises to secure the unpaid purchase money represented by the two notes. The deed was delivered to Hook, but was never recorded. These notes were indorsed and transferred by Wadsworth, in October, 1886, for value, to the Trustees of Illinois College, the appellee, who has since been and is now the holder of them; and the principal of them, with interest since October 9, 1892, remains unpaid. The purchase by Hook was made on account of the Jacksonville Southeastern Railway Company, now known as the Jacksonville, Louisville & St. Louis Railroad Company; but there was no formal conveyance by Hook to the Jacksonville Company, the property conveyed by the deed being controlled and used by that company as a car manufacturing and repair shop from the date of the sale until 1892. The property conveyed becoming inadequate for the uses of the Jacksonville Southeastern Line, in 1892 the old buildings were dismantled and tracks torn up, the materials and machinery carried to a new location, and the new shops were thereafter called the "Chicago, Peoria & St. Louis Railway Shops," and were used by the Jacksonville Southeastern Line as a car manufacturing and repair plant, and were taken possession of by the receiver in the principal case. The value of the steel boiler, stationary engine, lathe, hydraulic wheel press, belting and shafting, and other machines so removed, is found by the master to have been $6,180, aside from some 5,500 feet of iron rail, the value of which is not stated.

The appellee by intervening petition asks the court that it enter a decree directing the receiver to pay to the petitioner the value of the machinery as it was when taken to the new premises, or that the machinery be restored to the realty, with the value for the use of the same and damage for deterioration in value while in use in the new shops. The master reported that restitution could not be made in specie, and that the petitioner should be paid in cash for the same to the extent of the principal and accrued interest upon the notes, which report was confirmed by the court, and a decree entered

that Bosworth, receiver of the Chicago, Peoria & St. Louis Railway Company, pay to the Trustees of Illinois College the amount of the two notes, with interest, amounting to $6,609.40. This decree is brought by the named appellants to this court for review.

Bluford Wilson and P. B. Warren, for appellants.
Henry A. Gardner and Edwd. P. Kirby, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge, after stating the facts, delivered the opinion of the court.

By the law of the state of Illinois the vendor's lien reserved in the unrecorded deed to Hook was potential against the world, except creditors and purchasers in good faith. The property was, without the knowledge of the vendor, removed by Hook, the president of each of the roads and the common manager of them all, to locality in fact owned by the Chicago, Peoria & St. Louis Railway Company, but for the use of the several constituent companies composing the Jacksonville Southeastern Line, and was so used until taken possession of by the receiver in this suit. He could only justify his title and possession by showing that the Chicago, Peoria & St. Louis Railway Company was a bona fide holder of the property for value and without notice of the vendor's lien. This is not shown by the mere fact of removal and the placing of machinery upon premises owned by that company, and in fact used for the common benefit of the constituent companies; nor by the fact, if it be a fact, that that company was the only member of the association which through the earnings of its line and the sale of its bonds was able to maintain itself and its associates; nor by the fact that the other companies would in any accounting be shown to be indebted to it. There was no transfer of the title of the property by Hook to any one, so far as the record discloses. If purchased by him with the funds of the Jacksonville Southeastern Line, the property belonged to all the companies, and was subject to an equitable accounting between the constituent members of the association; but in that event, being so purchased for the association by Hook, its head, who was also the president and manager of each company, knowledge of the vendor's lien reserved in the unrecorded deed to Hook is clearly chargeable to each constituent member of the association. No one member of the partnership or association under such circumstances could be heard to say that it acquired the property without knowledge of the lien. There is no evidence of a sale of the property to the Chicago, Peoria & St. Louis Railway Company, or of any payment by it therefor. The presumption which attaches to commercial paper transferred before maturity does not apply to the transfer of chattels. A bona fide purchase for

value without notice must be proven as a fact by the possessor, and is not to be presumed, particularly under the circumstances surrounding this transaction.

The objection that the realty is not shown to be insufficient security for the payment of the debt cannot be sustained. There was no sale of this property. The equitable principle which requires a sale in the inverse order of alienation is not applicable here. The principle invoked is applied "where there are two creditors standing in equal equity, one of whom has security upon two funds and the other only upon one." Iglehart v. Crane, 42 Ill. 261. The entire property belonged in equity to the association, and not to Hook. The Chicago, Peoria & St. Louis Railway Company—as claimed by counsel—has in equity the right to the entire property, but that right is subject to the lien of the vendor. The company stands in no better plight than Hook, and its possession was in fact Hook's possession.

The objection that the court and the master erred in finding that the tools and machinery could not be restored in specie is equally fallacious. The petition was in the alternative, either for a restoration of that which had been detached from the realty, if it could be done, or for the value. This machinery had been stripped from the realty, converted to the use of wrongdoers, and used for nearly eight years. The appellee's right thereto was denied. The property manifestly could not have been restored in specie. It must have suffered much depreciation in its value. Under these circumstances the appellants cannot complain that the value is awarded, and not a specific return of the property ordered, particularly as the amount awarded by the decree, being the amount of the debt, is less than the value of the property taken, with interest from the taking.

The decree is affirmed.

AUSTIN v. DETROIT, Y. & A. A. RY.

(Supreme Court of Michigan, July 14, 1903.)

[96 N. W. Rep. 35.]

Street Railways—Additional Servitude.*

The construction and operation of a street railroad on a highway is not an additional servitude.

Same—Lowering Grade—Rights of Abutter.

An abutting owner has no right to compensation because the grade of a highway is lowered for a street railroad which is built to con-

*As to whether a street railway constitutes an additional servitude, see Lonaconing, M. & F. Ry. Co. v. Consolidation Coal Co. (Md.), 6 R. R. R. 8, 29 Am. & Eng. R. Cas., N. S., 8 (electric railway not an additional burden on highway); Peck v. Schenactady Ry. Co. (N. Y.), 4 R. R. R. 274, 27 Am. & Eng. R. Cas., N. S., 274 (electric railway); notes, 10 Am. & Eng. R. Cas., N. S., 222, 230; 1 Am. & Eng. R. Cas., N. S., 326; 4 Am. & Eng. R. Cas., N. S., 400 (electric

form thereto, though the highway is owned by a plank road company, the change of grade being with the consent of it and of the township.

Same—Same—Same—Construction of Line at Side of Highway.

An abutting owner has no right to compensation because a street railroad is constructed, on a lowered grade, so close to the side of the highway as to subject his fence and land to the danger of sliding into the highway.

Same—Same—Presumption.

The lowering of the grade of a highway by a street railway company without objection by the township will be presumed to be with its consent.

Montgomery and Moore, JJ., dissenting.

Error to Circuit Court, Wayne County; George S. Hosmer, Judge.

Action by Hugh Austin against the Detroit, Ypsilanti & Ann Arbor Railway. Judgment for plaintiff. Defendant brings error. Reversed.

Cutcheon, Stellwagen & MacKay, for appellant.
E. M. Vining and J. Emmet Sullivan, for appellee.

HOOKER, C. J. The defendant is the owner of an electric trolley line between Detroit and Ann Arbor, its railroad being laid in the public highway, in accordance with statutory authority, under licenses from the respective municipalities along its route. The township of Nankin granted the right to construct the road in the following language, viz., "Grants and conveys unto Thomas D. Kearney, attorney, his associates and assigns hereafter to be organized into a corporation under the laws of the State of Michigan, exclusive right and privilege of constructing and maintaining perpetually a street railway for the transportation of passengers and light freight, along, upon or adjacent to the highway, known as Chicago Road, etc., with all necessary and convenient turnouts, switches," etc., subject to the rights in said highway of the Detroit & Saline Plank Road. It also provides that "the track or tracks of said railway should be so laid as to obstruct as little as possible the free passage of carriages and vehicles

railway); 1 Am. & Eng. R. Cas., N. S., 326; 4 Am. & Eng. R. Cas., N. S., 400 (whether trolley is an additional burden); Canastota Knife Co. v. Newington, etc., Co. (Conn.), 7 Am. & Eng. R. Cas., N. S., 787; Chicago & Calumet Terminal R. Co. v. Whiting Hammond & East Chicago St. Ry. Co. (Ind.), 1 Am. & Eng. R. Cas., N. S., 181; Chicago & N. W. Ry. Co. v. Milwaukee R. & K. Electric Ry. Co. (Wis.), 7 Am. & Eng. R. Cas., N. S., 787; Carolina Cent. R. Co. v. Wilmington St. Ry. Co. (N. Car.), 7 Am. & Eng. R. Cas., N. S., 786; Southern Ry. Co. v. Atlanta R. T. Co. (Ga.), 18 Am. & Eng. R. Cas., N. S., 425; Snyder v. Ft. Madison St. Ry. Co. (Iowa), 11 Am. & Eng. R. Cas., N. S., 53; Freiday v. Sioux City R. T. Co. (Iowa), 1 Am. & Eng. R. Cas., N. S., 408; Potts v. Quaker City Elevated R. Co. (Pa.), 1 Am. & Eng. R. Cas., N. S., 401 (elevated railroads); Reid v. Norfolk City R. Co. (Va.), 6 Am. & Eng. R. Cas., N. S., 792 (conversion of horse railway into electric road); State v. Trenton Passenger Ry. Co., Consolidated (N. J.), 4 Am. & Eng. R. Cas., N. S., 392 (change of motive power).

along said highway and so as to best accommodate public travel." This highway was one maintained by the Detroit & Saline Plank Road Company, under the plank road act (Comp. Laws 1897, c. 173), and the railroad was built with the consent of said company. The plaintiff owned and occupied a farm upon said highway, along the east side of which ran the Flint & Pere Marquette Railroad, which crossed the highway in question a few rods east of the plaintiff's house. The railroad was about eight feet above the natural surface of the ground bordering the highway, which its trains crossed above grade by means of a bridge which was 15 feet long. To make room for the passage of teams under the bridge, the highway was graded down some feet at the intersection of the railroad, the cut extending westerly to a point about 15 feet west of plaintiff's dwelling. By consent of the plank road company, the traveled portion of the highway was widened and lowered, by grading, to accommodate the electric road, and a new bridge, both wider and longer than the old, as built by, and at the joint expense of, the two railroad companies. The electric line was laid along the north side of the highway, near to the line of the street, nearly the entire width of the roadway, including the bed of the railway track being cut down to a uniform grade, so that the cut reached the level of the highway, as it theretofore existed, some rods west of the plaintiff's house, which left plaintiff's premises some three or four feet higher than the roadway where the cut was deepest, the ground being cut back to within a foot or two of his fence at the surface, and sloping thence to the track. A flight of five or six steps was built by the railroad company from the track up to the level of the land in front of plaintiff's house. This action was brought to recover damages for an alleged injury to plaintiff's premises, and defendant has appealed from a judgment of $475 in plaintiff's favor.

It is the settled law that the public right to the highways goes to the extent of authorizing their use for the general purposes of public travel, and, as conditions change, the way may be adapted to new wants and methods of travel, including the equipment and use of electric railroads. The courts hold with great unanimity that the public right, when acquired, contemplates the use of the way for such purposes, and that the adjoining proprietor must suffer the contingent disadvantages of a change of grade, and that the use of the highway for an electric line is not an additional servitude. See Fuller v. Grand Rapids, 105 Mich. 529, 63 N. W. 530; Pontiac v. Carter, 32 Mich. 164; Dean v. Ry., 93 Mich. 330, 53 N. W. 396; 10 A. & E. Enc. of Law (2d Ed.) 1125; Green v. City Ry. (Md.) 28 Atl. 626, 44 Am. St. Rep. 288.

The plaintiff's contention in this case is that the railroad company had no right to cut off or impair his access to the highway from his premises by lowering the grade for its track

below the highway as it then existed, and by laying it so close to the line of the highway as to subject his fence and land to the danger of sliding into the highway. The Supreme Court of the state of Ohio has enunciated the doctrine that an abutting proprietor might recover damages if his access to the highway was impaired—Street Ry. v. Cumminsville, 14 Ohio St. 523—which is consistent with the rule that damages arising from a change of grade are recoverable, which rule we understand to obtain in that state, in opposition to the view generally taken. Had this railway been laid in the center of the street without change of grade, and so constructed by filling between the rails as to make it feasible for the public to drive upon and over it at will, no one will claim that it would be an additional servitude; or, had the line as built been so filled as to make it practicable for vehicles to be driven upon it as upon other parts of the way, the same would be true, except for the change of grade.

We take judicial notice that in rural districts the traveled portion of the road is but a small part of the land within the limits of the highway. It is manifest that in such places the railway may be more safely operated if built at one side and used separately. It is evident from the franchise that the authorities thought so in this instance, and required it to be kept away from the traveled portion. There was therefore no necessity for making a smooth way between the rails and adjoining the track, and it might have been imprudent to do so, thereby inviting travelers to unnecessarily drive in a place of danger. So long as it does not offer a comparatively insuperable obstacle to the use of the portion of the highway occupied by it for purposes reasonably necessary, and reasonable provisions are made by crossings for ingress and egress over it to and from adjoining premises, the owner of such premises cannot complain, if he could in any case, which we do not decide.

It is said that the grade of the street was made necessary by reason of this railway. It is well settled that an adjoining proprietor cannot complain if the grade of a highway is changed. The authorities may lawfully facilitate travel by such changes. We have held that a street railway is not an additional servitude, and the reason is that it is a provision made by public authority to facilitate public travel. It is the use of the highway, for the original purpose, by modified and changed vehicles and methods. If the public weal requires it, it is as much within the power of the public to lessen the grades for street cars as for wagons or automobiles. To say that the township or company might have changed this grade to improve its wagon road for the latter without recompense to adjacent proprietors, but that it could not do so for a street railway, or that a street railway is an additional servitude when the authorities permit the highway to be graded down for the purpose, and not when it is made to conform to the

pre-existing surface of the highway, is to make a distinction where none should in justice exist. We are of the opinion that the location of a railway in the center of the highway cannot be required by an abutting proprietor. There is a manifest propriety in separating, so far as possible, this from other uses of the highway. In the present case the franchise required it, and apparently the public authorities acquiesced in its location. The same may be said of the grade, so far as the public had control over it. The authorities authorized the change in the bridge, and the plank road company, which represented the public, in a sense, in the maintenance of the highway, and might lawfully grade the highway, for its full width, under the statute permitting the organization of plank roads, through its president (who was also president of the defendant) consented to the widening and lowering of its grade, with a view to the improvements authorized by law and the township. The statute authorizing street and suburban railways, like that providing for steam roads, is predicated upon public necessity. It is not to be assumed that such roads are burdens upon the inhabitants, but that they confer benefits to the general public. Such companies as are provided for are not created primarily for their own benefit, but for a desirable public purpose. It is not the province of courts to assume that these statutes are to be so strictly and technically construed as to prevent full measure of efficiency. One of these statutes requires the railway to be laid at the same grade as the highway. This is a proper provision, but we disbelieve that it was the intention that where this was not feasible, in view of existing grades, no railway could be constructed, or that the adjacent proprietors acquired rights to compensation in consequence. It is not unreasonable to suppose that the construction of a safe and satisfactory railroad may require some changes in the grade of the highway as theretofore existing, e. g., by filling or cutting and widening the graded portion, by lessening the grade of hills, adopting the road under bridges to the proper level, etc. The public authorities have the right to do these things when there is no railroad, and, to say that they must do it where it is only made imperative by the necessities of the use of the street for a railroad, is too narrow a construction. The law expressly recognizes the desirability of lessening grades for all uses of a highway, but highway improvements are necessarily gradual, owing to the expense. When a railroad is made, it is a substantial, expensive, and permanent improvement. It must not only be laid at grade, but, under any fair construction of the statute, it must be kept at grade. There is a manifest propriety, if not a necessity, that the township authorities provide for such general grades as may be advisable, and cause them to be made at that time, and there is, to our minds, no impropriety in imposing upon the railroad the burden of these changes for the general public good. It is

said that the contract does not include any such provision. An attempt to include specifications of all such changes would be attended with much detail, and perhaps difficulty. We think it not unreasonable or improper to infer that the railroad company would not be allowed to make extensive changes in the grade of highways without the approval and acquiescence of the public authorities, who, as we have shown, have the authority to cut down the grade, without further compensation to abutting proprietors. So long as the authorities do not object and take steps to prevent such changes as will permit of a proper construction of the road that they have authorized, we must assume consent, and the abutting proprietors cannot complain. It is inferable from the proof in this case that the steam railroad would have been an insuperable obstacle to laying this road at the pre-existing grade, as there was not room for the passage of the car beneath it without lowering the highway at the bridge, and it seems to have been necessary to widen the highway at that point. At all events it was done, and the trolley company paid one-half of the cost of an expensive bridge to accomplish crossing below the steam road grade. The township authorities had the power to consent to the construction of this road, and this necessarily implies consent to a readjustment of highway grades, within reasonable limits, with the sanction of those having authority under the law to make them. The consent to construct this road, and the acquiescence of all concerned in the change of grade, is a sufficient consent. The public cannot question it, and the plaintiff has no right of action in consequence. The case differs materially from that of Nicholas v. A. A. & Y. Ry., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371, for there the road was not made to conform to the grade of the highway. Here it is required. Comp. Laws 1897, § 6450. The cases of Green v. Atlantic Ry. Co. (Md.) 28 Atl. 626, 44 Am. St. Rep. 288, Briggs v. Ry Co., 79 Me. 363, 10 Atl. 47, 1 Am. St. Rep. 316, and Petticord v. B. C. & E. Co., 34 Md. 464, sustain the authority of a plank road company to change its grade without subjecting itself to liability, and, if it may do this, no good reason is suggested for holding defendant liable for doing the same, with the assent of the plank road company, in a project for the benefit of the highway authorized by law. The case of Uline v. N. Y. C. & H. R. R. R. Co., 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661, is analogous upon the question of the authority of the railroad company to act under a delegated power.

There are many assignments of error in this case, but we think the more important questions are the following: (1) Is the construction and operation of this railroad an additional servitude? (2) Has an abutting owner a right to compensation by reason of the lowering of the grade of the highway? (3) Was it unlawful to place the railroad to the side of the highway, in proximity to plaintiff's premises, and is he

entitled to compensation therefor? (4) Does the fact that the highway in question was owned by a plank road company, or the changing of the grade of the highway to accommodate the railroad, affect the question? We think all of these questions are answered by our discussion of the subject.

The jury should not have been allowed to infer that the construction of the railroad constituted an additional servitude because of its location, or by reason of the excavation made for it, or for the impairment of access to plaintiff's premises by reason thereof.

The court did not err in instructing the jury that damages were not recoverable because of the prevention of the hitching of teams, in front of plaintiff's premises, under the declaration. Hobart v. R. R. Co., 27 Wis. 200, 9 Am. Rep. 461.

We think it unnecessary to discuss other questions.

The judgment is reversed, and a new trial ordered.

CARPENTER and GRANT, JJ., concurred with HOOKER, C. J.

MONTGOMERY, J. (dissenting). The defendant is the owner of an electric trolley line between Detroit and Ann Arbor, its railroad being laid in the public highway, in accordance with statutory authority, under licenses from the respective municipalities along its route. The township of Nankin granted the right to construct the road in the following language, viz., "Grants and conveys unto Thomas D. Kearney, attorney, his associates and assigns hereafter to be organized into a corporation under the laws of the State of Michigan, exclusive right and privilege of constructing and maintaining perpetually a street railway for the transportation of passengers and light freight, along, upon or adjacent to the highway, known as Chicago Road," etc., subject to the rights in said highway of the Detroit & Saline Plank Road. It also provides that "the track or tracks of said railway should be so laid as to obstruct as little as possible the free passage of carriages and vehicles along said highway and so as to best accommodate public travel." This highway was one maintained by the Detroit & Saline Plank Road Company, under the plank road act (Comp. Laws 1897, c. 173), and the railroad was built with the consent of said company. The plaintiff owned and occupied a farm upon said highway, along the east side of which ran the Flint & Pere Marquette Railroad, which crossed the highway in question a few rods east of the plaintiff's house. The railroad was about eight feet above the natural surface of the ground bordering the highway, which its trains crossed above grade by means of a bridge which was 15 feet long. To make room for the passage of teams under the bridge, the highway was graded down some feet at the intersection of the railroad, the cut extending westerly to a point about 15 feet west of plaintiff's dwelling. By consent of the plank road company, the highway was

widened and lowered, by grading, to accommodate the electric road, and a new bridge, both wider and longer than the old, was built, by, and at the joint expense of, the two railroad companies. The electric line was laid along the north side of the highway, near to the line of the street, nearly the entire width of the roadway, including the bed of the railway track being cut down to a uniform grade, so that the cut reached the level of the highway, as it theretofore existed, some rods west of the plaintiff's house, which left plaintiff's premises some three or four feet higher than the roadway where the cut was deepest, the ground being cut back to within a foot or two of his fence at the surface, and sloping thence to the track. A flight of five or six steps was built by the railroad company from the track up to the level of the land in front of plaintiff's house. This action was brought to recover damages for an alleged injury to plaintiff's premises, and the defendant has appealed from a judgment of $475 in plaintiff's favor.

The plaintiff's contention in this case is that the railroad company had no right to cut off or impair his access to the highway from his premises by lowering the grade for its track below the highway as it then existed, and by laying it so close to the line of the highway as to subject his fence and land to the danger of sliding into the highway. The defendant contends, on the contrary, that the plaintiff's property has been subjected to no additional servitude. In the case of Detroit City Railway v. Mills, 85 Mich. 634, 48 N. W. 1007, the court held that the construction of an ordinary electric railway in the streets of a city corresponding to the grade of the street was not an additional servitude. But in Nichols v. Street Railway Company, 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371, it was held that the street railway act confers no power upon a railway company to construct a road along the line of a highway within two or three feet of the side of the road, where the roadbed does not conform to the grade of the street, but it is built upon a grade with cuts and fills—in that case the cuts and fills being two feet or thereabouts. It is sought to distinguish that case from the present in this: It is said that, while defendant's road does not conform to the grade as it existed when the contract with the township was made, the grade has since been changed by defendant with the consent of the plank road authorities, so that now the track is laid at grade. This is in effect saying that, while the defendant is not authorized to build a roadbed for its own use not conforming to the general grade, it may change the grade of the entire road, with the track, without regard to its effect upon adjacent owners, if it can get authority from the plank road company to do so. A reference to the statutes may throw light upon this question. Section 6446 provides that a company may construct, use, maintain, and own a street railway for the transportation of passengers, in and upon the

streets and highways of any township, upon such terms and conditions as may be agreed upon by the company and the township board. Does this statute contemplate that the township authorities may turn over to the street railway company the authority to wholly change the grade of its streets? I apprehend that no one will assert this authority without at least some misgivings. But even if this power be deemed to be granted to the township board by the section in question, it is sufficient for the purpose of this case to say that the township authorities never exercised that power, and never assumed to confer upon the defendant railway the right to change the grade of this street. The grant is set out above. It is simply a grant of the privilege of constructing and maintaining a street railway along the line of, upon, or adjacent to the highway known as the "Chicago Road," subject to the rights in said highway of the Detroit & Salina Plank Road, and contains a provision that the track or tracks shall be so laid as to obstruct as little as possible the free passage of carriages and vehicles along said highway, and so as best to accommodate public travel. One might look long and earnestly, but in vain, to find within the four corners of this contract any suggestion of a right in the company to wholly change the grade of this highway.

But it is said that the plank road company might change the grade for its own purposes, and that it has granted the right to the defendant company to change the grade, and that therefore the injury to plaintiff's property is damnum absque injuria. Here, again, a reference to the statute is not unprofitable. The Legislature has provided, by section 6470, that a street or electric railway may agree with a toll-road company for a purchase of all or any portion of the rights and franchises of such company, and in case of failure to agree there may be a condemnation; but the statute contains the express provision that the provisions of this act shall not be so construed as to affect the rights of abutting property owners or the rights of the public in such highways. In view of this provision, can it be said that the plank road company may agree with the street railway company that for its own purposes it may regrade a portion of the highway in a manner which injuriously affects the adjacent owner, and this without authority from the township board? We think it clear that no such right exists. Independent of this statutory provision, the difficulty to my mind is as obvious. The right of the plank road company is a special privilege and right, it terminates with its charter, its use of the highway is limited to such use as is essential for the purposes indicated by its charter, and it is reasoning in a circle to say that it may, under cover or pretense of enlarging its own uses of the power, evade the requirement of the statute which limits the use of a street railway to such as is agreed upon with the township board, and confer authority upon the street railway

which the township board withholds. For the reasons stated, I think it clear that the plaintiff was entitled to recover such damages as he sustained.

Other questions are raised by counsel which may be briefly considered. The declaration claimed damages to the plaintiff's land by reason of the excavation of that portion of the highway adjacent to his premises. Complaint is made that the circuit judge in his charge stated that this railway track, constructed as it was, constituted an additional servitude, and that evidence was given that the fence and soil would probably fall because of the excavation, and also as to the inconvenience in going up the steps onto the plaintiff's land. We think it may be said of this testimony that it did no more than describe the situation, and was not intended to afford a basis for damages. In fact, an inspection of the photograph of the premises, which was introduced in evidence, would of necessity exhibit these conditions and authorize the inferences drawn by the witnesses.

The court charged the jury that the occupation and excavation of that portion of the road was unlawful, and that the plaintiff was entitled to recover such damages as would compensate him, limiting the damages to the amount which the land actually depreciated in value on account of the peculiar construction of the road, and distinctly stated to the jury: "It is the damages for the excavation, and not for the operation of the road." He also instructed the jury that the plaintiff was not entitled to recover any damages because of the fact that teams could not be hitched in front of his house, as that claim was not covered by the pleadings. We think this instruction fully protected the defendant's rights, and that it was not error to permit the jury, in determining the damages caused by the excavation, to take into account the fact that plaintiff's fence would be more likely to fall by reason of such excavation.

We think that no error was committed to the prejudice of the defendant, and the judgment should be affirmed, with costs.

MOORE, J., concurred with MONTGOMERY, J.

GEORGETOWN & LEXINGTON TRACTION CO. v. MULHOLLAND.

(Court of Appeals of Kentucky, Oct. 8, 1903.)

[76 S. W. Rep. 148.]

Street Railways—Removal of Abutter's Fences from Highway—Action for Damages.

In an action by an owner of land abutting a highway against an electric railway company for injuries to plaintiff's highway fences in the construction of its road, an answer alleging that plaintiff's fences were constructed in the highway under a license obligating plaintiff to remove the same on request, and that the maintenance of

such fences in their present location was inconsistent with the use of the highway under defendant's franchise, and that it has requested plaintiff to remove them, but that he had refused, stated a valid defense.

Same—Same—Right to Compensation.

Where a traction company obtained a franchise for the maintenance of a railroad along a highway, and fences maintained by abutting owner in the highway obstructed the free use of the traction company's franchise, it had the right to remove them without compensation to the owner.

Same—Destruction of Private Crossings—Damages.

Where an owner of land on both sides of a highway was entitled to maintain certain crossings over the same, which were destroyed or injured by the construction of a street railroad along the highway, such owner was entitled to recover damages sustained between the time the crossings were injured and the time they were restored.

Same—Additional Servitude.*

An electric railway does not constitute additional servitude on a highway, so as to entitle an abutting owner to compensation for the use of the highway for such purpose.

Appeal from Circuit Court, Scott County.

"Not to be officially reported."

Action by James Mulholland against the Georgetown & Lexington Traction Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Berry & Webster and Montgomery & Lee, for appellant.
J. F. Askew and R. E. Roberts, for appellee.

BARKER, J. The Georgetown & Lexington Turnpike Road Company was incorporated by the General Assembly of the commonwealth of Kentucky in the year 1831, and under and by virtue of its charter it condemned and purchased a right of way 50 feet wide from Georgetown to Lexington, and between the time of its incorporation and the year 1834 it built on its right of way a turnpike road, which it maintained and operated until the year 1897, when it was purchased by the Scott fiscal court, by virtue of the statute, and made a free turnpike. After acquiring all of the rights of the turnpike road company, the Scott county fiscal court granted to the appellant, the Georgetown & Lexington Traction Company, the right to build upon that part of its roadway not macadamized an electric road from Georgetown to Lexington. In pursuance of this grant, appellant took possession and graded a strip of land along the west side of the road acquired by Scott county about eight feet wide, and was building thereon its electric railway at the time this litigation arose. Appellee, James Mulholland, owns a farm of several hundred acres, which lies on both sides of the turnpike in question, having a frontage of about 5,500 feet on the east side, and 2,340 feet on the west side. His land is fenced on both sides of the road, the fencing being partly stone and

*See preceding case, and foot-note. See also, monograph by J. Newton Fiero, 1 Am. & Eng. R. Cas., N. S., I.

partly plank. Before the electric road was completed, the appellee instituted this action in the Scott circuit court, setting up the foregoing facts, and, in substance, stating that the appellant had made deep cuts along the west side of the road, and high fills along the east side, so undermining his fencing on the one hand as to insure its speedy fall, and so piling the dirt against it on the other as to make it useless as a fence; that for the purpose of utilizing both sides of his farm he has and had private crossings connecting the east with the west side thereof; that, by reason of appellant's roadbed being made so much higher than the level of the road was before it constructed its line, his crossings were made useless, whereby he was damaged in the sum of $1,000. The appellant filed an answer, the first paragraph of which contains a general denial of the material allegations of the petition, and the second sets forth, in substance, the following statement of facts: That the Georgetown & Lexington Turnpike Road Company owned and maintained for more than 65 years a public highway of the width of 50 feet between Georgetown and Lexington; that appellee owned on both sides of the road, and that his fencing impinged upon the highway; that, as to this, he was a mere licensee, being under written agreement with the corporation to remove his fences whenever requested so to do, or the public interest or its travel made it necessary for him to do so; that the Scott county fiscal court purchased the turnpike, and succeeded to all the rights and privileges which the turnpike company had prior to the purchase; that appellant had been granted the right to construct and maintain an electric line along the road in question, and that this right was inconsistent with the further maintenance of appellee's fences thereon; that appellant notified appellee that his fences were obstructing its right to use the turnpike under its grant, and offered to move the same back upon his true line, without cost to him, which offer he refused; and also offered, if appellee would move his fences off of the highway back to his own line, to pay to him all of his costs incurred thereby, which proposition was also refused; that all of this was prior to the time of the grading of appellant's roadway or the erection thereon of its roadbed. A general demurrer was filed to the second paragraph of the answer, and sustained by the court, whereupon appellant prepared and tendered an amended answer, elaborating the facts contained in the second paragraph of its answer, and setting them forth with greater minuteness and particularity. Its motion to file this pleading was overruled, to all of which it excepted. This action of the court left in the case only the first paragraph of the answer, which contains a denial of the allegations of the petition. A trial of the case resulted in a judgment in favor of appellee for the sum of $800. Appellant's motion for a new trial having been overruled, it is here on appeal.

We think the court erred in sustaining appellee's demurrer

to the second paragraph of appellant's answer, and also in refusing to allow the amended answer to be filed, which was offered after the demurrer had been sustained. If appellee's fences were upon the highway over which appellant had been granted by the Scott county fiscal court the right to construct and operate its electric line, then it was his duty to remove them upon the demand of appellant, if they interfered with the free use of the grant in question. The grant to appellant carried with it the right to grade its proposed line in such a manner as to make the easement available. This involved, of necessity, the right to remove all obstructions in the public highway inconsistent with its free use for the purposes of the grant. If the fences of appellee obstructed the free use of the grant to appellant, it had the right to remove them. In the case of Miller v. Detroit, etc., Railway (Mich.) 84 N. W. 49, 51 L. R. A. 955, 84 Am. St. Rep. 569, it is said, speaking of a statement of facts similar to the one at bar: "These roads are not an additional servitude, as we have repeatedly held. When, therefore, their construction is duly authorized, it logically follows that the company has the right to remove from the highway any obstruction which interferes with the proper construction and operation of the road. Such power is necessarily implied. Dodd v. Consolidated Traction Company, 57 N. J. Law, 482, 31 Atl. 980; Southern Bell Tel. Company v. Francis, 109 Ala. 224, 19 South. 1, 31 L. R. A. 193, 55 Am. St. Rep. 930. When a man dedicates his land for a public highway, or it has been condemned for that purpose, and he has been compensated, it is definitely understood by him that whatever he may lawfully do within the boundary of that highway is done with the right of the lawful authority to appropriate the entire width of the highway for purposes of travel, if it become necessary. Street railways, in city and country, have come to be regarded as a public necessity, and their construction upon the highways universally sanctioned. If the township authorities may remove any obstruction to the public use, there seems to be no sound reason why they may not authorize street railway companies, telephone companies, and the like, to do so, when such companies are lawfully entitled to the use of the street. It is conceded that the township authorities in this case were authorized to grant the franchise to the defendant, and to determine in what part of the highway its roads should be constructed." The language of the court in the case cited is entirely consonant with reason. If the allegations of the answer and the amended answer are true, then appellee was a mere licensee, and could be required to move at any time. The grant to appellant being inconsistent with appellee's right longer to maintain his fences on the highway, it was his duty to move off upon request of appellant.

As this cause must be reversed for the errors above indicated, and will have to be retried, we deem it proper to make

the following suggestions as to the measure of damages to which appellee may be entitled: As to his crossings, he is entitled to recover such sum as will compensate him for the inconvenience or loss sustained by him between the time the crossings were injured by appellant and the time it restored them, if it has done so. This suggestion is made upon the idea that this action was instituted before appellant finished its road, and that, when finished, the crossings were restored to their former usefulness. If appellee's fences are upon the highway, he is not entitled to recover any damage by the acts of appellant which would not have accrued to him had they been upon his own line, provided he had prior notice that appellant needed that portion of the highway occupied by them for the enjoyment of its grant. If the cuts on the west side would not have undermined appellee's fencing on that side had it been back on his own line, then he is not entitled to damage by reason of the cuts. If the fills on the east side would not have injured his fencing had it been back on his own line, then he is likewise not entitled to damage by reason of the fills. The electric roadway in question was not an additional servitude upon the highway, and appellee was not entitled to anything growing out of the fact that appellant has constructed and is operating a line along the highway in front of his farm. Ashland & Catlettsburg Street Railway Company v. Faulkner (Ky.) 45 S. W. 235, 51 S. W. 806, 43 L. R. A. 554.

These suggestions obviate the necessity of discussing the other errors complained of by appellant. Upon the retrial of the case the pleadings will be changed to comport with this opinion, and evidence will be admissible upon the issues raised thereby; and it is believed that this will meet the requirements of the case.

Wherefore the judgment is reversed for proceedings consistent herewith.

ALDIS *et al* *v.* UNION ELEVATED R. CO.

(*Supreme Court of Illinois, April 24, 1903.*)

[68 N. E. Rep. 95.]

Eminent Domain—Elevated Railroads—Construction—Consent of City — Fee in Streets—Damages to Abutting Owner.*

Under Const. 1870, art. 2, § 13, providing that private property shall not be taken or damaged for public use without just compensation, an abutting owner, whose property has been injured by the

*As to whether an abutting owner may recover for injuries to property resulting from the construction and operation of an elevated railroad, see Aldrich v. Metropolitan W. S. El. R. Co. (Ill.), 2 R. R. R. 473, 25 Am. & Eng. R. Cas., N. S., 473 (injury caused by noise not constituting a taking of abutting property); note, 2 R. R. R. 214, 25 Am. & Eng. R. Cas., N. S., 214 (smoke, noise and vibration as elements of injury to property caused by operation of railroad); notes, 1 Am. & Eng. R. Cas., N. S., 380, 384; 10 Am. & Eng. R. Cas., N.

construction of an elevated street railway in a street, the fee of which is in the city, is entitled to recover the damages sustained, though the railway was legally constructed in the streets by permission of the mayor and city council, and was not so negligently operated as to constitute a nuisance.

Additional Servitude.

In an action by an abutting owner to recover damages to his abutting property by reason of the construction and operation of an elevated railway in a street, the fee of which was in the city, the fact that such a railroad did not constitute an additional servitude on the street was immaterial.

Appeal from Circuit Court, Cook County; Frank Baker, Judge.

Action by Owen L. Aldis and others against the Union Elevated Railroad Company. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

Peckham, Brown & Packard, Pike & Gade, and Wilson, Moore & McIlvaine, for appellants.

Knight & Brown and William G. Adams, for appellee.

HAND, J. This was an action on the case, brought by the appellants against the appellee in the circuit court of Cook county to recover damages by reason of the depreciation in value of the premises of appellants, located at the northwest corner of Van Buren and Dearborn streets, in the city of Chicago, upon which is located the Monadnock building, caused by the construction and operation by appellee of its elevated railroad in Van Buren street in front of said premises, and the erection of a station, platform, stairs, etc., at the intersection of said streets. The declaration, as amended, contained two counts, which, after describing the premises and the structure of said elevated road and method of its operation, averred that by means of the construction and operation of said elevated railroad, station, etc., their means of access to the said building and premises had been cut off, and the light, air, and view obstructed, and the enjoyment of their property disturbed by the throwing of smoke, dust, cinders, and filth into and upon said building and premises, by the creating and causing of loud and ominous noises, and by the causing of the ground and building thereon to shake and vibrate; that the railroad is a permanent structure; and that said building and premises are greatly damaged by the construction and operation of said elevated railroad and its appurtenances in the streets upon which said premises abut. A demurrer was sustained to the declaration, and, the appel-

S., 706; Philips v. Philadelphia & R. T. R. Co. (Pa.), 10 Am. & Eng. R. Cas., N. S., 706; Garrett v. Lake Roland Elevated Ry. Co. (Md.), 1 Am. & Eng. R. Cas., N. S., 385; Hunter v. Manhattan Ry. Co. (N. Y.), 1 Am. & Eng. R. Cas., N. S., 366; Oberfelder v. Metropolitan El. R. Co. (N. Y.), 1 Am. & Eng. R. Cas, N. S., 349; Tudor v. Chicago & Southside Rapid Transit R. Co. (Ill.), 1 Am. & Eng. R. Cas., N. S., 340; Baker v. Boston Elevated Ry. Co. (Mass.), 6 R. R. R. 831, 29 Am. & Eng. R. Cas., N. S., 831 (effect of ownership of fee).

lants having elected to stand by the same, the cause was dismissed for want of a sufficient declaration, and the appellants have prosecuted an appeal direct to this court on the ground that the construction of the first clause of section 13 of article 2 of the Constitution of 1870, providing that "private property shall not be taken or damaged for public use without just compensation," is involved.

The main contention of appellee is that, its elevated railroad having been constructed in the public streets of the city of Chicago by the permission of the mayor and city council, the appellants, as abutting owners, can recover no damages caused by the location, construction, and operation of said elevated railroad in the streets upon which their property abuts, unless the road is so improperly constructed or negligently operated as to make it a nuisance. We do not agree with such contention. The constitutional provision above referred to provides that private property shall not be damaged for public use without just compensation, and in the case of Doane v. Lake Street Elevated Railroad Co., 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. Rep. 265, where, at the suit of an abutting owner, it was sought to enjoin the construction of an elevated railroad in one of the public streets in the city of Chicago, the relief was denied upon the express ground that the complainant had an adequate remedy at law to recover all damages which his abutting property might sustain by reason of the construction and operation of the elevated road in the street in front of his property. In that case it was said (page 518, 165 Ill., page 522, 46 N. E., 36 L. R. A. 97, 56 Am. St. Rep. 265): "'Where the fee of the street is in the city, such damages as the abutting owner may suffer from the laying of a railroad track in the street are merely consequential, so far, at least, as they affect the property abutting on the street. In such case, as there is no physical taking of the land, injunction will not lie to enjoin the taking; the remedy being an action at law for damages.' * * * His injury is a depreciation of the property, which is capable of being estimated in money, and recoverable in an action at law, therefore a court of equity will not interfere by injunction." This case has never been overruled or modified, but is sustained by a long line of Illinois cases, and is a fair statement of the law as it has existed in this state since the adoption of the Constitution of 1870. Under the Constitution of 1848 a remedy for an injury like this did not exist, but one is given by the Constitution now in force. Rigney v. City of Chicago, 102 Ill. 64.

In case it is necessary to take private property for public use, the compensation must be fixed and paid before possession can be taken and the improvement made; but in a case like this, where no property is taken, the improvement may be made before the damages are ascertained and paid, the property owner in such case being driven to his action at

law for damages. Such action, however, is in the nature of a condemnation suit, and, when resorted to, the measure of damages and rules of evidence which are to be adopted are the same as though a direct proceeding by condemnation had been brought to determine the amount of damages to be paid prior to the making of the improvement. Chicago & Eastern Illinois Railroad Co. v. Loeb, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341; Illinois Central Railroad Co. v. Turner, 194 Ill. 575, 62 N. E. 798. The fact that the improvement has been made before the damages are determined and paid will not prejudice the property owner to recover the amount justly due him by reason of damage done his property. While a city may lawfully grant to an elevated railroad company, by ordinance, the right to construct its railroad in its streets, it is powerless to grant to such company the right to damage the property of the abutting owner (Illinois Central Railroad Co. v. Turner, supra); and, when the property of an abutting owner is damaged, his right, under the Constitution, to compensation, is not confined to a recovery for the tortious acts of the railroad company, but he may recover for an injury to his property which is the result of an act which is perfectly legal. Calumet & Chicago Canal & Dock Co. v. Morawetz, 195 Ill. 398, 63 N. E. 165.

While it seems to be conceded by the appellee that the rules of law hereinbefore announced apply to railroad companies in general whose tracks are laid in the streets of a municipality, it is contended they do not apply to appellee's road, as, it is said, it is a street railroad, and the construction thereof in the streets of the city of Chicago is not an additional servitude upon said streets. It has been held in a number of cases, notably in the Doane Case, that the construction of an elevated railroad in a street where the fee to the street is in the city is not an additional servitude upon the street; that is, that its construction therein with the consent of the municipality is not unlawful, as being a diversion of the street from the public use for which it was originally dedicated or acquired. While the doctrine of that and kindred cases is not questioned as between the abutting owner and a railroad company occupying the street with its railroad, on principle we see no difference as regards his right to recover damages for an injury to his property abutting on the street by reason of the construction and operation of a railroad in the street, whether it is a street or commercial railroad. The effect upon his property is the same, and, under the Constitution, if the same is depreciated in value by reason of the construction and operation thereof, it has been damaged, and he can recover. In Illinois Central Railroad Co. v. Turner, supra, and in Calumet & Chicago Canal & Dock Co. v. Morawetz, supra, interferences with the property of an abutting owner by reason of the construction and operation of a railroad in the public streets of a city, although by the

consent of the city, similar to those averred in this declaration, were held to give a cause of action to the abutting property owner.

The circuit court erred in sustaining the demurrer to the declaration. Its judgment will therefore be reversed, and the cause remanded to that court, with directions to overrule the demurrer.

Reversed and remanded.

On Rehearing.

(Oct. 7, 1903.)

PER CURIAM. The appellee has filed a petition for rehearing on the ground that its road is not an additional servitude upon the streets upon which appellants' property abuts, and it is said if damages are allowed the appellants for loss of air, light, view, access and the comfortable and safe enjoyment of their property, caused by the proper and reasonable operation of appellee's road, they will be paid for what they have waived, or be twice compensated. As held in the original opinion, this contention is not sound. At the time said streets were dedicated or condemned, appellants or their grantors did not part with, but retained as appurtenant to said property, the right of access to said streets, the right to enjoy the air and light which pass over said streets, the view, and the comfortable and safe enjoyment of their property (Field v. Barling, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406, 41 Am. St. Rep. 311; Doane v. Chicago City Railway Company, 160 Ill. 22, 45 N. E. 507, 35 L. R. A. 588; Kotz v. Illinois Central Railroad Co., 188 Ill. 578, 59 N. E. 240); and if the appellee has constructed and is engaged in operating an elevated railroad in said streets in front of appellants' property, the effect of which is to destroy these rights and thereby depreciate the value of appellants' property, it would seem too clear for argument that the property of appellants had been damaged, and, if damaged, that the appellants have not waived or been paid such damages.

In Aldrich v. Metropolitan West Side Elevated Railroad Co., 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237, the road was constructed upon the company's own right of way, and the court expressly declined to consider the rights of an abutter where the road was constructed in the street in front of his property, the effect of which was to destroy his rights of access, air, light and view and the comfortable and safe enjoyment of his property. That case is therefore not an authority, as is contended by appellee, conclusive of the question that the appellants cannot recover in this case.

The declaration averred and the demurrer admits the road of appellee to be an improvement of a permanent character. In Chicago & Eastern Illinois Railroad Co. v. Loeb, 118 Ill. 203, 8 N. E. 460, 59 Am. St. Rep. 341, which was an action

on the case to recover damages for depreciation in the value of property from the operation of a railroad in a public street upon which the property abutted, it was stated such "action for damages may be regarded as the nature of one kind of condemnation proceedings," and that all damages, past and future, caused by the operation of the road might be assessed in one suit.

After a re-examination of the original briefs in connection with the petition for a rehearing filed in this case, we have reached the same conclusion as we reached when the case was first considered. The petition for rehearing will therefore be denied.

Rehearing denied.

SCHNEIDER v. KNICKERBOCKER ICE CO. *et al.*

(Supreme Court of Wisconsin, Sept. 29, 1903.)

[96 N. W. Rep. 542.]

Railroads—Right of Way—Establishment—Private Tracks.

A railroad company, without having acquired a right of way over certain land belonging to defendant, by surveying the same or establishing a center line thereof, as required by Rev. St. 1898, § 1846, laid down a railroad track, extending its line to a section of land in which plaintiff was interested. Plaintiff thereupon constructed a further extension from such section line to his icehouse. Thereafter the railroad company conveyed its road to another company, which made no claim to that part of the extension on defendant's line, which was thereafter abandoned, and the track torn up: *held*, that plaintiff had no right to the maintenance of such extension over defendant's land.

Appeal from Waukesha County Court.

Suit by John J. Schneider against the Knickerbocker Ice Company and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Action to restrain defendants from removing a spur railway track, constructed by plaintiff, from certain lands where it was connected with the railway system of the defendant railway company to permit the moving of cars from such system to and from plaintiff's icehouse situated some distance from the terminal grounds of such railway company, and to establish his right to have such connection maintained, and to enjoy, by means thereof, the benefits of section 1802, Rev. St. 1898.

There is no bill of exceptions. The findings indicate the issues made by the pleadings and litigated. They are in substance and effect as follows: In and prior to December, 1899, the North Lakes Wisconsin Ice Company owned a tract of land in section 16, town 28, range 17 east, in Waukesha county, Wisconsin, bounded on the westerly side by the west line of such section. During the period mentioned the Milwaukee & Superior Railway Company, without having acquired a right of way over such land, surveyed, laid out and

established a center line therefor, traversing the same in an easterly and westerly direction, the easterly terminus being 100 feet east of the westerly boundary thereof, and occupied such right of way with its railway track, and subsequently extended such track, or permitted the same to be done by said ice company for the purpose of accommodating the latter in its business of dealing in ice, so that on December 1st, aforesaid, the westerly end of the track was about 40 feet west of said section line and on section 17. On said day said ice company conveyed to the railway company a right of way on said section 16 describing the same as one 50 feet wide as now located to the terminus of the road. August 14th thereafter plaintiff acquired an undivided half interest in a right of way 50 feet wide for a railway track in said section 17, connecting a place of business to be operated by him with the easterly boundary line of said section where defendant's railway track crossed the same. Subsequently the president and general manager of such railway company caused its track in said section and the westerly 20 feet thereof in section 16 to be removed, believing that portion to be upon lands not acquired by it for right of way purposes. A day or two thereafter said company conveyed its property, including whatever right it possessed to maintain a railway track upon its right of way in said section 16 to the defendant railway company. In September, 1901, plaintiff, at his own expense, constructed a spur track from the terminus of said track east of the line between sections 16 and 17, in a westerly direction to his icehouse in section 17, traversing the right of way in said section 17 of which he was part owner as aforesaid. He connected his track in section 16 with the defendant railway company's track. Immediately thereafter the defendant Knickerbocker Ice Company and the defendant John Field threatened to remove all that portion of plaintiff's track in section 16, and they intended so to do. To prevent such removal this action was commenced. The defendant railway company made no effort to disturb the situation created by plaintiff in any way. Plaintiff, at the time of the commencement of the action, was willing to comply with section 1802 aforesaid, and claimed the benefits thereof, and that he was the owner of a warehouse coming within its provisions, which he was entitled to reach from defendant railway company's track by a spur track connected therewith. Defendant John Field, at the time of the threatened removal as aforesaid, owned the land in section 16 upon which the plaintiff constructed his track, subject to any rights the defendant railway company had therein. He denied that it possessed any such rights, and his position was acquiesced in by said company. Prior to the conveyance to said company its grantor, by the president and general manager thereof promised plaintiff to extend its spur track to an icehouse to be erected by him in section 17, entitling him to enjoy the use of a railway con-

nection between his icehouse and the railway system of such grantee, provided he conveyed the right of way for such track to said grantee and agreed to furnish it with a certain amount of freight; but no such conveyance or agreement was ever made; neither did the defendant railway company, at the time it purchased the property, have any notice of the existence of such promise. The terminus of said company's main line is about one mile from the point in dispute. It is reached by a spur track. Neither said company's yard nor terminal limits reaches to or includes the location of plaintiff's icehouse.

Upon such facts the conclusion was reached that the defendants were entitled to a judgment dismissing the plaintiff's complaint with costs.

J. E. Wildish, for appellant.

Ryan, Merton & Newbury, for respondent Knickerbocker Ice Co.

C. H. Van Alstine, for respondent Chicago, M. & St. P. R. Co.

MARSHALL, J. (after stating the facts). But one question discussed in the briefs of counsel need be considered in deciding this case. We see no way of escape from the decision of the trial court that the place where appellant insists upon maintaining his track and connecting it with that of the respondent railway company is on premises owned neither by him nor such company, nor in which either owns a right of way. Appellant's counsel concedes, if that decision stands, that the judgment must be affirmed.

It is claimed that the railway company in fact owned a right of way up to the west line of section 16, including the premises in dispute, because it succeeded to the rights of the Milwaukee & Superior Railway Company after such company obtained a conveyance of a right of way for its railroad in said section 16, to the terminus thereof as the right of way was located, a track being then in place to and west of said section line, though the right of way was never surveyed to a point nearer such line than a point about 100 feet east of the same. It is well understood, we may safely say, that the location of a railway right of way, in a legal sense and in the sense the term is ordinarily used in railway parlance, is not accomplished by laying down a railway track, but by surveying and staking out the center line of the right of way for the purpose of building a railway track thereon and operating such track as required by section 1846, Rev. St. 1898. Respondent railway company's grantor never so established or located a right of way including the premises in question, so far as appears by anything in the record. From the circumstances that for the convenience of one of its customers it permitted such customer to extend, or itself extended, its track beyond the terminus fixed by the located right of way,

and subsequently conveyed the road, so far as the right of way had been located, it does not necessarily follow that its grantee obtained title to the premises beyond the surveyed right of way. At the time the track east of the west line of section 16 and on the premises in dispute was removed there was certainly legitimate ground for the claim that no railway right of way had been located thereon, in a legal sense, or in the sense the term was used in the deed. In that view its president and general manager having seen fit to abandon the disputed premises and done so, and its grantee, the respondent railway company, never having made any claim thereto, but submitted to the claim of John Field,—conceded to be the owner subject to such rights as such grantee may have therein—that it has no right of way over such premises, a third party circumstanced as plaintiff is cannot be heard successfully to claim to the contrary in order to enable him to enjoy a privilege dependent thereon. It seems quite clear that all parties interested in the title to the land in dispute prior to the claim of the appellant understood that the right of way conveyed to respondent railway company's grantor in section 16 did not extend to the west line of such section, and that with such view John Field was permitted to take and enjoy absolute possession of the premises as owner. Such parties having acquiesced in that construction of the conveyance, and it being a reasonable construction and one which was probably in the minds of the parties when the deed was made, the court cannot otherwise construe it to enable appellant to enjoy a privilege without which he will be a sufferer in respect to his business.

The judgment of the circuit court is affirmed.

CENTRAL TRUST CO. OF NEW YORK v. WASHINGTON COUNTY R. CO.

(Circuit Court, D., Maine, July 6, 1903.)

[124 Fed. Rep. 813.]

Railroads—Mortgages—Foreclosure—Parties.

In a suit by the holder of a mortgage given by a corporation to foreclose the same, stockholders and bondholders of the corporation may be permitted to intervene. Gregory v. Pike, 67 Fed. 837, 845, 15 C. C. A. 33, 41, explained and applied.

Same—Answer by Corporation—Authority of Counsel.

Where, in a suit to foreclose a corporation mortgage, the complainant would be entitled to a default and a decree pro confesso, if no answer had been filed, any question as to the authority of the executive officers of the corporation to employ a solicitor to answer, confessing the bill, is immaterial. It seems that, ordinarily, an answer under the seal of a corporation, by one of the principal officers, cannot be questioned.

Same—Construction of Railroad—Overpayment—Objection—Estoppel.

Where at the time a railroad was constructed, no objection was made to the contract by which the company's stocks and bonds

were issued in payment therefor, it could not subsequently be objected, after a long acquiescence, in a suit to foreclose a mortgage securing the bonds, that the actual cost of construction was only two-thirds of the par value of the bonds issued in payment therefor, and that the bonded indebtedness secured by the mortgage should therefore be scaled.

Same—Acquisition of Other Line—Powers.

Where the charter of a railroad company authorized it to construct its main line between certain termini, and also "to build branches or extend its line into one or more towns," the railroad was empowered to purchase a railroad already constructed, and appropriate as a branch line; and it was not limited to acquiring branch lines by building them.

Same—Mortgages—After-Acquired Property.

Where a railroad mortgage, in describing the property, contained the language, "and also all rights, powers, privileges, and franchises relating to or useful for the said railroad or branch, including the right to operate and maintain the same, whether now held or acquired by the mortgagor," such mortgage covered a line subsequently purchased by the mortgagor, which was an appropriate branch for the main line mortgaged.

Same.

Where, in a suit to foreclose a railroad mortgage, it appeared that the railroad at the time of foreclosure was capable of earning $100,000 annually, applicable to interest or dividends, which would pay 4 per cent. on $2,500,000, the upset price was fixed at $2,300,000.

In Equity.

Butler, Notman, Joline & Mynderse, and Chase Eastman, for Central Trust Co.

Mr. Littlefield, for intervening petitioners.

Curran & Curran, N. & H. B. Cleaves, and S. C. Perry, for Washington County R. Co.

Heath, Andrews & Dutton, for county of Washington.

PUTNAM, Circuit Judge. This is a bill in equity brought by the trustee under a mortgage of the Washington County Railroad Company, executed on the 10th day of March, 1898, to foreclose the same by sale as provided in the deed. The entire amount of the bonds issued was $2,320,000, bearing interest at 5 per cent. per annum. None of the coupons attached thereto have ever been paid, but no bill to foreclose was filed until this, on the 18th day of April, 1903.

The only parties to the bill are the complainant and the Washington County Railroad Company. The county of Washington, which holds all the preferred stock of the mortgagor corporation, amounting to the par of $500,000, and James Mitchell, holder of something over $70,000 of the mortgage bonds referred to, have severally asked leave to intervene. In Gregory v. Pike, 67 Fed. 837, 845, 15 C. C. A. 33, it was held that the chancellor has no power to make new parties defendant against the objection of the complainant. It was shown, however, on page 846, 67 Fed., page 41, 15 C. C. A., that this rule does not apply to cases of the coming in of a cestui que trust, or a stockholder as stockholder, under circumstances like those at bar. It applies only where those

who seek to intervene make issues which would not be disposed of so as to become res adjudicata provided they were not made parties. Under the circumstances, we deem it equitable to grant the petitions for intervention on special terms expediting the litigation, as set out in the orders in reference thereto which we will cause to be entered.

Previous to the petitions to intervene the Washington County Railroad Company had filed an answer admitting substantially all the allegations in the bill, so that, on the face of the pleadings as they thus stood, the complainant was undoubtedly entitled to a decree. It is claimed by the county of Washington that this answer was put in by the president and the general counsel of the defendant corporation without special authority to either so to do. Ordinarily, an answer under the seal of the corporation by one of the principal officers thereof cannot be questioned. However, it is not necessary for us to consider this contention, because, if the answer were invalid, as claimed by the county of Washington, the complainant would be entitled to a default and a decree pro confesso; also, being the answer of a corporation, it is, in effect, nothing more than a pleading, and cannot prejudice in any substantial manner whatever propositions may be made by the interveners. Therefore we leave the answer to stand.

Immediately on the filing of the answer, and before petitions for intervention were filed, the parties to the record submitted to the court a draft decree. Thereupon the petitions for intervention were presented to the court. The court postponed the consideration of the petitions until the coming in of the report of the special master, to whom the court referred the pleadings and the draft decree, with directions to hear the county of Washington, and Mitchell, as well as the parties to the record, and their proofs, and to include in his report his findings on the propositions which might be submitted by either of them to him, and to allow either of them to take exceptions, to be returned with his report. The report of the master has now been returned into court, with exceptions taken thereto by the county and by Mitchell, none coming from the parties to the record. Thereupon, as we have already said, we admitted the county of Washington and Mitchell as interveners, thus giving us proper jurisdiction over their exceptions.

It appears that the entire length of the railroad of the defendant corporation within the termini distinctly specified in its charter—that is, from a junction with the railroad of the Maine Central Railroad Company in Hancock county to its present terminus in the city of Calais, and its branch to Eastport, also expressly described in its charter—is 119 miles. Of this, 3 15-100 miles, constituting its terminus in the city of Calais, were acquired as hereinafter stated. The balance of the railroad thus expressly described in its charter, namely, 119 miles, less 3 15-100 miles spoken of, was constructed prior

to the 30th day of June, 1899, by the parties who now hold all of the bonds secured by the mortgage in question, aside from those owned by Mitchell, and others to the amount of the par of $4,000, with accumulated interest. The entire issue of bonds was $2,320,000, as already stated. In addition thereto, and to the preferred stock, there was an issue of 15,000 shares of the common stock of the defendant corporation of the par value of $100 each. The parties who thus constructed the railroad received in payment for the cost of construction 14,974 shares of common stock and $2,142,000 of the mortgage bonds in question, and on receipt of the same they entered into the control of the defendant corporation, and have ever since remained in control of it. No objection was ever made by the county of Washington, or by any person, to this arrangement, and the county, and every one concerned, acquiesced in reference thereto until the present bill was filed. It is now maintained by the county that the bonded indebtedness should be scaled down, because it is claimed that the actual cost of construction was only about two-thirds of the par of the bonds issued in payment therefor. If the court were compelled to pass on the issue, it would probably find, as a matter of fact, that the arrangement as described was in truth consented to by all the parties in interest and was satisfactory to them. However that may be, it is now too late to question the transaction in the federal courts. It is hardly necessary to cite authorities on this point, and therefore we will only refer to Pittsburg Railway Company v. Keokuk Bridge Company, 131 U. S. 371, 381, 9 Sup. Ct. 770, 33 L. Ed. 157. The transaction was neither unusual nor unreasonable. The parties constructing the railroad took their risk of gain and loss, and, apparently, if the court accepted the highest value which it has been suggested could be reasonably placed on the property, after making allowance for loss of interest, there has been neither the one nor the other to any substantial amount. Therefore there is no reason which would justify us in sustaining the proposition of the county of Washington in this respect.

In addition to the railroad, which was constructed as we have already said, the defendant corporation acquired a line, already in operation, extending from the present terminus of the defendant corporation in the city of Calais to Princeton. This was approximately 20 miles in length. Deducting the portion used by the defendant corporation for its line within its expressly chartered termini leaves the length of what was thus acquired approximately 17 miles.

The terms of this charter, followed, as it was, by the subscription to the preferred stock, shows, what is also a matter of common knowledge, that the purpose of the undertaking was to accommodate and develop the county of Washington. The whole line from Calais to Princeton is within that county, and it is a natural feeder to the main railroad of the defend-

ant corporation, and is naturally served by it, and the connection of the two and their practical union are apparently results which would naturally follow the general purpose of the enterprise and aid what it sought to accomplish.

The acquisition of this line to Princeton, however, was subsequent to the execution of the mortgage in question. Therefore, as we have said, the county of Washington claims that it should not be covered by this decree of foreclosure. The master found otherwise, and has put the case so clearly that we can hardly add anything to what has been said by him. We will, however, select Pennock v. Coe, 23 How. 117, 16 L. Ed. 436; Branch v. Jesup, 106 U. S. 468, 486, 1 Sup. Ct. 495, 27 L. Ed. 279; Bear Lake Company v. Garland, 164 U. S. 1, 15, 17 Sup. Ct. 7, 41 L. Ed. 327; Pardee v. Aldridge, 189 U. S. 429, 23 Sup. Ct. 514, 47 L. Ed. ——, and Hamlin v. European North American Railway Company, 72 Me. 83—as illustrating how liberally the federal courts and the local courts in Maine support provisions in mortgages of franchises of railroad corporations with reference to property subsequently acquired, which is of appropriate use in connection with such franchises. These cases, among other things, settle that with reference to realties and lines of railway subsequently acquired, provided they are incidental to the purposes of the franchise, it is entirely unimportant whether they are obtained by purchase or construction or by condemnation or deed.

By the charter of the Washington County Railroad Company, it was not only authorized to construct a main line of road between the termini which we have named, with a branch to Eastport, but also "to build branches or extend its lines into one or more towns, and operate the same with steam or other motive power." Of course, the words "one or more towns" leave the construction of this clause indefinite. It may well be said that it was not intended to permit correspondingly indefinite authority to "build branches," or to "extend its lines," for indefinite distances, including the possibility of paralleling other railroads. Considering the general purview of the charter, and especially the words "other motive power," which undoubtedly contemplated what are known as "trolley lines," which, at the date of the charter, extend ordinarily only short distances for local uses, it can hardly be questioned that the purpose of this provision was to enable this corporation to develop the county of Washington, as we have already suggested. Therefore, while we are not called on to determine, and it might be impossible to theoretically determine, the minimum or the maximum of the powers thus given to the Washington County Railroad Company, yet we can hardly doubt that the building of branches within the county, no longer than the line to Princeton, not injurious to other enterprises, and natural feeders to the main railroad, is within the purview of this

provision of its charter. Neither, in view of the authorities to which we have referred, and especially in view of the broad expression, "extend its lines," found in this extract from the charter, can we have any doubt that extension by purchase was authorized, as well as extension by construction, provided, in either case, that no detriment was done to any other existing enterprise. That there was any detriment in this case is not claimed, and it is a matter of common knowledge within this state and district that there was none such. Therefore we think the acquisition of this line to Princeton was an exercise of the franchises which the Washington County Railroad Company possessed at the time its mortgage was executed.

The mortgage, in describing what was embraced in it, contains the following language: "And also all rights, powers, privileges, and franchises, relating to or useful for the said railroad or branch, including the right to operate and maintain the same, whether now held or hereafter acquired by the mortgagor." We have already shown that the acquisition of this line to Princeton was within the exercise of franchises possessed by the respondent corporation at the time the mortgage was executed; but a question is raised by Washington county arising out of the two words, "relating to or useful for the said railroad or branch." The word "branch," in this connection, undoubtedly means the main line between the specified termini in Hancock county and the city of Calais; but there can be no question, in view of the facts which we have stated, that the line to Princeton was, as we have already said, a feeder to the main line, and was served by it, and therefore came within the words, "relating to or useful for the said railroad." This is emphasized by the fact that a part thereof, some three miles in length, as we have already said, was properly, and we have no doubt economically, made a portion of the main line. Therefore we hold that the line to Princeton should be covered into the decree.

This disposes of all the exceptions taken by the county of Washington to the report of the master, and leaves for consideration only a single exception taken by Mitchell. The master fixed the upset price of the property to be sold under the decree of foreclosure at $2,000,000. Mitchell claims that it should be $2,500,000. By the terms of the mortgage the purchaser at a foreclosure sale has the right to make the major payment in bonds, and the decree as reported by the master provides therefor. Where there is nothing of that character in the mortgage or the statutes, and the court is appealed to by the parties to insert it, it may, of course, as incidental thereto, impose equitable conditions as to the upset price, or as to any other topic as to which conditions can reasonably be imposed; but in the present case there is nothing in this feature of the decree, nor in any other feature thereof, which gives this court at the present time jurisdic-

tion, on the mere suggestion of either party, to fix an upset price. Nevertheless Mitchell appeals to us to do so, and the complainant consents that we should. The complainant, perhaps, is wise in this, because, in the absence of an upset price, the sale, being subject to confirmation, might be set aside on the ground that the bids were insufficient, and the final disposition of the property be embarrassed and delayed. Consequently it is proper for the parties to agree that the court should at the present time determine the upset price. Therefore we accept the jurisdiction in this respect which the parties desire us to exercise.

A careful examination of the facts satisfies us that the property at the present time is capable of earning at least $100,000 annually, applicable, on conservative rules, to interest or dividends. The past history indicates that the future will show larger net returns, but we are not justified in speculating on this. Events may occur which will diminish the net income notwithstanding the expectation of its increase. We are, however, justified by the continuous growth which the past has developed in taking the present net earning capacity of the property as indicating the value which shall be set on it for an upset price. This is to be estimated in view of the fact that the property can be made dividend earning as well as interest paying. As dividend earning, it would pay 4 per cent. on $2,500,000, which, on a fair basis, would justify a valuation at that figure. We should, however, allow for the fact that a purchaser would be expected to make a reasonable profit, and that there are embarrassments and difficulties often met with in converting an enterprise like this into a dividend paying property.

We deduct for all that $200,000, leaving the upset price to be fixed in the decree $2,300,000.

This disposes of all the questions which were left for us to consider.

It is ordered that the upset price named in the decree for sale shall be $2,300,000, instead of $2,000,000, as reported by the master; that all other exceptions to the master's report are overruled; and that, subject to the modification as to the upset price, the master's report is confirmed; and a decree will be entered accordingly.

BOROUGH OF MONTOOTH v. BROWNSVILLE AVE. ST. RY. CO. *et al.*

(*Supreme Court of Pennsylvania, May 25, 1903.*)

[55 Atl. Rep. 1036.]

Street Railways—Contract to Build—Breach—Narrowness of Street as a Defense.

It is no defense to an action for breach of contract to build a street railway on a certain street that for a distance of 75 feet the

highway was only 11 feet in width, the evidence not being conclusive that such width was insufficient for the purposes of the road.

Same—Same—Same—Same.

Where a street railway company contracted to build a road on a certain street, the fact that, because of the narrowness of the street, it was impossible to build such railway, is no defense to an action for breach of the contract.

Same—Same—Same—Sufficiency of Evidence.

Evidence in an action against a railway company for failure to build its line on a certain street in accordance with its contract *held* insufficient to show that the contract was impossible of performance.

Appeal from Court of Common Pleas, Allegheny County.

Action by the borough of Montooth against the Brownsville Avenue Street Railway Company and the Mercantile Trust Company of Pittsburg. Judgment for defendants, and plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

H. I. Riley, for appellant.

William A. Challener, Homer L. Castle, and Clarence Burleigh, for appellees.

POTTER, J. This is an action to recover upon a bond given by the Brownsville Avenue Street Railway Company to the borough of Montooth to secure the construction of a street railway upon West street in the said borough. The consent of the borough had been given by an ordinance dated September 21, 1900, which was formally accepted by the street railway company upon September 26th following. Its provisions required the filing of a bond conditioned for the faithful performance of all the terms of the ordinance, and stipulated that the bond was to be forfeited, and the sum of $2,000 paid as liquidated damages to the borough, if the street railway was not completely built and in operation on or before the 1st day of October, 1901. The bond thus required was given, and upon it the present action was brought. The trial judge found that the ordinance and its acceptance created an agreement between the borough and the railway company, and that by the terms of this agreement the company received a valuable right, for which, as a consideration, it was to construct the line, and grade and fill in with broken stone and pave the portions of West street referred to. He further found that the entire failure of the railway company to perform its agreement had occasioned a loss to the borough, which was not to be measured by any ordinary standard, and that the damages as agreed upon and liquidated by the parties should be considered as the proper measure of compensation. But the learned judge was of opinion that the railway company had a good defense upon the ground of the insufficiency of the width of the highway. It appeared from the testimony that for a distance of about 750 feet the width of the portion of

West street in the borough was not more than 11½ feet, and the court held, as a matter of mathematical certainty, and therefore of law, that this was not sufficient to admit of the safe construction and operation upon it of a line of street railway. Being thus of the opinion that it was impossible for the company to perform its contract, he directed a verdict for the defendant. But, "impossibility of performance is, in general, no answer to an action for damages for nonperformance." 3 Addison on Contracts, *1195. "If one, for a valid consideration, promises another to do that which is in fact impossible, but the promise is not obtained by actual or constructive fraud, or is not on its face obviously impossible, there seems no reason why the promisor should not be held to pay damages for the breach of the contract—not, in fact, for not doing what cannot be done, but for undertaking and promising to do it." 2 Parsons on Contracts, *673. The general rule is thus stated in a discussion upon the subject of "Impossibility of Performance as a Defense," in 12 Cent. Law J. 4: "Impossibility of performance, whether such impossibility arises through the fault of the promisor or not, will not constitute a valid defense to an action for a breach of the contract. If the promisor makes the promise conditional upon its continued possibility, then the risk is assumed by the promisee, and he loses his right of action if the contingency arises. But if the promisor makes the promise unconditionally, then he assumes the risk, and, as a general rule, he cannot set up the impossibility of performance as a defense to an action by the promisee."

It is the duty of the party making the promise to ascertain at the time whether or not performance is possible. If he neglect to inform himself, it is at his peril. But it is by no means clear that the evidence in this case justifies the conclusion that the construction and proper operation of the street railway upon West street, within the borough limits, was an impossibility. The narrow portion in which the difficulty lay, extended for a short distance only; and it does not seem to us that the problem which it presented was one to baffle the resources of the builders of modern street railways, even if for a distance of 750 feet they were confined to the use of about 11 feet in width of the highway. The borough engineer testifies positively that it is feasible to build and operate a line of railway over the street in question, and he bases his statement upon the fact that he had actually constructed another line of street railway, which in one place had only a 10-foot right of way. The argument against the sufficiency of the width for the purpose is based upon the supposed necessity for cutting off a portion of each side of the street for a sidewalk. But it does not follow that any such exclusive use of the street at that point will be required. As the borough authorities have granted the use of that street to the company, to build its street railway upon, it is to be presumed that other provisions, by means of widen-

ing the street or otherwise, will be made for a sidewalk, if it be needed. At the present time the street does not seem to be built upon, and is but little more than a country road; but, if the public needs require it, the street can be widened, either by the borough in the usual way, or the railway company can secure additional space by the purchase of ground from the abutting owners. The mere matter of additional expense to the company is no sufficient excuse for failure to comply with its contract. The argument for the appellee proceeds entirely upon the assumption that the company was not bound to make any effort to secure additional space which might be made available, if needful to enable it to build the road upon the right of way granted by the borough. We do not regard this position as tenable. The company knew the situations and the conditions existing upon the ground, or at least it certainly might have known them, when it made the agreement. It is fair to presume that at that time the company had in view a plan which would enable it to use to good advantage the privileges granted to it by the borough over the portion of West street within its limits. The testimony shows that West street was 40 feet in width, and while, at the narrow part, the portion of it within the borough was only 10 or 11 feet in width, yet the remainder of the highway was in existence at that point, and was open for the use of the public. Nothing appears in the evidence to show that the railway company could not have obtained the right from the proper authorities to make such auxiliary use of the remaining portion of the highway as would permit of the safe and comfortable operation of such an instrument of public convenience as a street railway. An inspection of the testimony makes it apparent that various other expedients might have been effective. For instance, if a double line of poles were thought necessary upon the 750-foot portion, permission might have been obtained to set them outside the line of the street, and upon either side. But even if confined to the limit of space which was clearly available, it seems that other methods were open to adoption, which would have made compliance possible. It does not appear from the evidence that double lines of poles are absolutely necessary, as instances were cited in which single lines of poles to support overhead wires are in practical use. It seems also, that, by means of an underground conduit, the power can be conveyed and the system successfully operated without the use of any poles at all.

As we read the evidence, we cannot avoid the conclusion that there was sufficient in it to justify a finding that it was possible for the railway company to have complied with its agreement to build its line in accordance with the terms of the ordinance. The third specification of error is therefore sustained.

The judgment is reversed, and a venire facias de novo is awarded.

OMAHA BRIDGE & TERMINAL RY. CO. *v.* REED *et al.*

(*Supreme Court of Nebraska, July 3, 1903.*)

[96 N. W. Rep. 276.]

Eminent Domain—Ownership—Right of Appeal.

A mortgagee is an owner, within the meaning of the statute providing for the taking of land under the power of eminent domain; and, as such owner, he has the right to prosecute an independent appeal from the freeholders' award.

Same—Award—Right of Lienholders.

In proceedings for the condemnation of land under the power of eminent domain, the money awarded by the freeholders, or by the district court on appeal, stands in place of the land, and belongs to lienholders, to the extent of the value of their liens.

Same—Same—Appeal by Mortgagee—Issues.

On appeal by a mortgagee from an award made by freeholders in a condemnation proceeding, the question to be tried and determined is the value of appellant's lien on the property appropriated.

Same—Same—Same.

An appeal by a mortgagee in a condemnation proceeding is not effective as to the landowner against whom no summons has been issued.

Same—Parties.

If the landowner is not brought into the district court by the mortgagee's appeal, the corporation at whose instance the condemnation proceeding was initiated may bring him in, if it is necessary to do so for the protection of its rights.

Same—Same.

A landowner who fails to appeal from the freeholders' award in a condemnation proceeding is conclusively bound by it.

(Syllabus by the Court.)

On rehearing. Affirmed.

For former opinion, see 92 N. W. 1021.

Wharton & Baird, for plaintiff in error.

Hall & McCulloch, for defendants in error.

SULLIVAN, C. J. After carefully examining the questions involved in this litigation, we conclude that the judgment of affirmance should be adhered to. We find it necessary, however, to modify in one particular the commissioner's opinion. It being settled that a mortgagee is an owner within the meaning of the statute providing for the taking of land under the power of eminent domain, it seems to follow that his right to an independent appeal for the protection of his interests cannot be denied. His security having been taken for public purposes, he is, of course, entitled to have the money paid as compensation applied upon his claim. The condemnation money stands in place of the land, and belongs to the mortgagee, to the extent of the value of his lien. Insurance Co. v. Slee, 123 Ill. 57, 12 N. E. 543; Chicago, B. & Q. R. Co. v. Chamberlain, 84 Ill. 333; Calumet River Ry. Co. v. Brown, 136 Ill. 322, 26 N. E. 501, 12 L. R. A. 84; Michigan Air Line Co. v. Barnes, 40 Mich. 383; 1 Jones, Mtgs. § 78; 7 Enc. Pl. & Pr. 637.

Upon the trial of this case in the district court it was in

effect determined that the mortgagees' interest in the land equaled or exceeded the damages assessed by the jury. In other words, the mortgagees, claiming to be owners, within the meaning of the statute, presented their claim to the district court for adjudication. They asserted and proved that they were owners, and that the value of their ownership was at least equal to the amount named in the verdict. The Omaha Bridge & Terminal Company had been duly summoned. It was in court, and had ample opportunity to controvert and disprove the mortgagees' claim. It knew the issue presented for trial was the value of the mortgage lien, and, if it was of opinion that the presence of the owner of the fee was necessary for the protection of its rights, it was its privilege to have him brought in. It failed to have him brought in; in effect, it consented to have the issue tried and determined without him; and it must now abide by the result. Chicago, K. & N. Ry. Co. v. Ellis, 52 Kan. 41, 33 Pac. 478; Lance v. Chicago & C. R. Co., 57 Iowa, 636, 11 N. W. 612; Washburn v. Milwaukee & L. W. R. Co., 59 Wis. 379, 18 N. W. 431.

In condemnation proceedings notice of appeal must be given when the statute so provides. Maxwell v. La Brune, 68 Iowa, 689, 28 N. W. 18; Butte County v. Boydstun, 68 Cal. 189, 8 Pac. 835; Jones v. Proprietors of Morris Aqueduct, 36 N. J. Law, 206. In this case the statute with respect to notice was not complied with. No notice of appeal was given to the landowner, and no effort made by either the mortgagees or the company to make him a party to the action in the district court. This being so, we must confess that we were wrong in holding, as we did in the former opinion, that the appeal was effective as to him. It was not effective, and the freeholders' award, so far as he is concerned, is conclusive.

The motion is overruled.

ATCHISON, T. & S. F. RY. CO. v. KANSAS CITY, M. & O. RY. CO. *et al.*

(*Supreme Court of Kansas, Oct. 10, 1903.*)

[73 Pac. Rep. 899.]

Eminent Domain—Right to Condemn Land of Another Railroad Company.*

One railway corporation cannot, under the general statutes of eminent domain of this state, condemn for right of way purposes

*As to the right to condemn the land of a railroad company, see Atchison, etc., Ry. Co. v. Kansas City, etc., Ry. Co. (Kan.), 7 R. R. R. 509, 30 Am. & Eng. R. Cas., N. S., 509 (land not in use for, and not necessary for railroad purposes); Ft. Worth & R. G. Ry. Co. v. Southwestern T. & T. Co. (Tex.), 6 R. R. R. 222, 29 Am. & Eng. R. Cas., N. S., 222 (right to condemn railroad right of way for telegraph line); Denver Power & Irrigation Co. v. Denver, etc., R. Co. (Colo.), 4 R. R. R. 822, 27 Am. & Eng. R. Cas., N. S., 822

the land of another railway corporation already in actual and necessary use for railway purposes.

Same—Same.

An attempted condemnation by one railway corporation, under the general statutes of eminent domain of this state, for right of way purposes, of an entire tract of land belonging to another railway corporation, a portion of which is already in actual and necessary use by the owner for railway purposes, and for all of which a single award of damages is made, is void as an entirety.

Same—Same—Injunction.

In a suit in equity, brought by a railway corporation to enjoin the unauthorized condemnation of its property by another railway corporation for right of way purposes under the general statutes of eminent domain, the court has no authority to sever from the whole a portion of a tract condemned as an entirety, and allow the proceedings to stand as to the remainder while invalidating them as to such portion; nor can the condemning corporation cure the unwarranted appropriation of an entire tract by disclaiming the right to use or occupy a portion of it.

(Syllabus by the Court.)

On rehearing. Reversed.

For former opinion, see 70 Pac. 939.

A. A. Hurd and Robt. Dunlap (N. H. Loomis, as amicus curiæ), for plaintiff in error.

J. McD. Trimble, Jno. A. Eaton, and J. G. Egan, for defendants in error.

BURCH, J. When this case was first presented, it was decided upon the theory that the real controversy related to the refusal of the trial court to enjoin the taking by one railway corporation, under the statutes of eminent domain, of property belonging to another railway corporation, whose actual occupancy by the owner was questioned, whose use for its corporate purposes was denied, and whose necessity for such purposes was assailed. The majority of the court concluded that a dispute of this character does not fall within the

(right to condemn railroad right of way for reservoir site for private water company); Seattle & M. R. Co. v. Bellingham Bay & E. R. Co. (Wash.), 5 R. R. R. 160, 23 Am. & Eng. R. Cas., N. S., 160 (right to condemn right of way of one company for another); Union Pac. R. Co. v. Colorado Postal Tel. Cable Co. (Colo.), 5 R. R. R. 349, 28 Am. & Eng. R. Cas., N. S., 349 (right of way for telegraph line); notes, 18 Am. & Eng. R. Cas., N. S., 373, 13 Am. & Eng. R. Cas., N. S., 408 (right under federal statutes to condemn railroad right of way for telegraph line); 3 Am. & Eng. R. Cas., N. S., 99, 103 (right to condemn property of other railroads and corporations); 4 Am. & Eng. R. Cas., N. S., 411 (occupancy of track of another company); City of Terre Haute v. Evansville, etc., R. Co. (Ind.), 8 Am. & Eng. R. Cas., N. S., 760 (condemnation for another public use); Savannah, etc., Ry. Co. v. Postal Tel. Cable Co. (Ga.), 20 Am. & Eng. R. Cas., N. S., 917 (for telegraph line); Foster v. Chicago, R. I. & T. Ry. Co. (Tex.), 3 Am. & Eng. R. Cas., N. S., 1; Gulf, C. & S. F. Ry. Co. v. Milam County (Tex.), 7 Am. & Eng. R. Cas., N. S., 780 (county road over right of way); Union Terminal R. Co. v. Board of R. Commissioners (Kan.), 3 Am. & Eng. R. Cas., N. S., 72 (crossing by one railroad over another); Lake Shore & Michigan Southern Ry. Co. v. Baltimore & Ohio & Chicago R. Co. (Ill.), 3 Am. & Eng. R. Cas., N. S., 57 (right of way across side track); Lake Erie & W.

jurisdiction of the board of railroad commissioners; that no tribunal has been provided by law to pass upon the propriety of a taking by one railroad company of the land of another in advance of condemnation under the statute; that the only remedy of an aggrieved landowner in such a case is whatever a court of equity can furnish; and that the judgment of such a court upon issues of fact of the character described is conclusive to the same extent as in other cases. In consequence of a rehearing granted under rule 23 of this court (43 Pac. vii.), it has become plain that more is involved in the case than has been determined. The district court granted a portion of the relief prayed for by the plaintiff upon the allegations of its petition, and enjoined the Orient Company from interfering with or obstructing that part of the lead track of the Santa Fe Company opposite to and directly south of its roundhouse, and also that part of the side track opposite to and directly south of its coal trestle. This judgment itself implies and discloses an attempt at an appropriation by the condemnation proceedings of the property protected by the injunction, and shows that such property was so conditioned as to warrant the interposition of the court. There is abundant evidence in the record that the report of the condemnation commissioners included land actually occupied by at least one of the Santa Fe Company's railway side tracks. Counsel for the respective parties do not agree as to the quantity of land affected, nor as to the full extent of the interference, but in referring to the track south of the coal trestle counsel for the Orient Company make the following statement in their brief on the rehearing: "The boundary of the Orient right of way would lap over a very few feet upon the extreme west end of that ground track." There is, therefore, no dispute as to the fact of appropriation. There is likewise abundant evidence in the record that this track was properly

R. Co. v. Comm'rs (Ohio), 18 Am. & Eng. R. Cas., N. S., 765 (county ditch across right of way); Chicago West Division Ry. Co. v. Metropolitan West Side El. R. Co. (Ill.), 3 Am. & Eng. R. Cas., N. S., 45; City Council of Augusta v. Georgia R. & Banking Co. (Ga.), 7 Am. & Eng. R. Cas., N. S., 384; In re American Transp. & Nav. Co. (N. J.), 3 Am. & Eng. R. Cas., N. S., 26; Lake Shore & Mich. Southern Ry. Co. v. Baltimore & Ohio & Chicago R. Co. (Ill.), 3 Am. & Eng. R. Cas., N. S., 57; National Docks & New Jersey Junction, etc., Co. v. Pennsylvania R. Co. (N. J.), 3 Am. & Eng. R. Cas., N. S., 82; St. Louis, Alton & Terre Haute Ry. Co. v. Bellville City Ry. Co. (Ill.), 3 Am. & Eng. R. Cas., N. S., 53; Southern Pac. R. Co. v. Southern California R. Co. (Cal.), 3 Am. & Eng. R. Cas., N. S., 37; Union Terminal R. Co. v. Board of R. Com'rs (Kan.), 3 Am. & Eng. R. Cas., N. S., 72; Postal Tel. Cable Co., of Utah v. Oregon S. L. R. Co. (Utah), 22 Am. & Eng. R. Cas., N. S., 273 (telegraph line); Chicago & N. W. R. Co. v. Cicero (Ill.), 3 Am. & Eng. R. Cas., N. S., 188; Mobile & O. R. Co. v. Postal Tel. Cable Co. (Ala.), 13 Am. & Eng. R. Cas., N. S., 423; Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co. (Minn.), 13 Am. & Eng. R. Cas., N. S., 449; Orleans & J. Ry. Co. v. Jefferson & L. P. Ry. Co. (La.), 16 Am. & Eng. R. Cas., N. S., 699.

used in connection with the coal trestle, which was erected in good faith to meet the necessities of the business of the Santa Fe Company as a common carrier, and that the whole improvement cost some $6,300. The evidence of the Santa Fe Company shows that estimates for this work were submitted in January, and that authority for its prosecution was given in April. Counsel for the Orient Company concede that it was commenced on May 6th, that the condemnation commissioners did not begin their work until May 27th, and that they did not file their report until June 14th. Until the commissioners' report was filed, it could not be known whose land had been taken, or in what quantity, or in what locality, and at least until the commissioners approached the land of the Santa Fe Company in the actual work of condemnation that company was fairly entitled, without question as to its motive, to make any use of its property which the legitimate advancement of its business interests demanded. Besides this, the record shows that upon the production of this evidence counsel for the Orient Company disclaimed any right to obstruct or interfere with the property protected by the injunction. Hence all further controversy as to the character of the use to which the land taken was put is also eliminated. The judgment involving the determination of these facts is not appealed from.

The record therefore fairly presents a case of an attempted condemnation by one railroad company, under the general statutes of eminent domain, of land owned by another railroad company, already in actual and necessary use for railroad purposes. Under the authority of the text quoted in the former opinion (1 Lewis, Eminent Domain [2d Ed.] § 267), and the adjudicated cases upon which that text is based, this cannot be done except by express statutory warrant, or by necessary implication from the language of the statutes, when an effort to apply the law is made. The latest decisions of the courts support this doctrine. Western Union Tel. Co. v. Pennsylvania R. Co. (C. C.) 120 Fed. 362, decided in January, 1903, and affirmed in Western Union Telegraph Co. v. Pennsylvania R. Co. (C. C. A.) 123 Fed. 33, decided May, 1903; Indianapolis & V. R. Co. v. Indianapolis & M. R. Transit Co. (Ind. App.) 67 N. E. 1013, decided in June, 1903. The opinions in these cases collate numerous authorities, and without doubt announce the law. The statutes cited in the original opinion are barren of any such express power, and the disclaimer negatives any excuse to resort to the doctrine of implication. Therefore the attempted condemnation of so much at least of the ground of the Santa Fe Company as was occupied by the coal track referred to was void.

So much of the report of the condemnation commissioners as relates to the lands of the Santa Fe Company, is as follows: "The Atchison, Topeka & Santa Fe Railway Company is the owner of the following described tracts or lots of

land in Lyon county, Kansas, to wit: Lots numbered four (4), five (5), and six (6), of block numbered one (1), lots numbered three (3) and four (4) of block numbered two (2), and lot numbered three (3) of block numbered six (6); all in Ruggles' addition to Emporia, a subdivision of the north ½ of the south ½ of the northeast quarter of sec. 16, Town. 19 S., range 11 E. Also a small triangular piece of ground in the southwest corner of the lands of said company in the southwest quarter of northwest quarter of sec. 16, Town. 19 S., range 11 E., as shown on plat annexed, over, through, and upon which the said route or right of way of the said the Kansas City, Mexico & Orient Railway Company is surveyed and located, as shown on the map or plat hereto attached and made a part of this report, and marked 'Exhibit A,' which map or plat correctly shows the exact location of the said route or right of way as accurately surveyed and located over, through, and upon the said tract or lot of land, and the quantity of land necessary to be taken from said tract or lot of land for said purpose. And we hereby appraise the value of the land taken for said route, right of way, and other purposes, including any and all crops and improvements upon the land actually taken or appropriated from said tract or lot of land, at four hundred dollars ($400.00). And we hereby assess the damages to said tract or lot of land by reason of the appropriation of said route or right of way, etc., over, across, and upon the same at fifty dollars; our total appraisement of said value and assessment of said damages being four hundred and fifty dollars ($450.00)." From this it will be seen that as to the property of the Santa Fe Company the condemnation proceeding was an entirety. A gross allowance of $400 for land taken was made, and a gross allowance of $50 damages to land not taken was made.

Under the statutes the condemning company has the absolute and uncontrolled direction of the condemnation proceeding. The commissioners lay off the route for such distance as the company desires, of such width as the company desires, within the limits of 100 feet, and upon such location as the company desires. If the company desires the land of another railroad company, the coveted quantity is surveyed and appraised, and a report of the proceeding made and filed. Upon making a deposit of damages and completing the county records, the company has the right to occupy the land, and by building the road may acquire its perpetual use. Against this proceeding the statute has given the landowner no remedy except by appeal, and by strict phraseology has limited the question to be tried upon appeal to the matter of damages alone. "Before any board of county commissioners shall proceed to lay off any railroad route as herein provided, notice of the time when the same shall be commenced shall be given, by publication thirty days before the time fixed, in some newspaper published in such county, or if none be pub-

lished therein, then in one of general circulation in the county wherein such railway is to be laid off; and an appeal shall be had from the determination of the board of county commissioners as to the value of the land, crops, buildings and other improvements on said land, and for all other damages sustained by such person or persons by reason of such right of way so appropriated, in the same manner as appeals are granted from the judgment of a justice of the peace to the district court; and said appeal and all subsequent proceedings shall only affect the amount of compensation to be allowed, but shall not delay the prosecution of the work on said railroad upon said company paying or depositing the amount so assessed by said commissioners with the county treasurer of the county within which the said lands are situated; and upon the payment or deposit, as aforesaid, of the amount so assessed by said commissioners, and upon said company executing a bond, with sufficient security, to be approved by the county clerk, to pay all damages and costs which said company may be adjudged to pay by said district court, said company may, notwithstanding said appeal, take possession of and use the said land and construct its road over the same." Section 1364, Gen. St. 1901. If, therefore, the landowner either accepts the condemnation money or takes an appeal, the perpetual use of the land vests in the condemning company when compensation is made. And, if an appeal be taken, no jurisdiction can vest in the appellate court to try the rightfulness of the appropriation of a part of any specific tract, or to eliminate from the condemnation proceeding a part of a tract wrongfully taken, or upon such elimination to apportion gross awards of damages for land taken and for injury to land not taken. To assume such jurisdiction in the face of the statute would be usurpation on the part of any court in which an appeal had been lodged. "Now, if the Legislature violates no constitutional provision in making the award of the commissioners final, if the landowner has no constitutional right to an appeal from such an award, it would seem to follow necessarily that that which the Legislature may withhold altogether it may grant upon conditions. The appeal being a matter of favor, and not a matter of right, the power that grants it may prescribe the terms upon which it shall be taken. How can it be held that a landowner who has no right to an appeal can, when one is tendered to him upon conditions, accept the tender, and repudiate the conditions? Can he, of his own volition, enlarge the scope of a grant, which is a mere matter of legislative favor? Many words cannot make this clearer. The landowner's constitutional guaranty terminates with the award of the commissioners. The appeal is a favor, and carries with it all the conditions the Legislature has seen fit to impose. An examination of the statute leaves no doubt as to the ex-

tent of these conditions. It provides that the appeal shall only be as to the amount of damages, and that it shall not delay the prosecution of the work." Central Branch U. P. R. Co. v. Atchison, T. & S. F. R. Co., 28 Kan. 453, 464. Under these circumstances the only adequate remedy available to the landowner is an injunction from a court of equity. See 2 Lewis, Eminent Domain (2d Ed.) § 643, and cases cited. It is elementary law that statutes conferring the power of eminent domain are to be strictly construed, and that in the exercise of the right such proceedings only are available as the Legislature provides. 1 Lewis, Eminent Domain (2d Ed.) §§ 253, 254, and cases cited. Therefore a court of equity, in a suit brought by a landowner to enjoin the unauthorized taking of his property under the statutes of eminent domain, has no power to enlarge or supplement such statutes by any improvisation of its own whereby a part of a tract condemned as an entirety may be severed from the whole, and the condemnation proceeding invalidated as to such part while allowed to stand undisturbed as to the remainder. Nor can the condemning party cure an unauthorized proceeding relating to an entire tract by disclaiming the right to use or occupy a portion of it. Such action would result in depriving the landowner who had been compelled to forego an appeal in order to protect his rights of any opportunity to contest the amount of damages awarded. Condemnation proceedings for any quantity of land appraised as an entirety, and for which a single award of damages is made, must be treated as an entirety, and must stand or fall as a whole. From this it follows that the condemnation proceeding assailed in this action is void as to all property described in that part of the commissioners' report quoted above, and that the injunction prayed for in the petition should have been granted.

In the syllabus of the first opinion filed it is stated that one railway corporation may, under the general statutes of eminent domain, condemn for its right of way real estate belonging to another railway corporation, not in actual and necessary use for railway purposes. This must be true, or it might be possible for one railway company, by a skillful extension of its grounds, to exclude another railway company from access to a city or other given territory. In its application, however, the rule is subject to some obvious restrictions. Every square foot of extensive yards or commodious grounds need not be improved or occupied to be absorbed in railway uses. An opportunity for necessary expansion and a reasonable anticipation of future needs should be indulged. Mere matters of convenience and economy to the condemning company are alone insufficient to justify a taking; and when the rule is brought to bear upon varying states of fact other considerations may arise of the highest importance in

determining the manner in which the relative requirements of the two roads should be adjusted.

In other respects the positions taken in the former opinion of the court are likewise adhered to. But, for the reasons stated above, the judgment denying the full relief prayed for in the petition is reversed, and the trial court is directed to proceed in accordance with the views herein expressed. All the Justices concurring.

SHIMER v. EASTON & N. ST. RY. CO.

(Supreme Court of Pennsylvania, May 4, 1903.)

[55 Atl. Rep. 769.]

Eminent Domain—Damages—Witnesses.

In an action to recover for damages to land, caused by a trolley road on a highway running through it, a witness who did not know the property prior to the construction of the trolley line was not competent to estimate the damages sustained by reason of its construction.

Same—Same.*

In an action by a landowner for damages caused by the construction of a trolley road on a highway, the jury cannot charge him, in diminution of his damages, with the general appreciation of property caused by such construction.

Appeal from Court of Common Pleas, Northampton County.

Action by William L. Shimer against the Easton & Nazareth Street Railway Company. From the judgment for defendant, plaintiff appeals. Reversed.

The plaintiff owned a farm on both sides of a public road leading from Easton to Nazareth, upon which the defendant company had constructed its railway, and had endeavored to enjoin the construction of the defendant's road, but the court dismissed his bill, and required the defendant to give him a bond to secure such damages as he might recover in an action at law.

Argued before MITCHELL, DEAN, BROWN, and MESTREZAT, JJ.

Russell C. Stewart and Aaron Goldsmith, for appellant.
E. J. Fox and J. W. Fox, for appellee.

MESTREZAT, J. The fifth assignment of error, which complains of the admission of W. T. Bissell as a witness, must be sustained. Bissell is a real estate speculator in the city of Easton, and was called as a witness by the defendant company to testify to the damages sustained in the construction

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*See Met. W. S. Ry. Co. v. Stickney, 150 Ill. 362, 3 Am. & Eng. R. Cas., N. S., 147.

Deduction of benefits in estimating compensation, see generally, monograph appended to Beveridge v. Lewis (Cal.), 3 R. R. R. 83, 26 Am. & Eng. R. Cas., N. S., 83.

of its trolley line on the public highway passing through the plaintiff's premises. From his preliminary examination, it appeared that he had no knowledge of the plaintiff's farm or its value prior to the construction of the railway, and since that time he had only passed along the highway intersecting the property. Bissell testified: "Q. Have you been on the farm or just along the road since the construction of the trolley line? A. Just along the road; I looked at the land as I passed." The plaintiff's counsel objected to the competency of the witness, on the ground that he did not know the farm before the construction of the railway, and that he had not shown that he was familiar with the value of farm land in that community. The learned trial judge overruled the objection and admitted the testimony. Immediately after this ruling the witness was thus examined: "Q. Now, Mr. Bissell, will you tell us whether there has been any change in the value—selling value—of the land of Mr. Shimer by reason of the construction of the trolley road on the highway adjoining? A. In most every instance it increases the value of property, in my estimation." Bissell, having admitted he did not know the farm prior to the construction of the trolley road, was not competent to give an estimate of the damages sustained by the plaintiff by reason of its construction. A responsive answer to the question propounded to the witness required him to know the property and its market value before, as well as after, the construction of the trolley line; otherwise, he could not tell whether there had been "any change in the selling value of the land by reason of the construction of the trolley road on the highway adjoining." Without a knowledge of the farm, it logically follows he could not know its market value. He must know the land, its character and quality, and in a general way, and to a reasonable extent, have in his mind such other data as will enable him to properly estimate its market value. Pittsburgh, Virginia & Charleston Ry. Co. v. Vance, 115 Pa. 325, 8 Atl. 764. Unless in possession of such information prior as well as subsequent to the construction of the trolley road. Bissell was clearly incompetent as a witness, and should not have been permitted to testify. As said in Gallagher v. Kemmerer, 144 Pa. 509, 22 Atl. 970, 27 Am. St. Rep. 673: "The witness might, perhaps, have been competent to testify as to the value of the land after the injury, but it is plain by his own statement that he knew nothing of its nature and character before the injury. How was it possible, therefore, for him to testify as to the value of the land free from the injury complained of?"

In view of the fact that the case goes back to be tried again, we need not consider the other assignments. It may be suggested, however, that the jury should have full and explicit instructions as to the measure of damages, and should be told that the plaintiff is entitled to any increase in the

value of his land by reason of the general appreciation of property in the neighborhood because of the construction of the trolley road. We are inclined to think, from an examination of the testimony, that some of the witnesses, as well as the jury, overlooked this fact in estimating the plaintiff's damages, and charged him with the general appreciation of property in that neighborhood.

The fifth assignment of error is sustained, the judgment is reversed, and a venire facias de novo is awarded.

CREECH v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina, July 3, 1903.)

[45 S. E. Rep. 86.]

Injury to Passenger—Failure to Stop Train at Crossing—Sufficiency of Complaint.*

Where, in an action for injuries to a passenger in attempting to board a train, the complaint alleges the failure of defendant to bring its train to a full stop at a railroad crossing, and the sudden increase of speed of the train just before reaching the crossing, and that the regulations of the defendant company required a stop at the crossing, but does not allege that such stop was for the purpose of receiving passengers that might desire to board the train, though it does allege that, if any one should happen to get on board the train during the stopping, he would be permitted to remain on the train, the complaint is subject to demurrer, as not stating any custom to stop which would warrant the plaintiff in believing that he would be allowed to board the train as passenger at that point.

Same—Contributory Negligence—Boarding Moving Train.*

A person attempting to board a train moving three miles an hour is not negligent as matter of law.

Appeal from Common Pleas Circuit Court of Barnwell County; Gage, Judge.

Action by Frank H. Creech against the Charleston & Western Carolina Railway Company. From order overruling demurrer to complaint, defendant appeals. Reversed.

S. J. Simpson, Laurie T. Izlar, Jos. Barnwell, B. L. Abney, and Robert Aldrich, for appellant.

Bellinger & Townsend and Davis & Best, for respondent.

JONES, J. This appeal is from an order overruling a demurrer to the complaint. For the purpose of this appeal

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*As to whether it is contributory negligence to board a moving steam railroad train, see Pence v. Wabash R. Co. (Iowa), 3 R. R. R. 77, 26 Am. & Eng. R. Cas., N. S., 77; Chesapeake & O. Ry. Co. v. Saulsberry (Ky.), 2 R. R. R. 84, 25 Am. & Eng. R. Cas., N. S., 84 (drunken passenger, after ejection); Young v. Chicago, etc., R. Co., 6 Am. & Eng. R. Cas., N. S., 231; Distler v. Long Island R. Co., 6 Am. & Eng. R. Cas. 235; Illinois Cent. R. Co. v. O'Keefe (Ill.), 9 Am. & Eng. R. Cas., N. S., 611; Louisville & N. R. Co. v. Bernard (Ky.), 6 Am. & Eng. R. Cas. N. S., 55; Schaefer v. St. Louis & S. R. Co. (Mo.), 2 Am. & Eng. R. Cas., N. S., 224.

it is sufficient to state the third and fourth paragraphs of the complaint as follows:

"(3) That at the railway station of the defendant in the town of Fairfax the defendant's road crosses at grade the road and track of the South Bound Railroad Company, at which crossing all trains upon defendant's road are required to come to a full stop befor crossing. That at the times hereinafter mentioned the defendant, by its servants, lessees, and licensees, were accustomed to receive and carry passengers for Barnwell and other points on the road of the said Carolina Midland Railway Company and Southern Railway Company, north of Allendale, who might board the train of the Southern Railway Company so run and operated over the road of the defendant while said trains were stopped at said crossing for the purpose of crossing said track of the South Bound Railroad Company.

"(4) That on the 26th day of January, A. D. 1900, the plaintiff went to the station of the defendant at said crossing in Fairfax, with a number of other intending passengers, to take said Southern passenger train so run over the track of the defendant, for Barnwell, S. C., and was ready to pay his fare as passenger upon said train. That as said train came up to said crossing it reduced its speed to the rate of three or four miles an hour, but negligently and carelessly failed to come to a full and complete stop before crossing the said track of the South Bound Railroad; but just before reaching said crossing, and as the plaintiff caught hold of the hand rail to the platform of one of the cars of the said train to board same, the defendant, by its said servants, licensees, and lessees, negligently and carelessly and suddenly increased the speed of said train, thereby causing the plaintiff to be caught, pulled, and carried along with the same, and thrown to the track in such manner that his head and face was cut and bruised, and his fingers run over and mashed by the train, so that three fingers on his left hand had to be amputated, and also bruised his hip and side, otherwise shocking and injuring his nervous system, which injuries are permanent, and causing him great pain and anguish, to his damage in the sum of $10,000."

To this complaint defendant interposed an oral demurrer that it did not state facts sufficient to constitute a cause of action upon the following grounds:

"(1) That under the statute law of South Carolina (Rev. St. 1893, § 1684) the stopping of a train before crossing the track of another road is not intended for the benefit or protection of persons desiring to board such trains at such crossings, and therefore not stopping at such crossings would not be negligence for which the defendant could be held responsible in the present case under said statute.

"(2) That under the statute law (Id. § 1687) of said state a railroad company is required to cause all of its trains of cars

for passengers to entirely stop upon each arrival at the station advertised by such company as a station for receiving passengers for a sufficient time to receive said passengers thereon, and, there being no allegation in the complaint that the place where the plaintiff attempted to board the defendant's train was a station so advertised, it was not negligence not to stop for the plaintiff, under the allegations of the complaint.

"(3) That a person intending to get on a train is not justified in making an attempt to get on if the train does not stop at a station, and therefore, the allegations of the complaint showing that plaintiff did make such an attempt at the crossing, he was guilty of contributory negligence in so doing, and therefore has stated no cause of action.

"(4) That, even if it is not under all circumstances contributory negligence for a person to attempt to get on a moving train, yet no circumstances are stated in the complaint to justify such attempt, and therefore the plaintiff under his own showing is guilty of contributory negligence, and he has stated no cause of action.

"(5) That not only are no circumstances stated in the complaint justifying the attempt to get on said train while moving, but there are circumstances alleged therein directly showing negligence on the part of the plaintiff and no negligence on the part of defendant company; it being alleged that the plaintiff attempted to board the train before it reached the crossing, and it not being alleged that the defendant was accustomed to stop its trains for passengers at the crossing."

The reasons which induced the court to overrule the demurrer are thus stated in the "case":

"I do not think, gentlemen, that the statutes have anything to do with this case. I think the statute with reference to a railroad crossing was not passed to affect the rights of parties under circumstances like this, and do not think the statute with reference to stopping at railroad stations has anything to do with this case. The serious question about the case is whether or not the complaint states a case of contributory negligence. That is the only question about it. If it is clear that it does, then it cannot be sustained; and whether it does or not is the question now at issue. What is negligence is never a question of law, unless it be so grossly negligent that the minds of all men will come to the same conclusion. For instance, if it is stated in the complaint that the train ran by there 25 miles an hour, and the plaintiff tried to board it, negligence there would be a conclusion of law, because it would be such an act as all men would come to the same conclusion on. That is an extreme case. Now, coming down from 25 miles an hour, you get to a point where men begin to differ. Some men would say the act was negligent, while other men would say it was not; and when you reach the stage that men differ about what the ordinary man

would do under like circumstances, then it is a mixed question of law and fact. The complaint is a statement of a cause of action at common law. The essence of it is that the railroad was accustomed to stop there. It makes no difference that it was at Fairfax; might have been in an old field miles away from the station. The allegation is that the railroad was accustomed to stop there to receive passengers. If it was the custom for the railroad to stop there to receive passengers, and if the plaintiff knew it, then if the plaintiff went there relying upon that custom, and the train failed to stop, according to the allegations of the complaint, was the plaintiff guilty of contributory negligence in getting on? It depends, I say, upon the habits of men. What does the ordinary man do under like circumstances? If it is a case of negligence, it is my duty to dismiss the complaint; but whether it is, or not, a case of negligence for a man to board a train at a place where a train was accustomed to stop, moving 3 miles an hour, is not a case where my mind reaches a decided, restful conclusion that the act was a negligent act, and, being of that opinion, I would not feel satisfied, especially in view of the allegation in the complaint that the railroad was accustomed to stop there and take passengers. I will not say anything more about the act of the plaintiff in trying to get on the train in the hearing of the jury, because it might prejudice his case, and it would be improper for me to do that. While it is a close question, I think, under all the circumstances, it is so close a case that I would not be justified in sustaining the demurrer."

The exceptions assign error in not holding in accordance with each of the grounds of objection made to the complaint as specified above.

1. We will first consider the complaint with a view to ascertaining whether it stated such contributory negligence on the part of the plaintiff as should defeat a recovery as matter of law. For the purpose of this question, we, of course, must assume that the complaint states a case of actionable negligence on the part of the defendant; for a question of contributory neligence cannot properly or logically arise, unless the defendant has been guilty of negligence which is a proximate cause of the injury. The case of Jarrell v. Railroad Co., 58 S. C. 492, 36 S. E. 910, approved in Elkins v. Railroad Co., 64 S. C. 561, 43 S. E. 19, shows that while contributory negligence is ordinarily a matter of defense, yet, if the complaint shows contributory negligence by the plaintiff, that would render the complaint demurrable for insufficiency, since it contained allegations which would defeat recovery on the cause of action alleged. With this rule in mind, the circuit court examined the complaint, and reached the conclusion that the facts stated did not show contributory negligence, as matter of law. In the case of Cooper v. Railway, 56 S. C. 94, 34 S. E. 16, the court sustained an order

overruling a demurrer to the complaint; the decision being based upon the principle that it is not negligence, as matter of law, for a passenger to alight from a moving train on the invitation of the carrier's agent, unless the circumstances are such as to make the danger of alighting obvious to a person of ordinary prudence or sense. That decision accords with the weight of authority in other jurisdictions, as may be seen by examination of the cases cited in support of the text in 5 Ency. Law (2d Ed.) 664.

Assuming the relation of passenger and carrier, the same principle should be applied when one is injured while attempting to board a moving train, since there is no such difference between the act of boarding and the act of alighting from a moving train as would fairly justify the application of different rules. As shown by the circuit court, the admitted speed of the train may be so great as to warrant the court in concluding therefrom, as matter of law, that boarding such train was negligent; but ordinarily it should be left to the jury to determine whether the passenger's act of alighting or boarding, under all the circumstances, was negligent. In the case of Central R., etc., Co. v. Miles, 88 Ala. 256, 6 South. 696, a speed of 3 miles an hour; and in the case of Louisville, etc., R. Co. v. Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443, a speed of 4½ miles an hour; and in the case of New York, etc., R. Co. v. Coulbourn, 69 Md. 360, 16 Atl. 208, 1 L. R. A. 541, 9 Am. St. Rep. 430, a speed of five miles an hour —was held not to show contributory negligence, as matter of law, in a passenger alighting from a moving train. In addition to the speed of the train, there are other circumstances proper to be considered in determining the fact of contributory negligence, as to the age or vigor of the passenger, whether he was with or without incumbrance, whether it was dark or light, the distance between the platform steps of the car and the landing, etc. But the main circumstances relied on in the demurrer to sustain contributory negligence being the speed of the train, moving at the rate of 3 or 4 miles an hour, and the fact not warranting a conclusive presumption of contributory negligence, it was not error to deny the demurrer, in so far as it was based upon contributory negligence. This requires the third and fourth exceptions to be overruled.

2. The first and second exceptions are based upon the idea that the complaint was for negligence arising from the breach of some duty imposed by statute. The circuit court, however, held, in effect, that the action was not based upon the statutes cited, but was an action for negligence under the common law. Section 2131, Civ. Code 1902, provides: "Whenever any railroad crosses the track of any other railroad, it shall be the duty of the engineer or person in control of the train, besides giving the signals required to be given near all crossings, to bring the train to a full or complete stop

before crossing the said track; the same rule to apply to the running of a locomotive by itself without a train." Section 2134, Civ. Code 1902, provides: "Every railroad company in this state shall cause its train of cars for passengers to entirely stop upon each arrival at a station advertised by such company as a station for receiving passengers upon said trains for a time sufficient to receive and let off passengers." The holding of the circuit court that the case stated in the complaint does not fall within either of these statutes was in accordance with appellant's contention, and is not in any way challenged by the respondent.

We will therefore proceed to consider whether the complaint states facts sufficient to constitute an action for negligence at common law. This question is substantially presented by the fifth ground of demurrer. In any action for negligence the complaint must allege some duty owing by defendant to plaintiff, or facts from which such duty may be inferred, a negligent breach or negligent performance of such duty, and injury to plaintiff as a proximate result. The complaint alleged two things as negligence: (1) The failure of defendant to bring its train to a full stop at said railroad crossing; (2) the sudden increase of the speed of the train just before reaching the crossing. But what duty owing by defendant to plaintiff was breached by these acts? As to the failure to stop before reaching the crossing, we have seen that no duty to plaintiff imposed by statute was thereby violated. If it be true that a regulation of the defendant company required such stop at the railroad crossing, it is not alleged that such stop was for the purpose of receiving passengers that might desire to board the train at that point, so as to create a duty to plaintiff as an intending passenger. The complaint does not allege (as the circuit court seemed to think) that the defendant's train was accustomed to stop there to receive passengers. On the contrary, the allegation is that "on January 26, 1900, defendant was accustomed to receive and carry passengers for Barnwell and other points * * * who might board the train of the Southern Railway Company so run and operated over the road of the defendant, while said trains were stopped at said crossing for the purpose of crossing said track of the South Bound Railroad Company." The plain meaning of this allegation is that, if any one should happen to get on board the train during the momentary stopping of the train for the purpose of safely crossing the other railroad track, he would be permitted to remain on the train as a passenger. Such allegation is very far from stating any custom of the defendant company to stop at said crossing for the purpose of receiving passengers, so as to warrant plaintiff in believing that he would be allowed to board the train as a passenger at that point. Certainly there was no allegation of any custom of defendant to receive as passengers at that point those who might board its moving

trains. The complaint in the third paragraph alleges "that at the railway station of the defendant in the town of Fairfax the defendant's road crosses at grade the road and track of the South Bound Company," etc., and in the fourth paragraph, "that on the 26th day of January, A. D. 1900, the plaintiff went to the station of the defendant at said crossing in Fairfax," etc. We may infer from these allegations either that the crossing was also a station, or that there was a station at the crossing; but it is not alleged that the station was for the purpose of receiving passengers, nor is it alleged that defendant was accustomed to receive passengers at such station. When plaintiff attempted to board defendant's moving train, what was the relation between plaintiff and defendant? Was he passenger, licensee, or trespasser? If passenger, the defendant owed the duty of observing the highest degree of care to avoid injuring him; if licensee, the defendant owed the duty of exercising ordinary care; if trespasser, the defendant owed him no duty, except not to willfully or wantonly injure him. If plaintiff was either a licensee or trespasser, clearly no cause of action is alleged, because the defendant company owed him as such no duty to stop the train at the alleged crossing; nor did the company owe him any duty to refrain from increasing the speed of the train just before reaching the crossing after stopping or slowing down. The complaint nowhere alleges that defendant was aware of plaintiff's position or intention to board the moving train.

Then was plaintiff a passenger, so as to throw upon defendant the duty of exercising the highest degree of care toward him? There is no doubt that the relation of passenger may arise before the train is boarded or ticket purchased. In the case of Johns v. R. R. Co., 39 S. C. 162, 17 S. E. 698, 20 L. R. A. 520, 39 Am. St. Rep. 709, the court held a railroad company owed the duty of exercising extraordinary care in providing safe approaches to one coming to its passenger station to become a passenger, whether he had a ticket or not. In 5 Am. & E. Ency. of Law (2d Ed.) 488, it is stated: "The relation of carrier and passenger begins when one puts himself in the care of the carrier, or directly within its control, with the bona fide intention of becoming a passenger and accepted as such by the carrier. Seldom, however, is there any formal act of delivery of the passenger's person into the care of the carrier, or of acceptance by the carrier of one who presents himself for transportation; hence the existence of the relation is commonly to be implied from the circumstances attendant. The rule is that these circumstances must be such as will warrant an implication that one has offered himself to be carried and that the offer has been accepted by the carrier." In Elliott on Railroads, § 1597, it is stated: "A person may become a passenger before he has entered the train or vehicle of the carrier. We think it safe to say that a person becomes a passenger when, intending to take passage,

he enters a place provided for the reception of passengers, as a depot, waiting room, or the like, at a time when such place is open for the reception of persons intending to take passage on the trains of the company." To the same effect are numerous cases, among which see Webster v. Fitchburg R. Co. (Mass.) 37 N. E. 165, 24 L. R. A. 521; Chicago, etc., R. Co. v. Jennings, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827. We accept as correct the results of the decisions as thus summarized by the annotator in 24 L. R. A. 523: "Considering all the decisions on the subject, which establish quite clearly that a person may sometimes be a passenger when attempting to take a train, although he has not yet got upon the car or even procured his ticket, there seems to be no other limitation of the rule so satisfactory as that he must, in order to be regarded as a passenger, present himself in a proper place and in a proper manner, because he cannot be presumed to have an invitation to present himself in any other way. Nevertheless, this rule would not prevent liability in many cases to persons presenting themselves otherwise, and therefore not to be regarded as passengers. But to such persons liability would evidently depend on the rule as to negligence toward mere licensees or trespassers."

The complaint neither states that plaintiff was a passenger at the time he attempted to board defendant's moving train, nor states facts from which the court could infer the existence of such relation to the defendant carrier. As shown, he did not present himself for carriage at a place where defendant stopped its train for the purpose of receiving its passengers, and did not attempt to board defendant's train under circumstances implying an invitation to board as passenger. Defendant being under no obligation to stop at the crossing for plaintiff, it was no breach of duty to plaintiff to fail to do so, and, the defendant not alleged to have any knowledge as to the situation of plaintiff and his attempt to board its moving train, it was not a breach of any duty to plaintiff to suddenly increase the speed of the train after slowing down for the crossing.

The judgment of the circuit court is reversed, and the complaint is dismissed, as not stating a cause of action.

RICKS v. GEORGIA S. & F. RY. CO.

(*Supreme Court of Georgia, June 30, 1903.*)

[45 S. E. Rep. 268.]

Carriers—Injury to Passenger—Boarding Moving Train.*

While it appeared from the testimony introduced by the plaintiff that the defendant railway company was chargeable with a violation

*As to whether it is negligence to board a moving train, see preceding case and foot-note.

of its duty as a common carrier, in that its train was not stopped at the station at which he wished to board it a sufficient length of time to afford him a reasonable opportunity to do so, yet as he confessedly, in order that he might not be left at that station, voluntarily assumed the risk of attempting to get aboard after the train was started, and while it was in motion, the trial court committed no error in granting a nonsuit; he having made no effort to show that the servants of the company were guilty of any misconduct save that of not stopping the train at the station a reasonable length of time.

(Syllabus by the Court.)

Error from City Court of Valdosta; W. H. Griffin, Judge.

Action by D. L. Ricks against the Georgia Southern & Florida Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

G. A. Whitaker, for plaintiff in error.

John I. Hall, R. C. Jordan, and Crawford & Walker, for defendant in error.

PER CURIAM. Judgment affirmed.

ILLINOIS CENT. R. CO. v. GLOVER.

(Court of Appeals of Kentucky, Jan. 29, 1903.)

[71 S. W. Rep. 630.]

Injury to Passenger—Contributory Negligence—Boarding Moving Train.*

Whether a passenger, who gets off his train at an intermediate station, and undertakes, under the direction of the conductor, to board it again while moving, is guilty of contributory negligence, is a question for the jury, considering the speed of the train, the direction he receives from the conductor, and the other circumstances.

Same—Same—Same.

The fact that the train he undertakes to board is a freight train does not change the rule, though it is a circumstance to be considered.

Jurisdiction—Waiver of Objection.

A defendant waives objection to the jurisdiction of the circuit court by filing a general demurrer to the petition and obtaining the judgment of the court thereon.

Appeal from circuit court, Daviess county.

"Not to be officially reported."

Action by Wm. P. Glover against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. D. Atchison, C. S. Walker, J. M. Dickinson, and Pirtle & Trabue, for appellant.

Lawrence P. Tanner, for appellee.

HOBSON, J. Appellee, Glover, took appellant's accommodation train at 6:30 on the morning of May 6, 1901, at

*See preceding case and foot-note.

Central City, to go to Leitchfield, and paid the conductor the fare. It was a slow train. There was a passenger train behind it, which made better time, and finding that his train would not get into Leitchfield as soon as he wanted to get there, he asked the conductor if he would give him a ticket, or the money back he had paid, in order that he might get on the passenger train. The conductor told him to ride on with him, and, if that train overtook them, he would give him the money that he might get on the other train, but he believed the accommodation would beat the passenger to Leitchfield. When they got to Goff, appellee, learning that the passenger train was coming close behind, got out of the car, and went to where the conductor was, to see him about getting his transportation on the other train. Just as he got to the conductor, and named the matter to him, he signaled the engineer to go ahead, and said to appellee he did not have time to give him his transportation. As the train started, appellee asked him what he must do, and the conductor told him to get on the train. As he went to get on at the front end of the caboose, where the conductor had gotten on, the brakeman told him if he tried to get on to get on the rear end. He did this, and just as he went to get on the train it gave a sort of lunge, and he was jerked down, and rolled over on the ground, by reason of which his left knee was severely hurt. The conductor was standing on the back end, and hallooed to him to catch the next train, which he did, and at the next station the conductor gave him his grip, and also arranged with the conductor of that train for his transportation to Leitchfield. He was confined to bed eight or ten days, was on crutches five or six weeks, and was lame for about four months. On the trial the knee was exhibited to the jury, and they found a verdict for appellee in the sum of $500.

The testimony is conflicting as to what took place between him and the conductor, and also as to the speed of the train. The conductor says he told him not to get on the train, and that it was running at a rapid rate; while appellee says that the train was running about three miles an hour, and that he would have had no trouble in getting on but for the sudden lunge of the train. The proof for appellant showed there was no sudden jerk of the train, but only that it was running fast. Under instructions that seem to us substantially to have submitted the issue to the jury, the jury followed or took as true appellee's version of the transaction, and therefore the question in the case is, was he entitled to recover on the facts stated by him? The court told the jury that, if the speed of the train was such that persons of ordinary judgment should have perceived the danger of attempting to board it, they should find for the defendant, although they believed from the evidence that the conductor told him to get on. He also told the jury that, although appellee did not perceive the danger himself, still if he was told by the conductor, or

warned by others, and persisted in the attempt, and so received his hurt when, but for his own negligence, he would not have been hurt, they should find for the defendant. Under the instructions of the court, taken as a whole, the jury could not have found for the plaintiff, unless they believed from the evidence that the train was running at such a slow speed as that a person of ordinary judgment and discretion might have deemed it safe to get upon the train, and the conductor told him to get on, and he made the attempt, believing it safe to do so; for he and the conductor agree that there was a conversation between them as to his getting on the train,—the conductor saying he told him not to get on, and appellee saying he told him to get on. The jury were, therefore, bound to believe either that the conductor told him not to get on, or that he told him to get on. Their verdict was thus a finding that the conductor told him to get on the train. While numerically the preponderance of the testimony is against the plaintiff, there are circumstances sustaining his version of the transaction, and the verdict is not so palpably against the evidence, or so excessive, as to warrant us in disturbing it. While there is some conflict in the authorities, the later cases sustain the rule that, where a passenger gets off his train at an intermediate station, and then undertakes to board it, while moving slowly, by the direction of the conductor or servant in charge, he is not per se guilty of negligence; but it is a question for the jury whether, considering the speed of the train, the direction he received, and other circumstances, he exercised proper care. 3 Thomp. Neg. §§ 2995–2998; Railroad Co. v. Eakin's Adm'r (Ky.) 45 S. W. 529, 46 S. W. 496, 47 S. W. 872; Railroad Co. v. Whittaker (Ky.) 57 S. W. 465; Carr v. Railroad Co. (Cal.) 33 Pac. 213, 21 L. R. A. 364. The case of Hunter v. Railroad Co. (N. Y.) 26 N. E. 958, 12 L. R. A. 431, and others like it, differ from this case, in that here appellee had paid his fare on this train, his baggage was on the train, the conductor had agreed to transfer him to the other train; so appellee had a right to be carried on this train. The fact that it was a freight train did not change the rule of law applicable in such cases, although appellee was required to use such care as was proper in view of its being a freight train. The fact that it was a freight train was simply a circumstance to be considered in connection with the other facts in the case on the question of negligence. 3 Thomp. Neg. §§ 2901–2903; Railway Co. v. Watson's Adm'r, 93 Ky. 654, 21 S. W. 244, 19 L. R. A. 310, 40 Am. St. Rep. 211.

The objection to the jurisdiction of the Daviess circuit court was waived by the filing of a general demurrer to the petition, and obtaining the judgment of the court as to its sufficiency. For the defendant could not, without objection to the jurisdiction of the court, submit the case for a judgment on a general demurrer, and then, after failing thus to

defeat the action, plead to the jurisdiction of the court to which it had submitted. McDowell v. Railroad Co., 90 Ky. 346, 14 S. W. 338; Georgetown Water Co. v. Central Thompson-Huston Co. (Super. Ct.) 16 Ky. Law Rep. 125. On the whole case we see no error to the prejudice of the substantial rights of the appellant.

Judgment affirmed.

CHOCTAW, O. & G. R. CO. v. ZWIRTZ.

(Supreme Court of Oklahoma, Sept. 9, 1903.)

[73 Pac. Rep. 941.]

Carriers—Baggage.*

Under the laws of this territory, baggage which a common carrier of persons must receive and carry without charge, except for an excess of weight over 100 pounds, means only such articles as are intended for the use of the passenger while traveling, or for his personal equipment, and does not include merchandise or articles intended for business purposes.

Pleading.

Every fact necessary to be proven to entitle the plaintiff to recover must be averred in his pleadings.

(Syllabus by the Court.)

Error from District Court, Caddo County; before Justice Gillette.

Action by Charles Zwirtz against the Choctaw, Oklahoma & Gulf Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

This case was originally brought in the probate court of Caddo county by Charles Zwirtz, as plaintiff, against the Choctaw, Oklahoma & Gulf Railroad Company, defendant. The petition contained three counts. The first count alleges that on August 5, 1901, the plaintiff purchased from the defendant's agent at Oklahoma City, in Oklahoma Territory, two tickets from said Oklahoma City to Anadarko, in said territory, and that said defendant, through its agent, accepted and undertook to transport as bag-

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*See foot-note appended to Illinois Cent. R. Co. v. Matthews (Ky.), 6 R. R. R. 769, 29 Am. & Eng. R. Cas., N. S., 769; notes, 7 Am. & Eng. R. Cas., N. S., 66 (bicycles); 2 Am. & Eng. R. Cas., N. S., 471 (jewelry in trunk received without knowledge of its contents); 20 Am. & Eng. R. Cas., N. S., 468; 8 Am. & Eng. R. Cas., N. S., 539 (merchandise as baggage); monograph by Mr. Rose, 2 Am. & Eng. R. Cas., N. S., ii; State of Missouri ex rel. Bettis v. Missouri Pac. R. Co. (Mo.), 7 Am. & Eng. R. Cas., N. S., 66 (bicycles); Georgia R. Co. v. Johnson (Ga.), 21 Am. & Eng. R. Cas., N. S., 840 (fruit in trunk is not); St. Louis Southwestern R. Co. v. Berry (Ark.), 2 Am. & Eng. R. Cas., N. S., 457 (money accepted as baggage by agent with notice that passenger was ignorant of rule forbidding such acceptance); Toledo & O. C. R. Co. v. Bowler & Burdick Co. (Ohio), 8 Am. & Eng. R. Cas., N. S., 533; Toledo & O. C. R. Co. v. Dages (Ohio), 8 Am. & Eng. R. Cas., N. S., 533; Southern Kansas Ry. Co. v. Clark (Kan.), 2 Am. & Eng. R. Cas., N. S., 460 (sample cases in baggage room).

gage from Oklahoma City to Anadarko a certain trunk belonging to the plaintiff, and checked said trunk as baggage, said check being numbered 48,286; that said trunk and contents were of the value of $207.50, for which amount the plaintiff prays judgment against the defendant, alleging that said trunk and contents were lost through the negligence of the defendant. The second count alleges that said trunk contained the following articles, necessary to the carrying on of said plaintiff's business as a butcher: One counter scale, three cleavers, one steel, two steak knives, two skinning knives, two meat saws; that, upon the loss of said tools, plaintiff made diligent efforts to obtain tools to carry on his business, but was unable to do so; and that he was delayed in the loss of said tools in starting and carrying on his business, whereby he was damaged in the sum of $300, for which amount he prays judgment against defendant. The third count alleges that, in addition to the articles mentioned in the first count, said trunk contained many articles of special value to the plaintiff, in the aggregate $300, for which amount he prays judgment against the defendant. The answer of the defendant was a general denial. At the trial of the case in the probate court, the defendant tendered to the plaintiff the trunk and contents, which upon examination were found by the plaintiff to be intact, and he accepted the same, and dismissed the first and third counts of his petition. The case went to trial upon the second count, resulting in a judgment for plaintiff against defendant amounting to $160 and costs. The defendant appealed to the district court, where the case was tried, resulting in a judgment in favor of the plaintiff for $125 and costs. A motion for a new trial was duly filed by the defendant, which was overruled, and the cause brought here by the defendant for review.

R. E. Campbell, for plaintiff in error.
Robinson & Jackson, for defendant in error.

IRWIN, J. (after stating the facts). The first assignment of error is that the court erred in overruling the defendant's objection to the introduction of evidence on the grounds that the petition fails to state a cause of action. In this count plaintiff seeks only to recover damages for the delay in delivering the butcher's tools to him at Anadarko, resulting, so he alleges, in delaying him in starting and carrying on his business. This contention turns upon whether or not the articles contained in said trunk were or were not properly baggage. This is a subject which we think is a proper subject for legislative limitation, and one which the Legislature of this territory has regulated by statute. Wilson's Rev. & Ann. St. 1903, § 708, contains this provision: "A common carrier of persons unless his vehicle is fitted for the reception of passengers exclusively, must receive and carry a reasonable amount of luggage for each passenger without any charge

except for an excess of weight over one hundred pounds to a passenger.' Section 709: "Luggage may consist of any articles intended for the use of a passenger while traveling or for his personal equipment." We take it that the term "luggage" is synonymous with "baggage"; the latter being in common use in this country, while the former seems to be almost exclusively used in England. They signify one and the same thing. The petition merely alleges that the plaintiff purchased the tickets, and upon them had the trunk checked as baggage. It is not alleged that defendant's agent knew the contents of the trunk, or the purpose of plaintiff's journey, and accepted the same with such knowledge. Therefore, unless the tools mentioned in plaintiff's petition come within the term "luggage," as defined by the statute, he has not stated a cause of action. The Legislature having defined "luggage" as baggage, the statute quoted limits the articles which common carriers may be required to carry to those which fall within the definition, and, if at common law other articles might have been included, then this statute limits the common law, and governs the subject in this territory. It seems to us that the statute, in determining of what items luggage may consist, uses the term "may" in the sense of "must" or "shall," because to say, "Luggage may consist of any articles intended for the use of a passenger while traveling or for his personal equipment," would infer that any other article would not come within the definition of baggage. To come within the statute, the tools for which rental value is sought to be recovered in this case must either have been intended for the use of the plaintiff while traveling, or for his personal equipment That they were not intended for his use while traveling is clear from the very nature of the articles themselves, and from the allegations of the petition, for the petition says they were articles necessary to carry on the plaintiff's business as a butcher. This language does not bring them within the definition in section 709 of the statute, which is articles intended for the use of the plaintiff while traveling, or for the plaintiff's personal equipment, but articles necessary for plaintiff's business as a butcher. Now, were they intended for his personal equipment? That is, the equipment of his person? The Century Dictionary defines "equipment" as the act of equipping or fitting, or the state of being equipped, as for a voyage or an expedition. It will be seen by the same authority that the term "equip" is derived from words of similar meaning, and often similar sound, in various other languages, all meaning or relating to a ship, voyage, or expedition. Now, the equipment here referred to is personal. The adjective "personal" is defined by Webster as pertaining to the external or bodily appearance. It is defined in the Century Dictionary as things of or pertaining to the person. It seems to us that a reasonable interpretation of the term "personal equipment" is that it

only includes clothing, jewelry, and such things as are used in the protection or adornment of the person. It does not include the tools with which one may gain a livelihood after the journey is completed. It is true that some cases there are which hold that tools may be carried as baggage, but such cases are always within jurisdictions where no statute similar to ours is in force; and it will also be seen on an examination of those cases that the tools there mentioned were shown to have been such as are usually carried by journeymen workmen in traveling, which is not one of the allegations of the petition in reference to the tools here involved.

The case of Oakes v. Northern Pac. Ry. Co. (decided by the Supreme Court of Oregon in 1891) 26 Pac. 230, 12 L. R. A. 318, 23 Am. St. Rep. 126, was a case where the Oakes Comedy Company, an organization giving theatrical entertainments in the villages and cites on the line of the defendant's road, checked seven trunks on five first-class tickets from Hope, in the state of Idaho, to Thompsons Falls, Mont., and said trunks were delivered to the said railroad company, and contained clothing, stage properties, costumes, musical instruments, and theatrical property of the said comedy company. It was further alleged in the petition in this case that, through the negligence of the said company, said train was wrecked, and a large part of said property destroyed by fire, etc. Justice Lord, in deciding that case, uses this language: "In determining the question presented by this record, it is necessary to understand the nature and extent of the obligation which a common carrier of passengers by rail assumes, as respects the personal baggage of the passenger. That obligation requires it not only to carry the passenger, but also to carry a reasonable amount of his personal baggage. The carriage of the baggage of the passenger, said Andrews, J., under reasonable limitations as to amount, is the ordinary incident to the carriage of the passenger; and the duty arises on the part of the company to carry the baggage of the passenger, as incident to the principal contract, without any specific agreement or separate compensation. Isaacson v. Railroad Co., 94 N. Y. 278, 46 Am. Rep. 142. As respects such baggage a carrier of passengers is held to the same liability as a common carrier of goods. For its loss or destruction, save by the act of God or the public enemy, it must respond, though without fault on its part. To this extent it is an insurer, and is responsible for the carriage and safe delivery of such baggage, the same as goods intrusted to it as freight. But it is only to such articles as may be legally termed baggage that such liability attaches, no matter what may be the contents of the bag or trunk. As to what constitutes baggage in the legal sense, or ordinary baggage or personal baggage as commonly used in England, it has been found by the courts difficult, if not impossible, to define with accuracy, within the meaning of the rule of the carrier's lia-

bility. It is agreed on all hands, said Earl, C. J., that it is impossible to draw any very well defined line as to what is and what is not necessary or ordinary baggage for a traveler. That which one traveler would consider indispensable would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind must be taken to be in the mind of the carrier when he receives a passenger for conveyance. 19 C. B. 321. In a general sense, it may be said to include such articles as it is usual for persons traveling to take with them, for their pleasure, convenience, and comfort, according to the habits and wants of the class to which they belong. In Weeks v. R. Co., 9 Hun, 669, it is said that a passenger may carry with him such articles of necessity and convenience as are usually carried by passengers for their personal use and comfort, instruction and convenience, or protection. In Jordan v. R. Co., 5 Cush. 69, 51 Am. Dec. 44, the rule is stated to be that baggage includes such articles as are of necessity or convenience for personal use, and such as it is usual for persons traveling to take with them. In Johnson v. Stone, 11 Humph. 419, the court said: 'It is not practical to state with precise accuracy what shall be included by the term "baggage." It certainly includes articles of necessity and personal convenience usually carried by passengers for their personal use, and what these may be will very much depend upon the habits, states, and resources of the passenger.' In Railroad Co. v. Swift, 12 Wall. 262, 20 L. Ed. 423, Justice Field said 'that the contract to carry the person only implies an obligation to transport such a limited quantity of articles as are ordinarily taken by travelers for personal use and convenience; such quantity, depending of course, upon the station of the party, the object and length of his journey.' In Macrow v. R. Co., L. R. 6 Q. B. 612, Cockburn, C. J., said: 'Whatever the passenger takes with him for his personal use and convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage. This would include not only articles of apparel, whether for use or ornament, but also the gun case or fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of analogous character, the use of which is personal to the traveler, and the taking of which has arisen from the fact of his journeying. On the other hand, the term "ordinary luggage," being thus confined to that which is personal to the passenger, and carried for his use and convenience, it follows that what is carried for the purpose of business, such as merchandise and the like, or for larger and ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary luggage, unless accepted as such by the carrier. So that it would seem that baggage, in

the sense of the law, may consist of such articles of apparel as, through necessity, convenience, comfort, or recreation, the passenger may take for his personal use, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or ultimate purpose of the journey. The question what articles of property, as to quantity and value, contained in a trunk, may be deemed baggage, within the rule, is to be determined by the jury, according to the circumstances of the case, subject to the power of the court to correct any abuse. As the contract of a carrier of passengers is to carry a reasonable amount of baggage for the accommodation of the passenger, it follows, from the nature and object of the contract, as observed by Appleton, C. J., that the right of the passenger is limited to the baggage required for his pleasure, convenience, and necessity during the journey. Wilson v. R. R. Co., 56 Me. 62, 96 Am. Dec. 435. Articles of whatever kind that do not properly come within the description of ordinary baggage are not included within the terms of such contract, nor is the carrier liable for their loss or destruction, in the absence of negligence. Stage properties, costumes, paraphernalia, advertising matter, etc., are not articles required for the pleasure or convenience or the necessity of the passenger during his journey, but are plainly intended for the larger or ulterior purposes of carrying on the theatrical business. They do not fall, therefore, under the denomination of baggage, and in the absence of negligence no liability can arise against the carrier for their loss or destruction, unless accepted as baggage by the carrier.' In the case of K. C., P. & G. R. Co. v. State (Ark.) 46 S. W. 421, 41 L. R. A. 334, 67 Am. St. Rep. 933, the court holds that the fact that a portion of the contents of the trunk were proper articles of baggage does not affect the tools in controversy. 'Merchandise is often carried as baggage, but the carrier is not always liable for it as such. The general rule is that the carrier is not liable for merchandise shipped as baggage, in the absence of conversion or gross negligence, unless it had notice that such merchandise was being so shipped, and accepted it as such. Where the trunk of a passenger contains both personal baggage, and also merchandise, but the carrier has no notice that the merchandise is in the passenger's trunk, it will be liable only for the loss of the personal baggage, and not for the merchandise.' Where the passenger delivers to the carrier, without comment, what appears to be personal baggage, the carrier is not put upon inquiry as to the nature of the property, but may assume that it consists only of personal baggage, and is not answerable for articles not coming within the description. Ray on Neg. of Imposed Duties, 561."

Now, it seems to us the question in this case is, do the butcher's tools described in the petition come within what the Legislature, in section 709, has termed "luggage"? Were

they such articles as are intended for the use of a passenger while traveling, or for his personal equipment? If they do not fall within either one of these rules, then they are not such as the laws of this territory require railroad companies to carry as baggage. It seems to us that the answer in this case must be in the negative; that, without discussing what might have been the effect of the delivering of such articles to a railroad company under the rules and regulations at common law, under the rules and regulations of our statute they are not baggage, and the railroad company is not required to carry them as such. If this contention is correct, then the objection of the defendant to the introduction of evidence on this count of the petition should have been sustained, and the failure to do so was error on the part of the court.

The second assignment of error is that the court erred in permitting the plaintiff to prove the rental value—the value of the use—of the tools over the objection of the defendant. It will be observed that the only allegation of damages in the second count of the plaintiff's petition, which is the only count on which the case was tried, is as follows: "That by the negligence of the company he was delayed in starting and carrying on his business, whereby he was damaged three hundred dollars, for which he demands judgment against the defendant." While the strict rules of the common law with reference to pleadings have been very much modified by our Code, still it can hardly be said that even under our Code a litigant can prove and recover a judgment for damages not claimed in his petition. The general rule, and one that has been followed in this territory, is that every fact necessary to be proven to entitle the plaintiff to recover must be averred in his petition. Church v. A., T. & S. F. R. Co., 1 Okl. 44, 29 Pac. 530. In this case we have carefully read over the second count in the petition—that being the count on which this action is based—and we fail to find that any claim is made for damages for the rental value of the use of the tools during the time the shipment was delayed. The record discloses that the court refused to permit plaintiff to prove loss to his business, but did permit him, over the defendant's objection, to prove the value of the use of the tools—the rental value—during the delay. The only allegation of damages is the allegation of damage by loss to business, and we are unable to see how, even under the liberal provisions of our Code, the plaintiff could be permitted to prove the rental value of these tools without amending his petition in this particular. This, we think, was error on the part of the district court.

The third assignment of error is that the court erred in overruling the demurrer to the plaintiff's evidence filed by the defendant at the close of plaintiff's evidence in the court below. If our view of the first assignment of error is correct, then it necessarily follows that this assignment of error is well taken.

The fourth assignment of error is that the measure of damages stated by the court in his instruction No. 2 is not the proper measure of damage. The instruction referred to is as follows: "You are instructed, gentlemen of the jury, that if you find from the evidence in this case, and the instructions of the court here given, that the plaintiff is entitled to recover in this action, the measure of damage upon which he is entitled to recover is the usual rental or usage value of said tools for the length of time he has, by the fault or neglect of the defendant company, been deprived of the use thereof. While it is agreed between the plaintiff and defendant that said goods were shipped on the 5th day of August, 1901, and were delivered to the plaintiff on the 14th day of October, 1901, the lapse of time between said dates is not the length of time for which the plaintiff would be entitled to recover damages. The defendant, after the receipt of the goods, is entitled to a reasonable time within which to deliver the same at Anadarko; and you must determine from the evidence what would be a reasonable time, under the facts and circumstances of this case, giving to the defendant credit for that time within which to deliver the same." By this instruction the court tells the jury that the plaintiff is entitled to recover the usual rental value or usage value of said tools for the length of time he has, by neglect or fault of the defendant company, been deprived of the use thereof. We think this is erroneous, for the reasons assigned for sustaining the second assignment of error.

We might add that in this case there is nothing either in the pleadings or in the evidence to show that the defendant or its baggage agent knew that the plaintiff was a butcher, or what the purpose of his journey was, or that his trunk contained butcher's tools. This being true, the damages claimed for rental value could not possibly have been within the contemplation of the defendant at the time of the making of the contract, and the only damages which could possibly have been contemplated were those imposed by Wilson's Rev. & Ann. St. § 2746, which reads as follows: "The detriment caused by a carrier's delay in the delivery of freight is deemed to be the depreciation in the intrinsic value of the freight during the delay, and also the depreciation, if any, in the market value thereof, otherwise than by reason of a depreciation in its intrinsic value, at the place where it ought to have been delivered, and between the day at which it ought to have been delivered, and the day of its actual delivery." This being the statutory provision as to the damage, it seems to us fair to presume that in the absence of any knowledge of any particular use to which the baggage checked was to be put, or any particular special value it might have, the only damage contemplated by the defendant railway company in case of delay or destruction would be the damage defined by statute.

The fifth assignment of error is that the court erred in

giving instruction No. 4. Instruction No. 4 is as follows: "You are instructed, gentlemen of the jury, that if the defendant company, being a common carrier of persons and baggage, offered to sell and did sell to plaintiff tickets for the transportation of himself and baggage to an amount of baggage within the limit for which baggage was received for transportation, to a point beyond its line of road, and his (plaintiff's) ticket so sold to him purported to carry him over connecting lines of road, and defendant company took and received full compensation for the transportation of the plaintiff and his said baggage, without contract and agreement other than that he and his baggage should be so transported, then I instruct you that connecting lines of road, under such agreement, would be the agents of defendant for the complete fulfillment of the contract, and the defendant would be liable for unnecessary neglect or delay which might occur upon such connecting lines of road." Wilson's Rev. & Ann. St. § 724, reads as follows: "If a common carrier accepts freight for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction, to some other competent carrier, carrying to the place of address, or connected with those who thus carry, and his liability ceases upon making such delivery." It would seem that this instruction and this section of the statute are in irreconcilable conflict. This being true, while this instruction might be good at common law, it must be held as a bad instruction under the terms of this particular statute. There is nothing in this record that indicates any stipulation on the part of the defendant to assume any liability, greater than that imposed by statute. In fact, the ticket, which is introduced in evidence, and appears in the record, contains a limit on the liability on the part of the company to its own lines.

There are some other assignments of error, but, as we think the case must be reversed for the reasons already expressed in this opinion, we do not deem it necessary to discuss them at this time.

The judgment of the lower court is hereby reversed at the costs of the defendant in error, and the cause remanded to the district court for such action as may be consistent with the views herein expressed. All the Justices concurring, except Gillette, J., who, having tried the cause in the court below, took no part in this decision, and Burford, C. J., absent.

LEE *v.* ELIZABETH, P. & C. J. RY. CO.

(*Supreme Court of New Jersey, June 8, 1903.*)

[55 Atl. Rep. 106.]

Carriers—Street Car Company—Injuries to Passenger—Contributory Negligence.*

Evidence in action by a street car passenger for injuries examined, and held to show that the accident was occasioned by plaintiff alighting from the car after it had started, and without notifying the conductor of her intention, and hence not to sustain a verdict for her.

Action by Mary Lee against the Elizabeth, Plainfield & Central Jersey Railway Company. On a rule to show cause. Rule dismissed. New trial granted.

Argued February term, 1903, before GUMMERE, C. J., and FORT, PITNEY, and HENDRICKSON, JJ.

J. A. Kiernan, for plaintiff.
Frank Bergen, for defendant.

PER CURIAM. A new trial is sought mainly upon the ground that the verdict is against the clear weight of the evi-

*Contributory negligence in alighting from moving car, see foot-note appended to Betts *v.* Wilmington City Ry. Co. (Del.), 5 R. R. R. 602, 28 Am. & Eng. R. Cas., N. S., 602; foot-note appended to McMichael *v.* Illinois Cent. R. Co. (La.), 7 R. R. R. 140, 30 Am. & Eng. R. Cas., N. S., 140; Chicago, etc., R. Co. *v.* Winfrey (Neb.), 6 R. R. R. 689, 29 Am. & Eng. R. Cas., N. S., 689; Brown *v.* New York, N. H. & H. R. Co. (Mass.), 3 R. R. R. 143, 26 Am. & Eng. R. Cas., N. S., 143; Pence *v.* Wabash R. Co. (Iowa), 3 R. R. R. 77, 26 Am. & Eng. R. Cas., N. S., 77; Comerford *v.* New York, etc., R. Co. (Mass.), 3 R. R. R. 130, 26 Am. & Eng. R. Cas., N. S., 130; La Pointe *v.* Boston, etc., R. R. (Mass.), 5 R. R. R. 464, 28 Am. & Eng. R. Cas., N. S., 464; Lindsay *v.* Southern Ry. Co. (Ga.), 3 R. R. R. 748, 26 Am. & Eng. R. Cas., N. S., 748; Selma Street & Suburban Ry. Co. *v.* Owen (Ala.), 2 R. R. R. 97, 25 Am. & Eng. R. Cas., N. S., 97 (jumping from moving street car to avoid apparent danger); Chicago, B. & Q. R. Co. *v.* Martelle (Neb.), 4 R. R. R. 872, 27 Am. & Eng. R. Cas., N. S., 872 (jumping from moving train after being carried beyond destination); United Rys. & Elec. Co. of Baltimore *v.* Beidelman (Md.), 4 R. R. R. 662, 27 Am. & Eng. R. Cas., N. S., 662 (necessity of leaving moving car, instruction); Walters *v.* Chicago & N. W. R. Co. (Wis.), 2 R. R. R. 237, 25 Am. & Eng. R. Cas., N. S., 237; Johnson *v.* Atlantic & N. C. R. Co. (N. Car.), 3 R. R. R. 770, 26 Am. & Eng. R. Cas., N. S., 770 (at invitation of conductor); Campbell *v.* Los Angeles Ry. Co. (Cal.), 1 R. R. R. 85, 24 Am. & Eng. R. Cas., N. S., 85; notes, 6 Am. & Eng. R. Cas., N. S., 192; 12 Am. & Eng. R. Cas., N. S., 164 (at invitation of conductor); 12 Am. & Eng. R. Cas., N. S., 222 (contrary to warning); Agulino *v.* New York, N. H. & H. R. Co. (R. I.), 14 Am. & Eng. R. Cas., N. S., 314; Atchison, Topeka & S. F. R. Co. *v.* O'Melia (Kan.), 2 Am. & Eng. R. Cas., N. S., 257; Baltimore & O. R. Co. *v.* Meyers (C. C. A.), 2 Am. & Eng. R. Cas., N. S., 262; Blevins *v.* Atchison, Topeka, etc., R. Co. (Okla.), 2 Am. & Eng. R. Cas., N. S., 329; Brashear *v.* Houston Cent. A. & N. R. Co. (La.), 2 Am. & Eng. R. Cas., N. S., 262; Chicago & A. R. Co. *v.* Byrum (Ill.), 2 Am. & Eng. R. Cas., N. S., 261, 262; Chicago, B. & Q. R. Co. *v.* Hyatt (Neb.), 4 Am. & Eng. R. Cas., N. S., 44; Floytrup *v.* Boston & Maine R. Co. (Mass.), 2 Am. & Eng. R. Cas., N. S., 273; Hoehn *v.* Chicago,

dence. Plaintiff testified as follows: "Q. When the car stopped at Chestnut street, what did you do? A. I went to go out, and I had one foot on the step to go down, and before I had the other foot on the conductor pulled the bell, and the—I went on the street. Before I had the other foot on the step—the right foot was not on the step when he pulled the bell—and I went on the street." The step mentioned was the running board. Two boys, aged 11 and 14 years, respectively, who were upon the street at the time, were called to corroborate her. Their testimony will be referred to later.

To meet the plaintiff's case, three passengers who occupied the next seat in the rear of plaintiff testified, in substance, that the train stopped, and some passengers in the rear got off; that just as the car started to move again the plaintiff turned to one of their party, and asked if this was Chestnut

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P. & St. L. R. Co. (Ill.), 2 Am. & Eng. R. Cas., N. S., 261; Jacob v. Flint & P. M. R. Co. (Mich.), 2 Am. & Eng. R. Cas., N. S., 258; La Pointe v. Boston & M. R. R. (Mass.), 23 Am. & Eng R. Cas., N. S., 105; Lehman v. Railroad Co. (La. Ann.), 2 Am. & Eng. R. Cas., N. S., 259; Louisville & N. R. Co. v. Depp (Ky.), 3 Am. & Eng. R. Cas., N. S., 440; McDonald v. Kansas City & I. R. Co. (Mo.), 2 Am. & Eng. R. Cas., N. S., 258, 262; New Jersey Traction Co. v. Gardner (N. J.), 2 Am. & Eng. R. Cas., N. S., 259; Outen v. North & South St. R. Co. (Ga.), 2 Am. & Eng. R. Cas., N. S., 258; Rothstein v. Pennsylvania R. Co. (Pa.), 2 Am. & Eng. R. Cas., N. S., 258, 262; Schiffler v. Chicago & N. W. Ry. Co. (Wis.), 8 Am. & Eng. R. Cas., N. S., 122; Texas & P. R. Co. v. Beckworth (Tex. Civ. App.), 2 Am. & Eng. R. Cas., N. S., 258, 261; Victor v. Pennsylvania R. Co. (Pa. St.), 2 Am. & Eng. R. Cas., N. S., 257, 259; Payne v. Nashville, etc., Ry. Co. (Tenn), 22 Am. & Eng. R. Cas., N. S., 677; Coursey v. Southern Ry. Co. (Ga.), 21 Am. & Eng. R. Cas., N. S., 412; New Jersey Traction Co. v. Gardner (N. J.), 9 Am. & Eng. R. Cas., N. S., 843; McPeak v. Missouri Pacific R. Co. (Mo.), 2 Am. & Eng. R. Cas., N. S., 226 (by direction of employee); Atchison, Topeka & Santa Fe R. Co. v. Hughes (Kan.), 2 Am. & Eng. R. Cas., N. S., 248; Lewis v. President, etc., Canal Co. (N. Y.), 2 Am. & Eng. R. Cas., N. S., 192 (by invitation of employee); Texas & Pacific Ry. Co. v. McLane (Tex. Civ. App.), 2 Am. & Eng. R. Cas., N. S., 263 (to avoid ditch); Cooper v. Georgia, C. & N. Ry. Co. (S. Car.), 16 Am. & Eng. R. Cas., N. S., 12 (on carrier's invitation not contributory negligence per se); Atchison, Topeka & S. F. R. Co. v. O'Melia (Kan.), 2 Am. & Eng. R. Cas., N. S., 257 (by invitation of train hands); Durham v. Louisville & N. R. Co. (Ky.), 2 Am. & Eng. R. Cas., N. S., 260; Hodges v. Southern Ry. Co. (N. Car.), 8 Am. & Eng. R. Cas., N. S., 46; Jacob v. Flint & P. M. R. Co. (Mich.), 2 Am. & Eng. R. Cas., N. S., 258, 260; Lehman v. Railroad Co. (La. Ann.), 2 Am. & Eng. R. Cas., N. S., 259; McDonald v. Kansas City & I. R. Co. (Mo.), 2 Am. & Eng. R. Cas., N. S., 258; New Jersey Traction Co. v. Gardner (N. J.), 2 Am. & Eng. R. Cas., N. S., 259; Rothstein v. Pennsylvania R. Co. (Pa.), 2 Am. & Eng. R. Cas., N. S., 258; Savannah, F. & W. R. Co. v. Wall (Ga.), 2 Am. & Eng. R. Cas., N. S., 260; Texas & P. R. Co. v. Beckworth (Tex. Civ. App.), 2 Am. & Eng. R. Cas., N. S., 261; Victor v. Pennsylvania R. Co. (Pa. St.), 2 Am. & Eng. R. Cas., N. S., 257, 259; Chicago & E. I. R. Co. v. Storment (Ill.), 21 Am. & Eng. R. Cas., N. S., 116; Brockett v. Fair Haven & W. R. Co. (Conn.), 20 Am. & Eng. R. Cas., N. S., 406 (to avoid danger); Jagger v. People's St. Ry. Co. (Pa.), 8 Am. & Eng. R. Cas., N. S., 771; Pray v. Omaha St. R. Co. (Neb.), 2 Am. & Eng. R. Cas., N. S., 299; McDonald v. Boston & Maine R. Co. (Me.), 2 Am. & Eng. R. Cas., N. S., 293.

street, Roselle, and, being answered in the affirmative, she, without notifying the conductor, stepped off the car and fell. Another witness testified that he and two ladies, who were his guests, from a distance, alighted from this car after it had stopped, and that then the car started on, and had only just started when he saw the car moving, and the plaintiff stepping off, and then saw her down in the street at the side of the car. He further testified that there was plenty of opportunity to get off the car while it stopped. The conductor's testimony was to the like effect as that of these four disinterested witnesses. The plaintiff herself admitted on cross-examination that when the car had gotten to Chestnut street she did ask the girls behind her if that was Chestnut street. She was not asked to explain whether, as she was stepping her foot upon the running board, she had hold of the car, and whether she had released her hold when the car started. She was not recalled for rebuttal, and there was a singular absence of detail in her account of the accident. The same may be said of the testimony of the two boys called in her behalf. The testimony of one was that he saw the woman get hurt, and then as follows: "Q. What did the car do when it came there? A. Stopped, and Mrs. Lee went to get off, and it was standing still when she went to get off, and as soon as she got on the footboard the car started, and she fell." The second boy testified to the stopping of the car, and to the plaintiff getting down, from where she was sitting, on the running board, and then as follows: "Q. What happened then, while she was on the running board? A. The car started up, and she went to get off, and the motion of the car made her fall." The fair inference from this answer would seem to be that the plaintiff "went to get off" after the car started.

We think the verdict is against the clear weight of the evidence. The rule to show cause will be made absolute, and a new trial granted.

LOUISVILLE, H. & ST. L. RY. CO. v. COONS.

(*Court of Appeals of Kentucky, Sept. 29, 1903.*)

[76 S. W. Rep. 45.]

Carriers—Injury to Passenger While Alighting—Negligence—Instruction.*

An instruction, in an action for injury to a passenger while alighting at a station after the train had started up, that, if the train remained at a standstill for a time reasonably long enough for plaintiff to alight, and she negligently delayed to do so till it was in motion, and got off while it was so in motion, and her injuries were the result of her contributory negligence, she could not recover; and that the meaning of negligence as used in the instruction was the want or absence of care—is erroneous in stating in effect that, unless she showed an absence of all care in alighting, verdict should be for her; as her choice to get off, if the train is started before she has time, must not be exercised negligently or unreasonably.

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*As to whether it is contributory negligence to alight from a moving car, see foot-note appended to preceding case.

Appeal from Circuit Court, Daviess County.

"Not to be officially reported."

Action by Martha E. Coons against the Louisville, Henderson & St. Louis Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

Chapeze Wathen and Helm, Bruce & Helm, for appellant.

Little & Slack and Sweeney, Ellis & Sweeney, for appellee.

O'REAR, J. Appellee was a passenger on one of appellant's trains from Owensboro to Holts station. On that occasion appellant had an excursion, and was hauling two extra coaches in addition to its regular ones. The train was crowded. Appellee purchased her ticket at Owensboro, where she boarded the train. She got on the train, and allowed the conductor to pass by her without giving up her ticket. She says she was not asked for it, and therefore did not give it up. It is clearly shown that the conductor did not know that she was to get off at Holts, and, in view of the long and crowded train, and that appellee failed either to give up her ticket or apprise the conductor of the fact that she wished to leave the train at Holts, we are not prepared to say that the conductor was negligent of any duty to her in not learning of her destination. Holts is a station at which presumably there is not much travel. There are two or three houses immediately thereabout. The train usually stopped there for a minute or a minute and a half. On this occasion there were no passengers for Holts except appellee. There were but one or two passengers to get on at this place. Appellee insists that the train did not stop long enough to allow her to alight from it in safety after it stopped, and that, as the train started before she could alight, she attempted to leave it, and was thrown to the ground, and severely sprained her ankle. Eight or ten witnesses seem to contradict her statement as to the length of time the train was stopped at the station. However, the jury found for appellee.

The only error that we deem it necessary to notice upon this appeal is the instruction of the court defining the duty of appellant under the circumstances. That instruction is the third one given to the jury, and is as follows: "The court further instructs the jury that if they believe from the evidence that on the arrival of defendant's train at Holts said train was brought to a standstill, and remained so for a time reasonably long enough for the plaintiff to alight from said train, and she negligently delayed getting off until the train was in motion, and got off while said train was so in motion, and was injured, and her injuries were the result of her own negligence contributing, without which she would not have been injured, they should find for the defendant." In L. & N. R. R. Co. v. Eakin's Adm'r, 103 Ky. 465, 45 S. W. 529, 46 S. W. 496, 47 S. W. 872, it was held that it

was not negligence per se for a passenger to leave a moving train when it had not stopped long enough for him to alight in safety at his destination. It was there said that where a passenger, by the wrongful act of the company, is compelled to choose between leaving the cars while they are moving slowly or submitting to the inconvenience of being carried by the station where he desired to stop, the company is liable for the consequences of the choice, provided it is not exercised negligently or unreasonably. It was held that the matter was one for the jury.

The court told the jury further in this case that the meaning of "negligence," as used in the instructions, is the want or absence of care. Then the court told the jury: "'Reasonable care,' as used, means such care as ordinarily prudent persons would usually observe under the same or similar circumstances." Therefore the jury were told in this case that, unless appellee showed a want or absence of care—that is, an absence of all care—in alighting from the moving train, they should find for her. This is beyond what was said by this court in the Eakin Case, supra, and is far beyond what we are willing to now approve. The jury should have been told that, if the train was brought to a standstill, and remained so for a time reasonably long enough for the plaintiff to alight therefrom, and if she had failed to apprise the conductor, or other proper person in charge of the train, of her desire to get off at that station, and that the trainmen were unaware of such desire, then the company was not negligent in starting the train when it did; but that, if the company failed to bring the train to a standstill for a sufficient length of time to enable plaintiff to alight therefrom in safety, and that she was thereby compelled to choose between leaving the cars while they were moving slowly or submit to the inconvenience of being carried by the station where she desired to stop, the company is liable for her injuries sustained by her choice of getting off the moving train, provided she did not act when a reasonably prudent person in the exercise of ordinary care and caution would have refrained from alighting under the circumstances.

For the reasons indicated, the judgment is reversed, and cause remanded for a new trial under proceedings not inconsistent herewith.

HUNTERSON v. UNION TRACTION CO.

(*Supreme Court of Pennsylvania, May 4, 1903.*)

[55 Atl. Rep. 543.]

Injury to Passenger—Boarding or Alighting from Moving Car.*

The burden is on a person injured by stepping on or off a moving

*Contributory negligence in alighting from moving car, see foot-note appended to preceding case.

As to whether it is contributory negligence to board a moving street car, see foot-note appended to South Chicago City Ry. Co. v.

street car and receiving an injury thereby to show why the case should go to the jury.

Same—Same.

Where plaintiff signals an electric car to stop at a crossing, and the signal is heeded, and the car is slackening its speed, and he attempts to get on while it is running three miles an hour, and is injured thereby, he cannot recover.

Mestrezat, J., dissenting.

Appeal from Court of Common Pleas, Philadelphia County; Ralston, Judge.

Action by John C. Hunterson against the Union Traction Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

Charles H. Edmunds, for appellant.
Thomas Leaming and Russell Duane, for appellee.

BROWN, J. The plaintiff below attempted to get on a moving electric street car. Just as he put one of his feet on the lower step of the rear platform and his right hand had grasped the hand rail, he was thrown, by the accelerated speed of the car, down on the street, and dragged about the length "of two pavements," sustaining injuries for which he seeks compensation. The learned trial judge directed a judgment of nonsuit to be entered, for the reason that the plaintiff's attempt to get on the moving car was an act of negligence, and, as he was injured in such attempt, he could not recover.

"To step on or off a moving car, whether the power which propels the car be steam or electricity, is per se negligence, and, if injury results to the passenger, he cannot recover damages. To this rule, as in all rules, there are some rare exceptions." Powelson v. United Traction Company, 204 Pa. 474, 54 Atl. 282. And to this we now add that, where one is injured in stepping on or getting off a moving car, the burden is upon him to clearly demonstrate to the court why his case should go to the jury, as a rare exception to the rule. The question to be settled on this appeal is whether the appellant's case is one of the rare exceptions to the rule and a jury should have been allowed to pass upon his negligence. Standing on the northeast corner of Fifth and Wharton streets, in the city of Philadelphia, the appellant saw a car approaching up Fifth street. When near him, he signaled the motorman to stop at the north crossing over Fifth street. In response to the signal the motorman slackened the speed of the car, but, without waiting for it to stop, the plaintiff attempted to step on

Dufresne (Ill.), 6 R. R. R. 137, 29 Am. & Eng. R. Cas., N. S., 137; Birmingham Ry. & Electric Co. v. Brannon (Ala.), 2 R. R. R. 154, 25 Am. & Eng. R. Cas., N. S., 154; Finkeldey v. Omnibus Cable Co. (Cal.), 5 Am. & Eng. R. Cas., N. S., 293; notes, 6 Am. & Eng. R. Cas., N. S., 231, 235; 4 Am. & Eng. R. Cas., N. S., 254.

it as it was passing the crossing. While, in a general way, he says the car was moving slowly, when pressed by the appellee to state more definitely what the speed was—as was its right to know in this controversy, involving his negligence as well as its own—he admits it to have been that of a man walking at an ordinary gait, or three or four miles an hour. With his case so presented by himself, it was the duty of the court to say he had been negligent. The duty of the plaintiff was to get on a car that had stopped. His signal to the motorman clearly was to stop, and not merely to slow up. The motorman so understood it, and was slackening the speed of the car, that he might stop at the usual stopping place. The slackened speed was not notice to the plaintiff to get on the moving car, but was that it would come to a full stop, if he would wait. No other inference can be drawn. But the plaintiff, impatient, as many of us so often are, even of a second's delay, tried to board the moving car, instead of waiting until he could safely get on it; and in doing so he voluntarily assumed the risk of experiencing just what happened to him. Whatever "rare exceptions" there may be to the rule that it is negligence per se to step on or off a moving car, no recovery can be permitted where an injured plaintiff, as in this case, at a crossing signals an approaching car to stop, whose signal is heeded, and he so understands by the slackened speed of the car as it approaches the usual stopping place, but who, before it stops, and while running at the speed stated, attempts to get on it. It is the negligence of the injured person in such a case that is a contributing cause to his injuries, and he cannot escape the rule that his carelessness is in the way of his right to recover.

Our attention has been called to several of our own cases as authority for the contention of the appellant that the jury should have been permitted to pass upon the question of his negligence, but no one of them is in conflict with the rule which we have applied to the facts now before us. In Stager v. Ridge Ave. Pass. Ry. Co., 119 Pa. 70, 12 Atl. 821, the court below refused to take off the judgment of nonsuit, assigning as a reason for its refusal to do so that the evidence of the plaintiff showed that the injury which resulted in the death of Harry W. Stager was caused by his own negligence in attempting to get upon a moving car by way of the front platform; that he had signaled the driver to stop, and the car's speed was slackened nearly to a full stop, when, without waiting, he jumped on the front platform of the car, lost his hold, fell off, and was run over; that the accident occurred at a point from three to five feet below the street crossing; that, had he waited a second or two, the car would have been completely stopped, and he could have entered it by the rear platform, and, if he had fallen off, he would not have been run over. It is true we said in that case, "We are not prepared to say, as matter of law, that the attempt of a pas-

senger to board a street car whilst it is in motion is to be considered an act of negligence, no matter what may be its rate of speed," but we affirmed the judgment because we were "of opinion that the learned court below was right, upon the grounds stated in his opinion, in entering the nonsuit." As to Walters v. Phila. Traction Co., 161 Pa. 36, 28 Atl. 941, upon which the appellant chiefly relies, we need only repeat what we said of it in Powelson v. United Traction Co., supra: "There was no relaxation of the rule, in the case cited, that to get on a moving car is negligence. The language quoted was affirmed in a per curiam opinion. It was not intended by this court to say that in that case, under the circumstances, it was not negligence in defendant to get on a moving car." In Jagger v. People's Pass. Ry. Co., 180 Pa. 436, 36 Atl. 867, 38 L. R. A. 786, the court below, in an opinion refusing to take off a nonsuit, described the accident as follows: "The case as presented, then, is simply this: The plaintiff motioned to the conductor to stop, the conductor rang the bell to have it done, the motorman slackened the car. Meantime the plaintiff had risen from his seat, and gone out on the rear platform. Without waiting for the car to come to a standstill, the plaintiff, suiting his own convenience, got off while it was in motion. The car gave a jerk, and he was thrown down and injured." The judgment was affirmed per curiam. In that case the plaintiff jumped off a moving car; here he jumped on. For the same reason that no recovery was permitted there, none can be had here.

Judgment affirmed.

MESTREZAT, J. (dissenting). The question involved in this case is correctly stated by the learned counsel for the appellant, to wit: "Whether or not it is negligence per se for a man, after having signaled the motorman to stop, to undertake to get on a street passenger car at a crossing of the highway when the car is moving so slowly that it had almost stopped." The learned trial judge answered the question in the negative, and granted a nonsuit. The plaintiff himself was the only witness in his behalf as to the circumstances attending the accident, and in considering this appeal his testimony must be taken to be true. He testifies, inter alia: "I was standing at the northeast corner of Fifth and Wharton streets, waiting for a Fifth street car. One came up Fifth street briskly. Just as it had reached Wharton street, another car reached Fifth street on Wharton. Both cars came to a dead stop on the other side of each street. I stepped out on the crossing, the car coming up Fifth street, nodded to the motorman, and he slowed his car to the crossing for me to get on. As it reached the crossing, I stepped on with one foot, and took hold of the hand rail with my right hand. The conductor was standing in the doorway, with his back to me, with his hand on the bell cord. At the same moment that I stepped on the car he signaled the motorman to go

ahead. The car was started quickly, and I was thrown to the street and dragged about two pavements. Q. Now, when the rear platform of the car reached the flag upon which you were standing, how fast was the car moving? A. Scarcely moving. Q. What do you mean by that? A. Well, I don't know that I can be more definite. It stopped just as all cars stop at crossings for men passengers to get upon them. Everybody knows what that is. Q. You say the car was scarcely moving? I wish you would contrast the motion of that car with the motion of a person walking or running. How would the motion of a car compare with a person walking along at the usual rate of speed? A. I think the car was moving slower than a person would walk quickly." On cross-examination, he said "that the car was moving slowly. It had almost absolutely stopped." He further stated, in reply to a question of appellee's counsel, that he thought the car was not moving faster than three or four miles per hour. He said that he did not think the conductor saw him. They exchanged no signals prior to the accident. He further testified on cross-examination: "A. Yes, now one foot was on the car. I do not think they both were. My hand was on the hand rail that is placed in the rear of the cars for passengers to take hold of. I had hold of that hand rail when the car was suddenly started and I was thrown off. Q. Where was your foot? A. One foot, I am sure, was on the car. I don't think two were." This was the testimony on which the trial judge held the plaintiff guilty of negligence. It will be observed that the testimony is somewhat conflicting as to the rate of speed at which the car was traveling when the plaintiff attempted to board it. The jury would have been justified in finding that the car was moving slowly, and had almost absolutely stopped. It was not for the court to resolve the apparently conflicting statements of the witnesses as to the speed of the car at the time the plaintiff attempted to enter it. That was for the jury. If any part of the plaintiff's testimony justified its submission to the jury on the question at issue, although other parts of the testimony showed apparent contradictions, the case should not have been withdrawn from the jury. In a personal injury case—Ely v. Pittsburg, etc., Ry. Co., 158 Pa. 233, 27 Atl. 970—in which the testimony was "extremely muddled and conflicting." Justice Mitchell, speaking for the court, said: "This testimony was contradictory, and the net result of it by no means clear. On part of it, he [plaintiff] was plainly entitled to go to the jury; on the other part of it, equally plainly he was not. Under these circumstances the case must go to the jury, whose province it is to reconcile conflicting statements, whether of the same or different witnesses, or to draw the line between them, and say which shall prevail." This language was repeated by Justice Dean and approved by him in the very recent case of Strader v.

Monroe County, 202 Pa. 626, 51 Atl. 1100, to which he added: "The court was bound to submit it to them. In trials of fact, if it were required that all the testimony should be consistent either with itself or that of other witnesses, but few cases would reach a jury."

In entering the nonsuit, the learned trial judge said: "I think, if I were to instruct the jury in this case, I would be obliged to instruct them that it was negligence to board a moving car, and, as I am at present informed, I will grant this motion." This is the single and only question presented here for consideration, and was so regarded and argued by the learned counsel of both parties. The rule or principle thus announced by the court below must be affirmed before the plaintiff can be deprived of his right to have the case presented to a jury. The majority opinion speaks of "some rare exceptions" to the rule, and that the plaintiff must "clearly demonstrate why his case should go to the jury as a rare exception," but its argument is devoted to sustaining the rule, and concludes with the statement that no recovery can be permitted in this case, because the plaintiff jumped "on a moving car." In my judgment, it is not negligence per se to board a moving street car, and that, therefore, the judgment of the court below is clearly erroneous, and should be reversed.

Street railway companies are incorporated for the purpose of carrying passengers in towns and cities and along suburban highways in thickly populated communities. To accommodate their patrons, they are required to stop frequently, and should stop at the intersection of streets, to receive and discharge passengers. They are common carriers, and the public has a right to demand of them a service that will give it frequent opportunities for entering and leaving their cars with safety. Hence they are expected to stop at the intersection of streets, if not oftener, so that those who desire may avail themselves of the service of the cars. The passenger enters and leaves the car quickly. It is a matter of common observation that great numbers of people board the car and leave it while it is in motion. This is permitted by the conductor, and by his action he very frequently invites it. This is the very well understood way in which street cars are operated in this country, and therefore a large percentage of passengers act upon the assumption that they are expected by the company to enter and depart from a car when it arrives at a crossing, whether it has entirely stopped or not. That this can be done with perfect safety if the car is moving slowly, is the hourly experience of thousands of people. It presupposes, of course, that the person attempting it has the use of his faculties and limbs, and that there is no obstruction on or near the platform that would interfere with or prevent access to or departure from the car. Why, then, should such action on the part of the passenger be declared negligence

per se? What is done with such frequency, and with the tacit acquiescence of the company's servants, by great numbers of people, who evidently regard it as safe, cannot be characterized as negligence in itself. On the contrary, the proper and logical inference from such action is that it is not attended with danger, and hence that it does not disclose a want of care. A reasonably prudent man would not attempt to get on or off a rapidly moving street car, as the danger would be apparent, and, if he did so, his act would convict him of negligence; but, should he enter or alight from a car almost at rest, the circumstances would be different, and the character of his act must be determined in the light of those circumstances. In the former the rapidity of the car would make the danger apparent to the dullest intellect; in the latter, the speed of the car would raise no doubt in the mind of a prudent man that he could accomplish the act with safety. The position of the majority of the court is not supported by any decision in this state. On the contrary, the authorities not only of this but of other states sustain the view herein stated. Stager v. Ridge Ave. Passenger Railway Company, 119 Pa. 70, 12 Atl. 821, is very similar in its facts to the case in hand. Mr. Justice Clark, delivering the opinion of the court, states the facts as follows: "It is admitted that Stager [plaintiff] attempted to board the car at the front platform whilst the car was in motion. He succeeded in getting on the lower step with one foot only, and before he could establish himself there a sudden motion of the car forward threw him off, and he fell under the wheels. It is not definitely shown at what rate the car was moving at the time of the occurrence. Stager had given the conductor a signal to stop, and as the car approached the crossing it 'slowed up,' but before it had fully arrived at the place where the stop was to be made, and whilst it was still in motion, he attempted to enter by the front platform, with the result stated. The evidence seems to show that the car was moving quite slowly, but it did not stop." The learned justice then says: "We are not prepared to say, as matter of law, that the attempt of a passenger to board a street car whilst it is in motion is to be considered an act of negligence, no matter what may be its rate of speed. A car may be moving so slowly that there would be no apparent danger whatever in attempting to enter it—so slowly that a person of reasonable prudence in the exercise of ordinary care would not hesitate to make the effort. It would be a hard rule that would hold a passenger guilty of culpable contributory negligence in such a case. In all cases of doubt the question must be left to the jury to say, under all the circumstances, whether the danger of boarding the train when in motion was so apparent as to have made it the duty of the plaintiff to desist from the attempt." Walters v. Philadelphia Traction Co., 161 Pa. 36, 28 Atl. 941, was an action for personal injuries sustained while the plain-

tiff was attempting to board a cable car which he had signaled to stop. The trial judge charged the jury as follows: "If you arrive at the conclusion that the car was in motion, and was not in that condition of motion which would induce any reasonable man to get on, then the plaintiff cannot recover. If, however, you should come to the conclusion that it had stopped, or was in the act of stopping, or was in such a condition of running or stopping as induced the plaintiff to think it was about to stop, then he had a right to get on; and, if the car started before he was safely seated in the car, and an injury resulted therefrom, then your verdict should be for the plaintiff." There was a verdict and judgment for the plaintiff, and this court affirmed the judgment, observing in the opinion that "the plaintiff's right to recover depended on questions of fact which were clearly for the consideration of the jury." In Linch v. Pittsburg Traction Co., 153 Pa. 102, 25 Atl. 621, the plaintiff attempted to alight from a moving cable car. The court below was requested to direct a verdict for the defendant, because no negligence was shown on the part of defendant, and plaintiff was guilty of contributory negligence. But the court refused the request for instructions, and charged as follows: "The car did not come to a full stop at all, and at the time of the sudden start he [plaintiff] was actually getting off. The question, then, for you to determine is whether it was negligence for him to attempt to get off in this way. If you should conclude that it was negligence in him to do it, you will probably hesitate very little in concluding that that negligence contributed to the injury. If he had been in some other position than alighting from the car, the probabilities are that he would not have got hurt. But was it negligence for him in that position to get off the car? Ordinarily, it would be considered negligence for a man to get off a moving car. We cannot say, as matter of law, that it is an act which a careful man would not, under any circumstances, do, and therefore we must leave it for you to determine whether this plaintiff was in the exercise of due care when he attempted to get off this car while it was in motion." This court held that the case was for the jury, and affirmed the judgment. These cases have been recognized and followed as the law of this state in the very recent case of Austrain v. United Traction Co., 19 Pa. Super. Ct. 329. There the plaintiff attempted to enter an electric open or summer car, and was injured. It was held that: "If a street railway car has stopped, or is in the act of stopping, or is in such a condition of running or stopping as induces an intended passenger to think it is about to stop, the passenger has a right to get on, and, if the car started before he is safely seated in the car, and an injury results therefrom, the company is liable." In Powelson v. United Traction Co., 204 Pa. 474, 54 Atl. 282, we reversed the judgment of nonsuit, and Justice Dean, delivering the opinion, stated the facts thus:

"On 25th of January, 1900, he [plaintiff] boarded a summer car in Allegheny City. When he saw the car coming about 100 feet distant, he waved his hand to the motorman to stop, who at once put on the brakes, so that when it reached plaintiff it had almost stopped, and he stepped on the running board, and was about to go into the body of the car, when the conductor rang the bell for the car to start. It was instantly started with a jerk, which threw the plaintiff off, ran over his leg, so crushing it that amputation followed." The court below on these facts was of opinion that there was no sufficient evidence of negligence on the part of the defendant, and that there was clearly contributory negligence on the part of the plaintiff. He therefore instructed the jury to find for the defendant. This court reversed the court below, the opinion concluding as follows: "There was conflicting evidence as to his negligence and that of the company. He says: 'It was not my carelessness in getting on the car when moving that threw me off, but yours in suddenly starting up before I had reasonable time to be seated.' We think the court erred in not leaving the truth of the matter to be determined by the jury."

While our decisions have settled the question under consideration here adversely to the contention of the appellee, the decisions of the other states are in harmony with our own authorities. In the recent case of Cicero & Proviso Street Ry. Co. v. Meixner (Ill.) 43 N. E. 823, 31 L. R. A. 331, an action to recover damages received while attempting to board an electric car, the Supreme Court of Illinois says: "The doctrine is established in nearly all of the states where the question has arisen that it is not negligence per se for a passenger to board or alight from a street car operated by horse power, and the question of contributory negligence is one of fact for the jury. * * * It would be impossible for a court to lay down the rule as to what particular rate of speed would be sufficient notice to a passenger that, if he attempted to get on or off, he would be held guilty of contributory negligence. It would also be a great hardship and unjust to lay down a general rule that a passenger attempting to board a street car while in motion at all should be held guilty of contributory negligence." The court also considered the question whether the rule as to persons boarding or alighting from horse cars should apply to electric cars, and concludes as follows: "While in electric cars the possibilities of speed are greater than in the case of horse cars, yet the general operation and management of such cars so nearly approach those of horse cars that it must be held that the same rule of law which in the cases cited and a long line of other cases holds that it is not negligence per se to board or depart from such cars while in motion is also applicable to electric cars." In Corlin v. West End Street Ry. Co., 154 Mass. 197, 27 N. E. 1000, and in Central Pass. Ry. Co. v.

Rose (Ky.) 22 S. W. 745, it was also held that the same rule should be applied to electric as to horse cars in determining the question of negligence in entering or leaving a street car, and that in both cases the question is for the jury. The same rule prevails in many other states, and it is there held that plaintiff's negligence is a question for the jury, and cannot be determined by the court as matter of law. North Birmingham Railway Co. v. Liddicoat, 99 Ala. 545, 13 South. 18; Railway Co. v. Atkins, 46 Ark. 423; Railway Co. v. Williams, 140 Ill. 275, 29 N. E. 672; Railway Co. v. Spahr, 7 Ind. App. 23, 33 N. E. 446; Railroad Co. v. McCandliss, 33 Kan. 366, 6 Pac. 587; Ober v. Railroad Co. (La.) 11 South. 818, 32 Am. St. Rep. 366; B. & O. R. R. Co. v. Kane (Md.) 13 Atl. 387, 9 Am. St. Rep. 387; N. Y. P. & N. R. R. Co. v. Coulbourn (Md.) 16 Atl. 208, 1 L. R. A. 541, 9 Am. St. Rep. 430; Wyatt v. Railway Co., 55 Mo. 485; Schepers v. Railroad Co., 126 Mo. 665, 29 S. W. 712; Sexton v. Railway Co. (Sup.) 57 N. Y. Supp. 577; Sahlgaard v. St. Paul City Ry. Co., 48 Minn. 232, 51 N. W. 111; Omaha Street Ry. Co. v. Martin, 48 Neb. 65, 66 N. W. 1007; Munroe v. Third Avenue R. R. Co., 18 Jones & S. 114; Finkeldey v. Omnibus Cable Co., 114 Cal. 28, 45 Pac. 996. Where one attempts to board a moving car and is injured by his own carelessness, he cannot recover, and it is immaterial at what rate of speed the car is running. But it is equally clear, it seems to me, that when a person is boarding or departing from a car, using due care, and the negligent act of the motorman by quickly and suddenly accelerating the speed of the car, or by any other careless act, causes injury to the person, the street railway company is responsible. The reason is that the act of the injured party in entering or leaving the car in no way contributes to his injuries, which are the result solely of the carrier's negligence.

I would reverse the judgment of the court below, and submit the case to a jury to determine the negligence of the plaintiff and of the defendant company.

PITTSBURG, S. & W. R. CO. *et al.* v. FISKE.

(*Circuit Court of Appeals, Third Circuit, July 3, 1903.*)

[123 Fed. Rep. 760.]

Injunction—Grounds—Protection of Right of Possession of Real Property.

The right of a plaintiff who was in possession of a switch track, and the land on which it was laid, under a prima facie title, to invoke the aid of a court by injunction to protect his possession, cannot be defeated by the action of defendant in moving an engine and cars onto the track without license or lawful authority; and plaintiff was justified in removing the obstruction and restoring the property to its rightful status, using such force as was necessary.

Same—Title to Support Suit.

One in possession of land under a claim of title which is not merely

colorable may maintain a suit for an injunction to protect his possession, in a proper case, until a superior title shall have been established in an appropriate action.

Same—Repeated or Continuing Trespasses.

An owner of land is entitled to an injunction to restrain trespasses thereon where it is shown that a trespass has been committed by defendant, and will be continued or repeated unless restrained.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

George L. Roberts, for appellants.
Harry Alvan Hall, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This is an appeal from a decree awarding an injunction restraining the plaintiffs in error "from interfering with, or in any manner obstructing the use of, the switch in controversy." This switch, and the land upon which it was laid, were in possession of the plaintiff below, under at least a prima facie title, when the defendants, without license or authority of law, placed an engine and cars upon it, and so prevented the plaintiff from using it as he desired to do. This was a trespass, and the act of the injured party in repelling it, by removing, with such force as was requisite, the intruding rolling stock from the switch, was legally justified. Therefore no weight can be accorded to the first proposition submitted by the plaintiffs in error, as follows: "The writ of injunction in this case should not have been issued, for the reason that it was used to enable the plaintiff to maintain a position acquired by him through force, and not the position that existed several days previous to the granting of the injunction."

The status which it was the duty of the court to maintain was that which actually and rightfully existed when the injunction was applied for, and not that which the defendants had endeavored to wrongfully create.

The second and third of the propositions of the plaintiff in error assume that the court below should not have granted an injunction without first and finally deciding the controversy respecting the title to the switch. This assumption is inadmissible. The plaintiff below was, as we have said, in possession, under a claim of right which was by no means merely colorable; and he was entitled to protection against interference with that possession until a superior title should be established, if it could be, in an appropriate action. The defendants were not entitled to determine that matter for themselves, as they had attempted to do, and the court was clearly right in prohibiting any renewal of that attempt.

The fourth proposition of the plaintiffs in error is that the plaintiff below had a complete and adequate remedy at law. But in our opinion he had not. The proofs made in quite evident that the trespass which had been committed would, if not restrained, be repeated and continued; and it is well

settled that under such circumstances an injunction may and should be awarded, to secure a plaintiff against probable irreparable injury, and for the avoidance of a multiplicity of suits.

The assignment of errors need not be referred to with particularity, for the case of the plaintiffs in error has been submitted upon the several propositions to which we have adverted, as embracing "all the reasons contained in said assignments."

The decree of the Circuit Court is affirmed, with costs.

STATE *ex rel.* MOORE *v.* BOARD OF COM'RS OF CLINTON COUNTY *et al.*

(*Supreme Court of Indiana, Oct. 15, 1903.*)

[68 N. E. Rep. 295.]

Mandamus—Parties.

On appeal in mandamus against a board of county commissioners it is not necessary to serve with process and make parties to the appeal new incumbents of the office of commissioner; Burns' Rev. St. 1901 § 1182, authorizing mandamus against any inferior tribunal, "board," etc.

Same—Railroads—Enforcement of Public Aid—Scope of Erroneous Decision.

A taxpayer petitioned the board of county commissioners to cancel aid previously voted to a railroad. Another taxpayer filed a cross-petition asking that the levy be enforced. On appeal the circuit court entered judgment refusing petitioner's relief, adjudging the railroad entitled to the appropriation, directing the board to order the treasurer to enforce the levy, and directing the treasurer and auditor to collect the tax. On appeal to the Supreme Court, that body, while affirming the judgment generally, and in its opinion recognizing the order fixing the taxpayers' liability for the tax, held that the directions to the board and county officers were void, because they were not parties to the cross-petition. Subsequently, in suits between other parties, this decision was reversed: *held* that, though the erroneous decision still remained the law of the case, it would be regarded as affecting only the orders for the collection of the tax, and therefore, the right to the aid having been generally affirmed, mandamus might be resorted to to compel the board to collect the tax.

Variance.

It is not a variance that in pleading a judgment portions are omitted which have been vacated on appeal.

Mandamus—Railroads—Enforcement of Public Aid—Right of Taxpayer to Maintain Action.

One who is a taxpayer at the time of commencing mandamus to enforce the collection of a railroad aid tax has sufficient interest to maintain the action.

Same—Same—Same—Same—Parties on Appeal.

Where a railroad's right to receive a tax in aid thereof previously voted and levied has been judicially determined on petition to the board of county commissioners and appeal therefrom, a taxpayer seeking to enforce the collection of the tax is not required to again petition the board, and appeal from its decision if adverse, but may institute mandamus.

Nature of Aid.

A petition to a board of county commissioners for an election to vote railroad aid specified a "donation or a taking of stock." The board ordered an election on the subject of "appropriating" a certain sum. The notice of election stated the vote was to be taken on aiding the railroad by "donating" money. The order of the board for the collection of the tax recited that a majority had voted in favor of "an appropriation": *held*, that the fact that the people voted on the question of a donation settled the form of the aid to be extended, and the aid was properly pleaded as a donation.

Remedies.

After a judicial decision favorably determining a railroad's right to receive aid previously voted, the board of county commissioners made an order directing the collection of the suspended tax. About a year later it made another order setting aside the first, which operated in fact to prevent the auditor from proceeding with the collection: *held*, that mandamus would lie to compel the entry of a new order directing the collection of the tax, and relator was not reduced to the alternative of either appealing from the second order or else ignoring it, and relying on the first as still in force.

Orders—Burden of Proof.

The burden of showing any other orders still more recent was on the board, as a matter peculiarly within its own knowledge.

Conclusiveness of Judgment.

The decision of a board of county commissioners on petitions of taxpayers was adverse to a railroad's right to receive aid previously voted. On appeal this was reversed, and the railroad's right favorably determined, no issue having been raised that former adjudications by the board had exhausted its jurisdiction: *held*, that the judgment of reversal was conclusive of such issue, and could not be collaterally attacked as coram non judice.

Scope of Issues.

In an opinion affirming a judgment favorable to a railroad's right to receive public aid previously voted, and for which a tax had been levied, the Supreme Court remarked that it was not necessary to sustain the judgment that it should appear that the company had expended a sum equal to the donation in construction within the township: *held*, that this was merely a determination that the burden on that issue was on the taxpayers who had originally petitioned for a cancellation of the tax, rather than on cross-petitioners, who had asked its enforcement; and did not amount to a determination that the judgment in favor of the latter was invalid.

Same.

Taxpayers petitioned a board of county commissioners to cancel a railroad aid tax. Others filed cross-petitions asking its enforcement. On appeal from the board's decision judgment was rendered against the original petitioners and in favor of the cross-petitioners: *held*, that criticisms of the latter judgment as not supported by the cross-petition were futile, the judgment against the original petitioners having settled the company's right.

Same.

After a railroad's right to receive public aid previously voted, and for which a tax had been levied, has been judicially determined, no issues are open on mandamus to compel collection of the tax, except as to the former of the proceedings which shall be directed.

Appeal from Circuit Court, Montgomery County; Jere West, Judge.

Mandamus by the state of Indiana, on the relation of William R. Moore, against the board of commissioners of Clinton

county and others. Judgment for defendants, and relator appeals. Reversed.

Wm. R. Moore, A. W. Hatch, F. Winter, and Clarence Winter, for appellant.

Martin A. Morrison, Crane & Anderson, and Gavin & Davis, for appellees.

GILLETT, J. Action by way of mandate to compel the board of commissioners of Clinton county to order the placing upon the duplicate of a tax that had theretofore been levied in aid of a railroad company, but which had been suspended until the completion of the railroad. March 5, 1878, a petition was filed before the board of commissioners of said county for the submission to the voters of Center township therein of a proposition to aid the Frankfort & State Line Railroad Company. Such proceedings were afterwards had that pursuant to an election a tax was levied by said board. April 29, 1886, one David P. Barner, a freeholder, and more than 25 other freeholders of said township, filed with said board a petition asking that the aid so voted be canceled, for the reason "that said railroad company had not within five years expended in the construction of said road in said township an amount equal to the aid so voted." Due notice of said petition was given, and on June 16, 1886, one Samuel O. Bayless, a resident taxpayer of said township, appeared, and filed a cross-petition in said proceeding, alleging, in substance, the voting of said aid; that said railroad company, within the time required, had done an amount of work in the construction of said railroad in said township equal to the amount of the aid so voted, and had fully completed its entire line in said township and county. His petition concluded with a prayer that said board order said tax collected as if the collection thereof had never been suspended. Both said Bayless and said railroad company filed an answer to the petition of Barner and his associates, and they joined issue with said Bayless upon his cross-petition. A trial before the board resulted in a judgment canceling said tax and aid, and from said judgment Bayless and the railroad company appealed. Pending the appeal the Western Construction Company was made a party on its own application, and filed an intervening petition. The case was ultimately sent on change of venue to the White circuit court, and said court, after a trial, rendered judgment that the petitioners Barner et al., were not entitled to any relief; that said railroad company, by expending a sum of money in excess of $20,000, had "according to law, earned said sum of twenty thousand dollars local aid voted by the taxpayers of said Center township in favour of said railroad company"; that said construction company had acquired the right to said appropriation by assignment; and directing that the board of com-

missioners of said county of Clinton enter upon its records an order requiring that said tax be immediately collected by the treasurer of said county, as though the same had never been suspended. Further orders were made in said judgment upon the auditor and treasurer of said county as to the steps they were respectively required to take to collect and pay over said aid. From said judgment said petitioners prosecuted an appeal to this court, where said judgment was affirmed. Barner v. Bayless, 134 Ind. 600, 33 N. E. 907, 34 N. E. 502. In the course of the opinion in that case it was said: "Many of the questions discussed by counsel in their briefs, when applied to this case, are of no importance whatever. The board of commissioners of Clinton county was not a party to the cross-complaint of Bayless, nor was the county auditor or county treasurer such party. They were not parties to this suit in any sense. It is plain, therefore, that any order the court may have made in this case in relation to the collection of the tax in controversy was a mere nullity, for the reason that no party was before the court upon whom such an order could operate. Such order could not affect the appellants, because they had no power to execute it; nor were any orders made by the court affecting them beyond fixing their liability for the tax which they were seeking to avoid. Nor does the order of the court directing that the tax, when collected, be paid over to the appellee, the Western Construction Company, in any manner affect the appellants. If they are compelled to pay the tax in controversy, it is immaterial to them whether it is paid over to the railroad company or to the construction company which performed the labor of constructing the railroad. Stripped of these immaterial matters, we reach the controlling question in the case, and that is the question as to whether the railroad company had expended, in Center township, in the actual construction of its road, a sum equal to the donation voted by the township. This was the question for trial before the circuit court. As a question of fact, it was hotly contested, and the evidence relating to it was conflicting. The court hearing the evidence reached the conclusion that the company had expended, in the actual construction of its road in Center township, a sum largely in excess of the amount of the donation in controversy. With this conclusion we have neither the power nor the inclination to interfere."

After said case was disposed of on appeal to this court, said Bayless and the Western Construction Company instituted contempt proceedings against the members of said board and the auditor and the treasurer of said county in the White circuit court, charging that said officers had failed to carry out the provisions of said judgment after a certified copy of the same had been served upon them. Upon a hearing said officers were committed by said court, and they appealed to

this court, and here secured a reversal of said judgment. McKinney v. Frankford & State Line Co., 140 Ind. 95, 38 N. E. 170, 39 N. E. 500; Davis v. Bayless, 140 Ind. 700, 38 N. E. 400. The ground of reversal, as expressed in the McKinney Case, seems to have been that the officers were not subject to proceedings for contempt in failing to obey the directions of a judgment to which they were not parties; but it was stated by this court in ruling on the petition for a rehearing in said cause, that, "if the appellant refused to discharge a duty enjoined upon him by law, a proper remedy was provided to compel him, upon his failure, to show sufficient cause for his refusal." Subsequent to the disposition of said causes, the relator herein commenced a proceeding by way of mandate against the auditor and treasurer of said county to compel them to proceed to collect the tax. A demurrer was addressed by the defendants in said action to the application and alternative writ. The demurrer was sustained, and final judgment rendered against said relator. The latter appealed to this court, but the judgment was affirmed. State ex rel. Moore v. Burgett, 151 Ind. 94, 51 N. E. 139. In the latter case a somewhat different view seems to have been taken from that expressed in Barner v. Bayless, supra, as to the effect of the judgment against the board of commissioners; but the rulings or statements of this court in the Barner Case were not pleaded in the Burgett Case, and this court held that it could not take judicial notice of said decision. As neither the taxpayers nor the appellee herein were parties to the Burgett Case, the rulings of this court in the opinion therein rendered have not become the law of the case, but, as they accord with our present view, we quote the following from the opinion therein rendered: "Under the provisions of section 7865, Burns' Rev. St. 1894 (section 5778, Horner's Rev. St. 1897), the White circuit court was authorized to make a final determination of the proceedings appealed from, and cause the same to be executed; or it had the power to send the same down to the board with orders how to proceed, and require such board to comply with the final determination made by the court in the premises. The White circuit court found that the railroad company had, within the proper time, expended in the construction of its road in said township more than the amount of the aid voted, and had fully complied with all the requirements of the statute; and said court was fully authorized to render final judgment ordering 'that said tax be collected at once, the same as though the same had never been suspended.' It is not alleged, however, in the application or alternative writs, that the White circuit court rendered such judgment; but, on the contrary, it is alleged that said court rendered judgment that 'the board of commissioners of said county of Clinton, in the state of Indiana, shall enter upon its record an order requiring that said tax be immediately collected by the treasurer of

said county as though the same had never been suspended.' It, in effect, as it was fully empowered to do, sent the same down to the board of commissioners of said county, with orders that such board enter such final order and judgment. This order was binding on the board of commissioners of Clinton county as a judicial body, and they were required to make and enter such order and judgment as directed, the same as a circuit court is required to perform and execute the orders and mandates of this court made in a case appealed from such court. It is not necessary, in order to bind an inferior court in a case appealed from it, that the member or members thereof should be made parties to the case on appeal. Until said order of the White circuit court is entered by the board of commissioners of Clinton county on its records, appellant cannot claim or assert any rights thereunder against appellees. It is not averred that the board of commissioners of Clinton county ever entered said order on its records. Such allegation was necessary to render the application and alternative writ sufficient to withstand the demurrer."

As to the pleadings in this case, they consisted of four paragraphs of petition, with accompanying alternative writs, the general denial, the 15 years statute of limitations, and a reply thereto. Upon the conclusion of appellant's evidence, the court directed a verdict against it, and upon the return of said verdict rendered final judgment thereon. We have set out the greater part of the evidence above, and in connection with such further statements as to the evidence as hereinafter appear a sufficient understanding of the facts can be had. The question as to the propriety of the court's instruction is duly presented, and it is also assigned as error that the court overruled the demurrer to appellee's plea of the statute of limitations.

A preliminary question has been presented by a motion to dismiss the appeal, assigning as a reason that appellant has failed to make parties to this appeal, and to serve with process, the individual members of the board of commissioners who were inducted into office subsequent to the rendition of the judgment in the court below. An affidavit was filed in support of said motion. It is contended on behalf of appellant that the board, in its collective capacity, was the sole defendant below and appellee here, and that the members thereof were only mentioned as showing the officers against whom the writ was to run. We incline to this view, but, if this be wrong, it does not follow that the appeal should be dismissed. If the individual members of the board had been the sole defendants in the case, there would have been a fair basis for the argument that upon an appeal from a judgment in their favor, which would, in effect, be a judgment in favor of the officers, their successors should have been served with process, if not made parties appellee. Schrader v. State ex

rel. (Ind. Sup.) 61 N. E. 721; Elliott, Appellate Procedure, § 153. While it may be true that for most purposes there is wanting authority under section 7820, Burns' Rev. St. 1901, to sue a board of county commissioners, except concerning a matter pertaining to its corporate affairs, or for an act done in its corporate capacity, yet it is provided by statute that writs of mandate may be issued to any inferior tribunal, corporation, board, or person to compel the performance of any act which the law specially enjoins, or a duty resulting from an office, trust, or station (section 1182, Burns' Rev. St. 1901); and this, we think, in view of the practice that existed before the enactment of the statute, warrants the conclusion that it was the legislative purpose to authorize the issuing of writs of mandate against boards of commissioners to compel the performance of ministerial duties generally. It was sufficient, in our opinion, to make either the board, as such, or all of the members thereof, parties. Wren v. Indianapolis, 96 Ind. 206. As the board was a party defendant below and is an appellee here, and has been served with process, it is evident that it is in a position to urge every available ground that may exist in support of the judgment below. If the individual members of the board in their official capacities can be said to have been parties below, it is clear that the assignment of errors continues them as parties here. The judgment was in favor of the officers, rather than in favor of the individual incumbents of the offices. Wolfe v. Peirce, 23 Ind. App. 591, 55 N. E. 872. While it is true that the new members of the board have not been served with process, yet, as the board in its collective capacity is a party, and can offer all available grounds of defense, we think that to dismiss the appeal on the ground suggested would be to pursue a technicality beyond the vanishing point. In any possible view as to who were made parties below or here, it appears that this court has jurisdiction authorizing it to adjudicate every question presented on this appeal between all the parties, and this is sufficient. Wren v. City of Indianapolis, supra; Wolfe v. Peirce, supra. The motion to dismiss the appeal is overruled.

We now proceed to a consideration of the principal case. Accepting the view of counsel for appellant that the duty herein sought to be enforced is a duty that has its origin in the judgment of the White circuit court, and that the statute could not begin to run until the disposition of said case in this court, we think, nevertheless, that the plea of the 15-year statute of limitations was sufficient. Whether said plea would be borne out by the facts is a question that is not presented.

Taking up the question as to whether the facts alleged and proved by appellant stated and showed a cause of action, we have first to observe that the theory on which the alternative writs in this case proceed is that the appellee board is charged with a duty to order the collection of the suspended tax by

reason of what was adjudicated by the White circuit court. That court having decided the meritorious questions involved, and its judgment having been affirmed by this court, it would seem, upon superficial consideration at least, that the award of the White circuit court should be performed; but, as appellee's counsel have suggested many reasons which appeal to them as sufficient to uphold the result below, we regard ourselves as called upon not only to decide all of said points, but to particularly express our views as to a majority of them.

After a consideration of the objections urged against said proceedings, but before writing upon them, we may say that it is our judgment that but one serious question can exist as to the effect of said judgment as res adjudicata, and that question grows out of the declaration of this court, upon appeal from such judgment, that the board of commissioners was not bound thereby, because it was not a party thereto. The correct view upon this subject is expressed in State ex rel. Moore v. Burgett, supra. The declaration in the Barner Case, although incorrect, remains the law of the case, from which the parties cannot now escape; but we should not extend an erroneous declaration of the law beyond what is required. It is true that the opinion in said case declared that the orders made in relation to the collection of the tax were nullities for the assigned reason that the officers were not before the court, and therefore there was no one upon whom such orders could operate; but this court, in the opinion mentioned, recognized and did not disturb the orders made by the White circuit court against the petitioners, "fixing their liability for the tax." It is also to be considered that the opinion was followed by a general judgment of affirmance. Most questions were therefore settled against the appellants to that appeal, and the decision of such question has also become the law of the case. Giving to the erroneous declaration of law the narrowest limits necessary to fairly comport with its language, and it results that it must be held that it was, in effect, declared and settled that all questions of detail with reference to the enforcement and collection of the tax were still open. The judgment not only settled the question of performance on the part of the railroad company, but also the question as to the right to have steps taken to enforce and collect the necessary tax. Provision is made by statute for a public notice of the pendency of a proceeding to cancel an aid voted by a township, and we think that the result of a proceeding under such a statute is to conclude all persons in interest as to questions which might have been properly litigated under the issues tendered by the petitioners. Persons brought in under the notice provided by statute in such a case may file a cross-petition setting up matters germane to the original petition, and obtain affirmative relief. See Stoner v. Rice, 121 Ind.

51, 22 N. E. 968, 6 L. R. A. 387. The conditions of the appropriation having been shown to have been performed by the railroad company, the suspended tax ought to have been ordered collected; and as the same statute that provides for the hearing of the application to cancel has also provided that upon performance the commissioners are to order the collection, we think that the granting of such relief upon a cross-petition was clearly authorized. As the result in the circuit court was one that might have been reached under the issues, and as it concluded all persons having an interest as to the right to have the tax ordered collected, we are unwilling to hold that the board of commissioners—the mere tribunal or agency to effectuate a proper result—can contend concerning questions that are settled against all of the taxpayers. It is our view that by reason of the former decision there only remains open the question as to the provisions that should be made for the collection and paying over of the tax. It may be admitted that under our ruling but routine matters remain to be determined, and that, with all else settled, the duty of the board in the premises is clear; but the fact that this result is obtained ought not to lead us to accord any broader operation to a wrong decision. In our opinion, as the judgment of the White circuit court has settled the question as to the right to have a tax levied against the township, and as that court is now prevented from enforcing its judgment by reason of a declaration of this court on appeal that rendered the provision made nugatory, there is sufficient reason for holding that such judgment as it now stands creates a duty upon the part of the board that can be enforced by writ of mandate. The taxpayers are concluded on all points except as to the orders against the officers by the result of the Barner Case, and to the extent that the taxpayers are concluded it must be held that the board cannot refight the old battle. Upon the points upon which the decision in said case remained res adjudicata, after the disposition thereof in this court, it must still so remain, and from the establishment of such facts by an adjudication that binds all interested parties flows the privilege of enforcing the right as against the board whose lawful duty it is to accord such right.

It is claimed by counsel for appellee that there is a variance between the allegations of the various paragraphs of the writ and the judgment rendered. There is no such variance between the fourth paragraph and the transcript of the judgment offered in evidence. Whatever is omitted from the judgment as alleged in said paragraph is what appellee's counsel contend was substracted from the judgment by the declaration of this court on appeal. It is not a variance, however, that the judgment as rendered contained further provisions than those pleaded. The description of the judgment in the writ was correct as far as it went. Whether there was a variance between the evidence and any other paragraph

of writ, and whether appellee could be heard to urge the question as to a variance here, are questions that it is not necessary to decide.

We do not think that the judgment of the White circuit court that was pleaded and proved was without the issue. Even if the money was spent on an extension of the road within the township, yet it was a question of law for the White circuit court whether this was a performance within the issues; and, besides, it was adjudged on appeal to this court from said judgment that, independently of said question, the finding of the White circuit court was right. It must also be borne in mind that the finding and judgment of the White circuit court was against the petitioners upon their petition, and this amounts to an affirmance of the converse of the allegations of said petition as to the failure to spend an amount of money equal to the appropriation in the construction of the road in the township within the time provided by law.

As to the claim that relator was without interest, earlier decisions have settled the proposition that the question is one between the taxpayers. Board of Com'rs Crawford Co. v. Louisville, etc., R. Co., 39 Ind. 192; Sankey v. Terre Haute, etc., R. Co., 42 Ind. 402; Jager v. Doherty, 61 Ind. 528. It is our view that such tax as is collected should be collected from the entire property of the township as of the date when the board makes the order sought to be enforced in this proceeding, and it is therefore sufficient if the relator be a taxpayer at the time of the institution of the action. The Legislature evidently did not contemplate that a case would arise where there would be unnecessary delay in the collection of the tax. This consideration explains some of the provisions of section 5369, Burns' Rev. St. 1901, but it is evident from the whole course of the enactments that it was intended that whenever such a tax was collected it was to be from the whole body of the township, and not as special assessments. See Lake Shore, etc., R. Co. v. Smith, 131 Ind. 512, 31 N. E. 196.

After the judgment was recovered in the original action, relator was not obliged to refile the demand for the collection of the tax before the board, and to appeal in case it decided adversely. The proceeding originally was judicial in its nature, but, after all questions having in them the element of judicial discretion had been eliminated by the adjudication against the taxpayers, there remained but a ministerial duty for the board to perform; that is, to order the suspended tax collected. Carroll v. Board of Police, 28 Miss. 38; McKinney v. Frankford & State Line Co., supra.

It is contended that the writ alleges that there was a donation of stock to the railroad company, while the petition which was filed before the board provided for a donation or a taking of stock. Waiving the question as to the effect of

the former adjudication, we proceed to examine the point made. The petition was in form as stated. The board ordered an election "for the purpose of taking the votes of the legal voters of said township upon the subject of appropriating twenty thousand dollars in money by said township for the purpose of aiding in the construction of the Frankfort and State Line Railroad, as prayed in the foregoing petition." The notice of the holding of the election stated that the vote was to be taken "upon the subject of said township aiding the Frankfort and State Line Railroad Company in the construction of a railroad into said township by donation money to said company to the amount of twenty thousand dollars, as provided by an act," etc. The sheriff's notice was to the same effect. The subsequent order of the board for the collection of the tax recited that a majority of the legal voters of the township voted in favor of "an appropriation," and ordered the collection of a tax for the purpose of aiding said railroad company. In a case of this kind, where the petition and the commissioners' order are ambiguous, but the people vote on the distinctive proposition to make a donation, we think that their vote settles the nature of the aid to be extended. Faris v. Reynolds, 70 Ind. 359; Lafayette, etc., R. Co. v. Geiger, 34 Ind. 185. As said in the former case: "The people of a township, who vote this tax upon themselves, should have the right, and, as we think, have the right, under the law, to determine by their vote the manner in which the money shall be used—whether by donation of the money or by taking stock in the company. They may be supposed to know what their interests in the matter may be quite as well as the board of commissioners of the county."

It appears that after the judgment was rendered by the White circuit court in the main case, the board met, and ordered the suspended tax collected, and that about a year later it made an order setting aside said former order and declaring it void. It is now insisted by appellee that, if the latter order was entered without jurisdiction, it did not affect the prior order, while, if there was jurisdiction to make the subsequent order, appellant should have appealed therefrom. Appellee's last order, as the record in this case shows, practically operated to prevent the auditor from putting the tax on the duplicate, and it is hardly conscionable for appellee to insist upon the invalidity of such order, as it is not willing to concede that the former order is still operative. In point of law it is probable that the second order was void, but we hold that, as the record stands, relator had a right to require the entering of a new order.

The conduct of the board when demand was made of it, as well as the long course of litigation, warranted the inference that it had not made any other order concerning the collection of the tax except as above mentioned. If it had, we think that, as a matter peculiarly within its own knowledge, it should have offered affirmative evidence upon the subject,

instead of insisting that relator should prove negatively that no order had been made for the collection of the tax after the making of the entry last mentioned. See Shearer v. State, 7 Blackf. 99; Stevenson v. State, 65 Ind. 409.

It is claimed that the record introduced in evidence shows that prior to the proceedings on which the judgment in the White circuit court was based there had been two adjudications by said board against the right to have the tax collected, and that, therefore, the board had exhausted its power to further consider said claim. Waiving all question as to the issues here, it is a sufficient answer to this proposition that no such issue was tendered in said former case, and, as the question as to the right to have the tax collected was determined against the taxpayers therein, the relator here is entitled to the benefit of the later adjudication. We cannot sanction the view that a judgment is to be regarded as a nullity for the reason suggested in a case where the board was acting judicially, with jurisdiction over the parties and over the class of actions to which the particular case belongs, where nothing appears in the record to suggest any defect of jurisdiction.

We think that the record does not bear out the claim that the Carroll circuit court did not grant a new trial to the cross-complainants. The record shows that the court "grants a new trial herein." The claim that a new trial was granted to the defendants, and not to them as cross-complainants, is also contradicted by the further proceedings in the cause.

We think that the court erred in directing a verdict in appellee's favor.

We now proceed to a consideration of the cross-errors assigned by appellee respecting the rulings below on the pleadings. We are of the opinion that the various paragraphs of alternative writ were sufficient for reasons heretofore expressed. There was no available error in the sustaining of a demurrer to appellee's paragraphs of answer numbered from 2 to 23, both inclusive. The matters pleaded in certain of said paragraphs would have been admissible under the general denial. Upon only two points do we feel justified in further expressing ourselves. The fact that this court stated in its opinion on the petition for a rehearing in the Barner Case that it was not necessary to sustain the judgment that it should appear that the railroad company had expended a sum equal to the donation in the construction of its road in the township, does not amount to a determination that the adjudication in favor of Bayless was invalid. Barner and his copetitioners were alleging in substance that the railroad company had not expended a sum of money in the construction of its road in said township equal to the donation within the time required by law. Bayless affirmed the contrary in his cross-petition. This court merely held in that particular that the burden was on the original petitioners.

In a number of paragraphs of answer appellee alleges as

facts matters which were adjudicated to the contrary by the judgment of the White circuit court. Counsel for appellee attempt to dissect that judgment in the effort to show that it does not respond to the averments of the cross-complaint, forgetting, apparently, the force of the adjudication against the taxpayers under the petition to cancel. Nor are we the more impressed with the effort to now bring forward matters of defense that were not made grounds of defense in the former case. As to what may be termed the direct defenses, at least, if a party holds them back when he is sued, he is not at liberty to assert them afterwards. Faught v. Faught, 98 Ind. 470; 24 Am. & Eng. Ency. of Law, 781, 782.

In concluding this opinion we quote, as much in point, so far as principle is concerned, the following from the opinion of the Supreme Court of the United States in the case of County Court of Ralls County v. United States, 105 U. S. 733, 26 L. Ed. 1220: "In the return to the alternative writ many defenses were set up which related to the validity of the coupons on which the judgment had been obtained, as obligations of the county. As to all these defenses it is sufficient to say it was conclusively settled by the judgment which lies at the foundation of the present suit that the coupons were binding obligations of the county, duly created under the authority of the charter of the railroad company, and as such entitled to payment out of any fund that could lawfully be raised. It has been, in effect, so decided by the Supreme Court of Missouri in State v. Rainey, 74 Mo. 229, and the principle on which the decision rests is elementary. The present suit is in the nature of an execution, and its object is to enforce the payment, in some way provided by law, of the judgment which has been recovered. The only defenses that can be considered are those which may be presented in the proper course of judicial procedure against the collection of valid coupons executed under the authority of law and reduced to judgment. While the coupons are merged in the judgment, they carried with them into the judgment all the remedies which in law formed a part of their contract obligations, and these remedies may still be enforced in all appropriate ways, notwithstanding the change in the form of the debt." The above case, in substance, expresses our view here. This action is in the nature of an action to obtain what might be termed an execution on the judgment of the White circuit court, and it is only as to matters that relate to the question as to the form of the execution that are long open to controversy.

We find no available error against appellee, but because of the overruling of appellant's motion for a new trial the final judgment will have to be reversed, with a direction to grant a new trial. It is so ordered.

MONKS, C. J., concurs in the result.

CITY OF PHILADELPHIA *v.* PHILADELPHIA TRACTION CO.

(*Supreme Court of Pennsylvania, May 11, 1903.*)

[55 Atl. Rep. 762.]

Taxation—Railroad Property—Delegation of Authority to Municipalities.

A legislature has authority to impose a tax on the property of railroad corporations, the superstructure of the road and water stations alone excepted, and to delegate its authority to do so to municipalities.

Same—Same—Traction Motor Company—Application of Statute.

Act April 21, 1858 (P. L. 385), providing that depots, offices, carhouses, and other real property of railroad corporations situated in the city of Philadelphia—the superstructure and the water stations alone excepted—shall be subject to taxation for city purposes, applies to a traction motor company which leases and operates street railways in such city.

Same—Street Railways as Railroads—Application of Statute.*

The words "railroad" and "railway," as used in the statutes of Pennsylvania, are synonymous, and apply to both steam and street railways, unless the context clearly shows a different intent.

Traction Motor Company—Taxation of Street Railways.

When a traction company operates a railroad, and leases the franchises of various railway companies, and operates them on its own account, it is exercising the franchises of a street railway company, as it is authorized to do, and enjoys the privileges granted to, and becomes subject to the liabilities imposed by law on such companies.

Appeal from Court of Common Pleas, Philadelphia County.

Action by the city of Philadelphia against the Philadelphia Traction Company. From an order making absolute a rule for judgment for want of a sufficient affidavit of defense, defendant appeals. Affirmed.

The defendant filed an affidavit of defense, the material portion of which is as follows: The defendant is a traction motor company, duly incorporated under the act of assembly of the commonwealth of Pennsylvania, entitled "An act to provide for the incorporation and regulation of motor power companies for operating passenger railways by cables, electrical, or other means," approved March 22, 1887 (P. L. 8), for the purpose of "constructing and operating motors and cables for supplying motive power to passenger railways, and the necessary apparatus for applying the same." Prior

*Street railways as railroads within the meaning of statutes, see foot-note appended to Cordray *v.* Savannah, etc., Ry. (Ga.), 7 R. R. R. 286, 30 Am. & Eng. R. Cas., N. S., 286; Savannah, etc., Ry. *v.* Williams (Ga.), 7 R. R. R. 279, 30 Am. & Eng. R. Cas., N. S., 279; notes, 11 Am. & Eng. R. Cas., N. S., 666; 7 Am. & Eng. R. Cas., N. S., 552; Board of Railroad Com'rs *v.* Market, St. Ry. Co. (Cal.), 23 Am. & Eng. R. Cas., N. S., 21; Fidelity Loan & Trust Co. *v.* Douglas (Iowa), 9 Am. & Eng. R. Cas., N. S., 713; Massachusetts L. & T. Co. *v.* Hamilton (C. C. A.), 11 Am. & Eng. R. Cas., N. S., 771.

to the year 1896, the defendant had, in pursuance of powers expressly granted to it under said act, entered into certain contracts and leases with passenger railways in the city of Philadelphia. Said railway companies were engaged in the business of carrying persons from place to place along the various streets of the said city, and, under and by virtue of said contracts and leases, it became and was the duty of the defendant to operate the cars over the lines of said various railways, and to provide facilities and buildings necessary for such purpose. In order to carry out these objects, and the duty which it owed to its said lessors and the public in the premises, it became necessary for the defendant company to acquire real estate, and to erect thereon buildings for the housing, storage, and handling of cars when not in use and overnight. It accordingly purchased, with a portion of the money representing its, capital stock, premises situate on the east side of Sixteenth street, from Jackson to Wolf, in the Twenty-Sixth Ward of the city of Philadelphia, described in the lien, and constructed thereon the building mentioned in the scire facias, which is a car barn, for the housing and care of its cars, as aforesaid. The building is used for the storage of cars overnight, which cars otherwise would have to stand upon the public streets. A small portion of it is used as the office and headquarters of the superintendent, who is actually in charge of the business at said car barn, looking after the said cars, and dispatching them upon their various trips. Said property was purchased and used for the purposes aforesaid, and was indispensably necessary to the operation of said defendant company's public franchise, and was used for no other purposes whatsoever. As said property represented part of defendant's capital stock, it was liable to pay, and has paid, to the commonwealth of Pennsylvania, a tax for said year upon the said property, as part of such capital. Said property was and is part of the public works of defendant, and used as such only, was essential to the carrying out of the public purpose for which it was incorporated, as aforesaid, and defendant received no profit or income therefrom by way of rental or otherwise. Defendant is advised, and therefore avers, that such being the case, the local authorities of the county are without power to impose the tax aforesaid, not only because it would result in double taxation upon the same property, contrary to the intent of the acts providing for the levying and collection of taxes, but because, if such property was subject to seizure and sale piecemeal, the defendant would be crippled in the exercise of the public functions required of it, and that such power has not been conferred upon the local authorities. The court made absolute a rule for judgment for want of a sufficient affidavit of defense.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Ellis Ames Ballard and Rufus E. Shapley, for appellant.

Mayne R. Longstreth, John L. Kinsey, City Sol., and James Alcorn, Asst. City Sol., for appellee.

FELL, J. The city's claim for taxes is based on the act of April 21, 1858 (P. L. 385), which provides that "the offices, depots, car houses, and other real property of railway corporations situate in said city, the superstructure of the road and water stations alone excepted, are and hereafter shall be subject to taxation by ordinance for city purposes." The power of the Legislature to impose this tax, and to delegate its authority to do so to the municipality, has been settled by our decisions. Penna. R. R. Co. v. Pittsburgh, 104 Pa. 522; Jermyn v. Fowler, 186 Pa. 595, 40 Atl. 972. Nor is this case within the class of cases in which it has been held that, in the absence of an express declaration, it will be presumed that the Legislature did not intend to subject to taxation as real estate the property of a corporation that is essential to the exercise of its franchises, and has once been taxed as a part of its capital. The power to tax and the intention to tax are clear, and the single question to be considered is whether a traction motor company, which leases and operates street railways, is within the provision of the act of 1858. The act subjects to taxation for city purposes "the real property of railway corporations situate in the city, the superstructure and water stations alone excepted." It is argued that the exception of the "superstructure and water stations" indicates that steam railroads only were meant, since they are the only roads owning their right of way or having water stations. That the word "railway" as used is of little or no importance in construing the act. The words "railway" and "railroad" have been used indiscriminately by the Legislature, and have no strict technical meaning in our statutes. A number of passenger railways were incorporated about the time of the passage of the act of 1858, and some of them in the special acts of incorporation are designated as "railway companies" and some as "railroad companies." The rule established by our decisions is that these words used in the statutes will be considered as synonymous, and either will be held to apply to both kinds of roads, unless there appears from the title of the act, its purpose or its context, something to indicate that a particular kind of a road is intended. Hestonville, etc., Railroad Co. v. Philadelphia, 89 Pa. 210; Gyger v. Phila. City Pass. Ry. Co., 136 Pa. 96, 20 Atl. 399; Cheetham v. McCormick, 178 Pa. 186, 35 Atl. 631; Old Colony Trust Co. v. Rapid Transit Co., 192 Pa. 596, 44 Atl. 319. The exemption from taxation of the superstructure and water stations clearly indicates that steam railroads were included, but it does not follow that passenger railway companies were excluded. The word used applies to both kinds of roads,

and we see no ground on which it can be held that either is exempted from the operation of the act. An act similar to the one under consideration was construed in Penna. R. R. Co. v. Pittsburgh, 104 Pa. 522. This act provides that "all real estate situated in said city owned or possessed by any railroad company shall be and is hereby made subject to taxation for city purposes, the same as other real estate in the city." Act Jan. 4, 1859 (P. L. 828). It was held that the act applied to both steam railroads and passenger railways, and that under it the land, buildings, and improvements thereon of the companies were liable to taxation for city purposes, although they were essential to the exercise of corporate franchises in the operation of the roads. There is no real distinction between these acts.

It remains to determine whether, for the purpose of this inquiry, there is a distinction between passenger railway companies and traction motor companies. Companies of the latter class are incorporated under the act of March 22, 1887 (P. L. 8), and the grant of power is to enter upon streets upon which passenger railways have been constructed, with the consent of the railway company, and to construct, maintain, and operate thereon motors, cables, electrical and other appliances for the traction of the cars of the passenger railways. They are given power to "lease the property and franchises of street passenger railways which they may desire to operate, and to operate said railways." By the Acts of May 15, 1895 (P. L. 63, and P. L. 64), they are authorized to buy and own the franchises of street passenger railways, to lay out new lines, and to operate their different lines as a general system. A traction company whose business is confined to the construction of appliances for street railway companies, or to the operation of motors, cables, electrical or other appliances for the traction of the cars of such companies, has but little resemblance to a street railway company, and more to a construction or power company. But when, as in this case, it operates a railway, and leases the property and franchises of various railway companies, and operates them on its own account, it is exercising the franchises of a street railway company, as it is authorized to do, and it enjoys the privileges granted to, and becomes subject to the liabilities imposed by law upon, such companies. This view is in harmony with all of our decisions touching the subject. Rafferty v. Central Traction Co., 147 Pa. 579, 23 Atl. 884, 30 Am. St. Rep. 763; Reeves v. Phila. Traction Co., 152 Pa. 153, 25 Atl. 516; Old Colony Trust Co. v. Allentown, etc., Rapid Transit Co., 192 Pa. 596, 44 Atl. 319.

The judgment is affirmed.

ROCHE *et ux.* *v.* DENVER & R. G. R. CO.

(*Court of Appeals of Colorado, Oct. 12, 1903.*)

[73 Pac. Rep. 880.]

Killing of Brakeman—Negligence—Question for Jury.

A railroad brakeman, helping make up a train, was killed between the cars by a projecting log. The accident occurred before full daylight, and while attaching a helper engine. The conductor had inspected the cars by merely walking along the side and overlooking them generally. The evidence did not show whether the projecting log was so loaded, or whether it had slid, nor how long it had projected: *held*, that the question of defendant's negligence was for the jury.

Same—Contributory Negligence—Question for Jury.

Whether the plaintiff's decedent was guilty of contributory negligence was also for the jury.

Safe Place to Work—Care Required of Master.

It is the duty of the master to exercise ordinary care in seeing that his servants are provided with a reasonably safe place to work.

Appliances—Duty of Master.*

The master must see that the appliances used by the servant are in a reasonably safe and suitable condition.

Vice Principals.†

If a master delegate his duty of furnishing the servant a safe

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*As to the degree of care due from railroad companies, as employers, in furnishing appliances, see generally, foot-note appended to Atlantic & D. Ry. Co. *v.* West (Va.), 6 R. R. R. 291, 29 Am. & Eng. R. Cas., N. S., 291; Louisville & N. R. Co. *v.* Richardson (Ky.), 1 R. R. R. 360, 24 Am. & Eng. R. Cas., N. S., 360; Gustafson *v.* Seattle Traction Co. (Wash.), 3 R. R. R. 176, 26 Am. & Eng. R. Cas., N. S., 176; Dolan *v.* Sierra Ry. Co. of California (Cal.), 2 R. R. R. 875, 25 Am. & Eng. R. Cas., N. S., 875; notes, 6 Am. & Eng. R. Cas., N. S., 584; 19 Am. & Eng. R. Cas., N. S., 428; 16 Am. & Eng. R. Cas., N. S., 570; 12 Am. & Eng. R. Cas., N. S., 668; Shadford *v.* Ann Arbor St. Ry. Co. (Mich.), 6 Am. & Eng. R. Cas., N. S., 584; Benson *v.* N. Y., N. H. & H. R. Co. (R. I.), 22 Am. & Eng. R. Cas., N. S., 299; Baldwin *v.* Atlantic City R. Co. (N. J.), 17 Am. & Eng. R. Cas., N. S., 486; Chicago, B. & Q. R. Co. *v.* Oyster (Neb.), 12 Am. & Eng. R. Cas., N. S., 655; Chesapeake & O. R. Co. *v.* Lash (Va.), 3 Am. & Eng. R. Cas., N. S., 569; Creswell *v.* Wilmington & N. R. Co. (Del.), 14 Am. & Eng. R. Cas., N. S., 625; Seldomridge *v.* C. & O. Ry. Co. (W. Va.), 14 Am. & Eng. R. Cas., N. S., 639; Bland *v.* Shreveport Belt Ry. Co. (La.), 4 Am. & Eng. R. Cas., N. S., 349; Gaulden *v.* Kansas City S. Ry. Co. (La.), 23 Am. & Eng. R. Cas., N. S., 909; Norfolk, etc., R. Co. *v.* Ampey (Va.), 5 Am. & Eng. R. Cas., N. S., 706, 707; Kent *v.* Yazoo & M. V. R. Co. (Miss.), 21 Am. & Eng R. Cas., N. S., 332; Clements *v.* Alabama Great Southern R. Co. (Ala.), 19 Am. & Eng. R. Cas., N. S., 266; Crouse *v.* Chicago & N. W. Ry. Co. (Wis.), 14 Am. & Eng. R. Cas., N. S., 780; Louisville & N. R. Co. *v.* Jones (Ala.), 23 Am. & Eng. R. Cas., N. S., 224; Indiana, I. & I. R. Co. *v.* Bundy (Ind.), 14 Am. & Eng. R. Cas., N. S., 660; Cameron *v.* Great Northern Ry. Co. (N. Dak.), 12 Am. & Eng. R. Cas., N. S., 520.

†As to what are nonassignable duties due from a railroad, as an employer, see McDonald *v.* Michigan Cent R. Co. (Mich.), 7 R. R. R. 288, 30 Am. & Eng. R. Cas., N. S., 288 (inspection and repair of cars); note appended to Northern Pac. Ry. Co. *v.* Mix (C. C. A.), 6 R. R. R. 739, 29 Am. & Eng. R. Cas., N. S., 739 (train dispatching); Louisville & N. R. Co. *v.* Pointer (Ky.), 5 R. R. R. 181, 28 Am. & Eng. R. Cas., N. S., 181

place to work, or safe appliances, the person delegated represents the master, and is not a fellow servant.

Killing of Brakeman—Negligence in Loading Car—Liability.

Where a railroad brakeman was killed by reason of the unsafe condition of a car load of logs when it was turned over to him, the company was responsible, if such condition was known to it, or could have been known by the exercise of reasonable care.

Same—Same—Question for Jury.

In an action for the death of a railway brakeman by a log projecting from a car load of logs, evidence examined, and *held* that the question whether the condition of the load existed before the accident, so as to be noticeable on inspection, was for the jury.

Appeal from District Court, Arapahoe County.

Action by James Roche and wife against the Denver & Rio Grande Railroad Company. From a judgment for defendant, plaintiffs appeal. Reversed.

Patterson, Richardson & Hawkins, for appellants.

Wolcott, Vaile & Waterman and Wm. W. Field, for appellee.

THOMSON, P. This action was brought by the appellants against the appellee to recover for the loss of their son James Roche, Jr., a brakeman in the employ of the appellee, who was killed on the 30th day of December, 1898, while supposedly engaged in the discharge of his duties as such brakeman. The complaint alleged that, while a train of cars operated by the defendant was at Leadville, the defendant caused young Roche to go between two of the cars of the train for the purpose of making or unmaking an air coupling, or for some other purpose which required his presence between the cars; that while so engaged he was caught between the deadwood of one of the cars and a log projecting from a load of logs upon the other, and killed; that the projection was due either to negligent or unskillful loading of the logs upon the cars, or to some cause operating subsequently; that the cause of the accident was the forcing of the cars together by an attempt to couple a helper engine to the rear of the train; that the dangerous condition of the load was or should have been known to the defendant, but was unknown to the deceased; and that the injury was received without fault or negligence on the part of the deceased. The answer put in issue all of the allegations of the complaint, and averred that the injuries received by Roche, if any were received by him,

(duty to maintain safe roadbed); Atchison, T. & S. F. Ry. Co. v. Kingscott (Kan.), 4 R. R. R. 528, 27 Am. & Eng. R. Cas., N. S., 528; Budge v. Morgan's L. & T. R. & S. S. Co. (La.), 4 R. R. R. 440, 27 Am. & Eng. R. Cas., N. S., 440 (duty to furnish and inspect appliances); Smith v. Erie R. Co. (N. J.), 4 R. R. R. 793, 27 Am. & Eng. R. Cas., N. S., 793 (safe place to work and appliances); Chicago & A. Ry. Co. v. Eaton (Ill.), 1 R. R. R. 353, 24 Am. & Eng. R. Cas., N. S., 353 (safe track); Dolan v. Sierra Ry. Co. of California (Cal.), 2 R. R. R. 875, 25 Am. & Eng. R. Cas., N. S., 875; Troxler v. Southern Ry. Co. (N Car.), 14 Am. & Eng. R. Cas., N. S., 711 (furnishing appliances).

were due to his own want of care, or to the negligence of his fellow servants.

The defendant was operating a branch of its road running between Leadville and Ibex. Herman O. Bair was the conductor in charge of that branch. Roche came to Leadville on the night of the 28th of December, having been sent there by the defendant's trainmaster from Salida, and reported to Bair, who was unacquainted with him, for work. Bair gave him work on the 29th as head brakeman. On the morning of the 30th, Roche assisted Bair in making up a train consisting of four cars of coal and a car of rough logs, intended for mining timbers, and in getting out a flanger. The logs were of different sizes. In making up the train, Bair observed that a coal car intended for the train was marked "Cracked Flange." This car was ordered detached, and the other four were pulled out upon the main line. The grade from Leadville to Ibex is quite steep, and a helper engine was ordered attached to the rear of the train. The flanger was behind the head engine, the car of logs followed it, and the coal cars came next. The timber car and the coal cars were coupled together when they were put into the train. No air was to be used on the train that morning; and whether the air hose between these two cars was coupled together, the witnesses did not know. Immediately after the contact of the helper engine with the rear of the train, Roche was found lying beside the track on the left side of the cars, with his head crushed in; and it was then discovered that a log lying on the floor of the timber car projected beyond the end of that car, and towards the coal car behind it, about 10 inches, so that if the two cars were jolted together the end of the projecting log would strike the deadwood of the coal car to the left of the drawhead. The ends of the other logs were even with the end of the car on which they rested. Blood was found on the end of the projecting log and on the opposite deadwood of the coal car. The time of the accident was near sunrise. One of the witnesses said the sun was not up at the time, and it was not full daylight. The weather was quite cold. The company had provided inspectors at Leadville, whose duty it was to see that the cars generally were in good order before they were started. These inspectors had marked a car "Cracked Flange," and it was detached. Their duties, however, were confined to an inspection of tracks, gears, and wheels. They did not inspect loaded cars. The duty of such inspection devolved upon the conductor. On this occasion he made a very slight inspection. To use his language, he merely walked up the side of the cars and overlooked them generally. He did not see the projecting log. Whether the projection occurred in the loading, or was attributable to some other cause, no witness positively knew. Bair, however, testified that this log must have been "sticking out" before the helper engine was coupled on; that logs were usually rolled on the car in any way, but they generally bound each

other; and that, as a rule, whenever shunting occurred, the whole load shifted together. Roche did not go between the cars in obedience to any direction from the conductor; but, according to the testimony of the latter, it was his duty, without specific direction, to couple or uncouple cars, and to couple or uncouple air hose, and, whenever he observed any thing that he thought needed attention, to attend to it, and go between the cars for the purpose. The trial court, after hearing the evidence, directed the jury to return a verdict for the defendant. This was done accordingly, and judgment entered on the verdict.

We think the case should have been submitted to the jury. It is the duty of the master to exercise ordinary care in seeing that his servants are provided with a reasonably safe place in which to work, and that the instrumentalities and appliances to be used by them are in a reasonably safe and suitable condition. And he cannot escape responsibility for a disregard of his duty by delegating its performance to an employee. Such employee, without regard to his rank, would represent the master. He would not be a fellow servant of the other employees, and his negligence would be the master's negligence. Grant v. Varney, 21 Colo. 329, 40 Pac. 771; Colorado Milling & Elevator Co. v. Mitchell, 26 Colo. 284, 58 Pac. 28; McKean v. Fuel & Iron Co. (Colo. App.) 71 Pac. 425.

Whether we regard the train of cars as the place on and about which Roche was required to work, or the cars as the instrumentalities and appliances he was required to use, is immaterial. The same principle is applicable in either case, and for brevity we shall treat the cars as appliances. Now, one of the appliances furnished to Roche was a car loaded with mining timbers. Car and load together constituted the appliance; and, if the load was in a dangerous condition, the appliance, of which it was a part, also was. In his testimony, Bair, the conductor, said: "Anything in reference to the car itself, or to the load which is upon it, which enhances the danger of operating it, either to the company or the employee, is a bad-order car." Whether the log was placed in its dangerous position at the loading of the car, or was afterwards forced backward by the motion of the train, or otherwise, does not directly appear; but, whatever the cause, the company was responsible for the condition of the car when it was turned over to Roche, if such condition was, or by the exercise of reasonable care might have been, known to it. Corbin v. Railroad Co., 64 Minn. 185, 66 N. W. 271; George v. Clark, 85 Fed. 608, 29 C. C. A. 374; Hannah v. Railroad Co., 154 Mass. 529, 28 N. E. 682; Grant v. Varney, supra; Colorado Milling & Elevator Co. v. Mitchell, supra; McKean v. Fuel & Iron Co., supra.

But it is contended that there was no evidence that prior to the jolt caused by the coupling of the helper engine this timber projected beyond the others, that a condition which

did not exist could not have been known, and that the absence of some kind of a showing of its previous projection was a fatal failure of proof. It is true that the projection had not been seen by any witness until after the accident; but Bair testified that, as a general rule, in the case of a load of logs, when there was a shunting, the whole load shifted together. It is true he said that this particular log may not have been bound by the other logs, but he expressed the opinion that it must have projected before the coupling. It would also seem from the statements of this witness that, as a rule, logs were loaded carelessly. He said they were generally rolled on in any way. His testimony, taken as a whole, presented an important question of fact, to be settled, not by the court, but by the jury. If, as a general rule, whatever would cause a movement among the logs would shift the whole load, as no reason was shown why this load was not subject to the general rule, and as the abrupt coming together of the cars did not disturb the other logs, an inference would be at least allowable that it did not disturb this. Indeed, reasoning from the probability that whatever would move one stick of timber would move the entire load, the jury might have found that the original position of the log had not been changed—that it was left projecting when it was put upon the car—and such conclusion would be strengthened by the evidence of the careless manner in which logs were loaded upon cars.

But it is insisted that Roche ought to have seen the projecting timber, and that, with the projection visible before him, his placing himself in a position of exposure to injury from it was his own negligence. It may be that Roche was guilty of such contributory negligence as would preclude a recovery in this action, but we do not think the evidence so conclusive as to warrant the trial judge in taking the question from the jury. It must be presumed that he went between the cars for some purpose connected with his duty as a brakeman. The train was being put in readiness to move, and he may have thought that what he had to do must be done quickly. The time was early morning, and complete daylight had not come. He had the right to assume that the company had seen to the safety of the car. If he was in haste, and proceeding by an imperfect light, the projecting timber may well have escaped his observation; and whether, under all the circumstances disclosed by the evidence, he might justly be charged with contributory negligence, was for the jury to say. Northern Pac. Railroad Co. v. Everett, 152 U. S. 107, 14 Sup. Ct. 474, 38 L. Ed. 373; Corbin v. Railroad Co., supra.

As the questions of the defendant's negligence and Roche's contributory negligence could be determined only by the jury, the court erred in directing a verdict. The judgment must be reversed. Reversed.

MAXWELL, J., not sitting.

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Ticket scalper cannot be denied transportation.
Ford *v.* East Louisiana R. Co. (La.), 229.

Verdict for defendant where plaintiff relied wholly on doctrine of res ipsa loquitur, and there was absence of negligence with respect to defective appliance.
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Complaint insufficient to show that plaintiff was a passenger.
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Liability on account of wantonness in running street car over crossing, although motorman was not aware of plaintiff's peril.
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Railroad company cannot enjoin construction of a street railway across its tracks in public road, where none of its franchises are invaded or injured.
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Evidence as to speed of train.
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Moore *v.* Lindell Ry. Co. (Mo.), 46.

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Admission of testimony of deceased's widow that "times had been hard" not such prejudicial error as to require new trial.
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Chicago, B. & Q. R. Co. *v.* Douglass County (Neb.), 828.

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Conductor injured by reason of unsafe cars not prevented from recovering by S. Car. Const. art. 9, § 15, unless he would have regarded them as unsafe if he had exercised ordinary prudence.
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Illegal to make contract for more than ten hours' work a day, under Rhode Island statute limiting hours of labor of certain street railway employees.
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Proceedings quasi in rem in the nature of garnishment of agent of railroad company, against which there is an unsatisfied judgment, under Burns' Rev. St. 1901, § 834a.
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Right to injunction to protect prima facie title to switch track could not be defeated by act of defendant in moving a train onto such track without authority; and plaintiff was justified in using necessary force in removing the obstruction.
Pittsburg, S. & W. R. Co. *v.* Fiske (C. C. A.), 936.

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Proceeds from sale of mileage was not part of current income.
Gregg *v.* Metropolitan Trust Co. (C. C. A.), 844.

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LEASES AND RUNNING POWERS.

Lessor not liable, as an employee, to lessee's servant injured through the negligence of his master.
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Care due in switching cars to persons on or about track engaged in unloading them.
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Mere acquiescence in use of track by public does not constitute a license.
Wilmurth *v.* Illinois Cent. R. Co. (Ky.), 762.

Same care due licensees and passengers in unloading baggage at depot.
Holcombe *v.* Southern Ry. Co. (S. Car.), 482.

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LIENS.

Receiver of company, whose line had constituted portion of consolidated line, was chargeable with notice of vendor's lien on property bought for use of consolidated line, but subsequently removed to location belonging to receiver's company; and lienholder was not required to first exhaust the real estate of the associated lines; nor was the receiver entitled to replace it, after it had been used for a number of years since its removal.
Mercantile Trust Co. *v.* Chicago P. & St. L. Ry. Co. (C. C. A.), 859.
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Abrogated rule no defense.
Boyle *v.* Union Pac. R. Co. (Utah), 5.
Assumption of Risk.
Application for employment inadmissible to establish assumption of risk from structure near track.
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Employee may presume that structures are not too near track.
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Inexperienced employee injured, while coupling cars, by reason of defects.
Branz *v.* Omaha & C. B. Ry. & Bridge Co. (Iowa), 642.
Ordinary duties.
Rosemand *v.* Southern Ry. (S. Car.), 531.
Question for jury where conductor boarding train was struck by post of cattle guard.
McDannald *v.* Washington & C. R. Ry. Co. (Wash.), 593.
Reliance on insufficient promise to repair engine step.
Gulf, C. & S. F. Ry. Co. *v.* Garren (Tex.), 384.
Risk from defective appliances connected with track not assumed by employee whose work was not near track, and who had no duty calling his attention thereto.
Noe *v.* Rapid Ry. Co. (Mich.), 654.
Sudden jerk of freight train causing injury to brakeman.
Texas & Pacific Railroad Company *v.* Abe Behymer (U. S.), 393.
Care required in furnishing safe appliances.
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Care required of master in furnishing safe place to work.
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Care required of master in inspecting appliances.
Roche *v.* Denver & R. G. R. Co. (Colo.), 955.
Care required of master to prevent freight trains from jerking and jarring.
Texas & Pacific Railroad Company *v.* Abe Behymer (U. S.), 393.
Consent of servant to transfer of services, question for jury.
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Continuous act of foreman in placing, and failing to remove, torpedo from track, where, as result of prank, employee was injured.
Sullivan *v.* Louisville & N. R. Co. (Ky.), 368.

Contributory Negligence.

Brakeman stepping into ditch filled with snow, while passing before moving cars, to couple them, was not guilty of contributory negligence, as matter of law.
De Cair *v.* Manistee & G. R. R. Co. (Mich.), 378.

Brakeman using foot to push bumper in place.
Elmore *v.* Seaboard Air-Line Ry. Co. (N. Car.), 663.

Conductor jumping from car to avoid danger from collision.
Seccombe *v.* Detroit Electric Ry. (Mich.), 343.

Conductor's failure to examine cars before taking them in train was not, where car inspector at station.
Barksdale *v.* Charleston & W. C. Ry. Co. (S. Car.), 600.

Conductor stepping on defective brake in passing from one car to another.
Boyle *v.* Union Pac. R. Co. (Utah), 5.

Direction of verdict for defendant when lever used in connection with semaphore signal was reasonably safe, and injured brakeman did not use it with proper care.
Chapman *v.* Pere Marquette R. Co. (Mich.), 661.

Disobedience of rules.
Nordquist *v.* Great Northern Ry. Co. (Minn.), 340.

Going between cars to make coupling in obedience to order.
Elmore *v.* Seaboard Air-Line Ry. Co. (N. Car.), 663.

Injured at place where not required to be in performance of duties.
Philips *v.* Central R. Co. of New Jersey (N. J.), 15.

No defense where failure to furnish self-couplers.
Elmore *v.* Seaboard Air-Line Ry. C[illegible] 663.

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Setterstrom *v.* Brainerd & N. M. Ry. Co. (Minn.), 500.

Question for jury where brakeman had been killed by log projecting from loaded car, while he was making up train.
Roche *v.* Denver & R. G. R. Co. (Colo.), 955.

Question for jury where conductor boarding track was struck by post of cattle guard.
McDannald *v.* Washington & C. R. Ry. Co. (Wash.), 593.

Riding in dangerous place.
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Violation of rules.
Erie R. Co. *v.* Kane (C. C. A.), 423.
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Violation of rules requiring fireman to assist in watching for obstructions.
Erie R. Co. *v.* Kane (C. C. A.), 423.

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Duty of injured employee to prevent aggravation of injuries, instruction.
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Erroneous instruction permitting recovery of punitive damages where employee was injured by coal chute near track.
Louisville & N. R. Co. *v.* Hall (Ky.), 541.

Evidence as to size of plaintiff's family not admissible.
Louisville & N. R. Co. *v.* Collinsworth (Fla.), 16.

Verdict reduced to $6,000, in action for injury to conductor.
McDannald *v.* Washington & C. R. Ry. Co. (Wash.), 593.

Defect in track not proximate cause where motorman was injured in collision.
Seccombe *v.* Detroit Electric Ry. (Mich.), 343.

Duty to construct and maintain safe bridges.

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Duty to warn servant of perils of employment.
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Error, in action for injury to employee, not to direct nonsuit where negligence of train dispatcher was alleged.
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Evidence.

Admissibility of evidence of custom to go in front of moving cars in coupling them.
De Cair *v.* Manistee & G. R. R. Co. (Mich.), 378.

Admissibility of evidence to show promise to repair engine step.
Gulf, C. & S. F. Ry. Co. *v.* Garren (Tex.), 384.

Admissibility of testimony of counsel for plaintiff to show that latter relied on promise to repair engine step.
Gulf, C. & S. F. Ry. Co. *v.* Garren (Tex.), 384.

Admissibility of testimony of injured brakeman as to his reason for attempting to pass in front of moving car.
De Cair *v.* Manistee & G. R. R. Co. (Mich.), 378.

Application for employment inadmissible to establish assumption of risk from structures too near track.
Texas & P. Ry. Co. *v.* Swearingen (C. C. A.), 348.

Credibility of employees as witnesses.
Seaboard Air-Line Ry. *v.* Walthour (Ga.), 18.

Declaration of injured brakeman a statement regarding past fact, and not admissible as res gestæ.
Bumgardner *v.* Southern Ry. Co. (N. Car.), 443.

Res gestæ, statement of conductor of car causing injury, made while it was still moving, and plaintiff's leg was still pinioned, that he thought plaintiff was at dinner, was admissible.
Kansas City Southern Ry. Co. *v.* Moles (C. C. A.), 22.

Existence of relationship.
St. Louis S. W. Ry. Co. *v.* Smith (Ark.), 1.

Existence of relationship where switching crew worked for two companies.
Gulf, C. & S. F. Ry. Co. *v.* Shelton (Tex.), 634.

Fact that injured employee had remained in the employment, with knowledge of master's failure to comply with statute requiring use of self-couplers, no excuse for such failure.
Elmore *v.* Seaboard Air-Line Ry. Co. (N. Car.), 663.

Failure to promulgate other rule for backing cars not negligence for which motorman injured in collision could recover.
Seccombe *v.* Detroit Electric Ry. (Mich.), 343.

Foreign car, not liable for injury to brakeman from defective grab iron on roof.
Anderson *v.* Erie R. Co. (N. J.), 19.

Foreign cars, presumption that they are received by defendant, as a common carrier, for transportation.
Anderson *v.* Erie R. Co. (N. J.), 19.

Inspection of appliances, degree of care.
McGrath *v.* Delaware, L. & W. R. Co. (N. J.), 337.

Instruction, in action for injury to brakeman in a collision, erroneous for assuming that train became separated, and that collision afterward occurred.
Bumgardner *v.* Southern Ry. Co. (N. Car.), 443.

Insufficiency of evidence to create presumption of notice to master of incompetency of conductor.
Seccombe *v.* Detroit Electric Ry. (Mich.), 343.

Insufficiency of evidence to show negligence of other employee than head brakeman, where employee was injured

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by negligence in setting switch.
Setterstrom *v.* Brainerd & N. M. Ry. Co. (Minn.), 500.

Liability for compensation for services where continuous line operated by two companies of same name, but incorporated by different states.
St. Louis S. W. Ry. Co. *v.* Smith (Ark.), 1.

Liability for death of brakeman, killed by log projecting from loaded car, depended upon whether master was chargeable with notice of the condition of the load.
Roche *v.* Denver & R. G. R. Co. (Colo.), 955.

Liability for injury to fireman from collision caused by brakes being tampered with.
Norfolk & W. Ry. Co. *v.* Cromer (Va.), 371.

Liability of master for injury to employee resulting from prank of foreman in leaving torpedo on track.
Sullivan *v.* Louisville & N. R. Co. (Ky.), 368.

Master not liable for negligence of substitute brakeman in setting switch.
Setterstrom *v.* Brainerd & N. M. Ry. Co. (Minn.), 500.

Negligence in failing to repair a violation of statute requiring self-couplers to be furnished.
Elmore *v.* Seaboard Air-Line Ry. Co. (N. Car.), 663.

Negligence in placing coal chutes near track, erroneous instruction.
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Negligence in placing post of cattle guard near track, question for jury.
McDannald *v.* Washington & C. R. Ry. Co. (Wash.), 593.

Negligence of brakeman in employing substitute to set switch, question for jury.
Setterstrom *v.* Brainerd & N. M. Ry. Co. (Minn.), 500.

Negligence of foreman in failing to see that track is clear for approaching train a question for jury, in action for injury to employee struck by flying object.
Texas & Pacific Railway Company *v.* Michael Carlin (U. S.), 627.

Negligence of motorman in executing order starting car, without looking to see conductor's position, and in leaving apparatus without closing current, and thereby injuring conductor.
Sams *v.* St. Louis & M. R. Co. (Mo.), 396.

Negligence of substitute brakeman in setting switch proximate cause of injury to employee.
Setterstrom *v.* Brainerd & N. M. Ry. Co. (Minn.), 500.

Negligence question for jury where brakeman was killed by log projecting from loaded car, which had been inspected by conductor.
Roche *v.* Denver & R. G. R. Co. (Colo.), 955.

Negligence to place structures too near track.
Texas & P. Ry. Co. *v.* Swearingen (C. C. A.), 348.

Presumption that common-law rule exists in foreign state, where railroad employee was injured.
Rosemand *v.* Southern Ry. (S. Car.), 531.

Question for jury as to safe method of coupling cars.
Branz *v.* Omaha & C. B. Ry. & Bridge Co. (Iowa), 642.

Question for jury whether master was chargeable with notice of condition of load, where brakeman was killed by log projecting from loaded car.
Roche *v.* Denver & R. G. R. Co. (Colo.), 955.

Reasonableness of rule imposing duty of inspection upon conductors and brakemen a question of law.
Scott *v.* Eastern Ry. Co. of Minnesota (Minn.), 647.

Rule imposing duty of inspection upon conductors and brakemen must be reasonable.
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Rule imposing duty of inspection upon conductors and brake-

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men not contrary to public policy.
Scott *v.* Eastern Ry. Co. of Minnesota (Minn.), 647.

Rule requiring brakemen and conductors to inspect car steps a reasonable one.
Scott *v.* Eastern Ry. Co. of Minnesota (Minn.), 647.

Sufficiency of declaration, in action for injury to fireman alleged to have resulted from negligence of engineer, his superior officer, under § 193 of Mississippi Constitution.
Cheaves *v.* Southern Ry. Co. in Mississippi (Miss.), 388.

Sufficiency of evidence that bridge was unsafe.
Copeland *v.* Wabash R. Co. (Mo.), 508.

Sufficiency of evidence to show negligence with respect to track where brakeman was injured while passing in front of moving cars.
De Cair *v.* Manistee & G. R. R. Co. (Mich.), 378.

Sufficiency of evidence to show that injury of fireman resulted from negligence of engineer.
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Labarge *v.* Pere Marquette R. Co. (Mich.), 456.

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Louisville & N. R. Co. *v.* Hall (Ky.), 541.
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Error in refusing to permit examination of plaintiff's person by defendant's physician where plaintiff's physician was allowed to give testimony based on such an examination by himself.
Brown *v.* Chicago, Milwaukee & St. Paul Ry. Co. (N. Dak.), 783.
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Negligence of railroad not proximate cause of suicide of person rendered insane by railroad accident.
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Land exempted from railroad land grant by § 23 of Act of Congress of March 3, 1871.
Southern Pacific Railroad Company *v.* United States of America (U. S.), 837.
Relocation of abandoned mining claim subject to railroad right of way under Colorado statute.
Bonner *v.* Rio Grande S. R. Co. (Colo.), 94.
Right to perfect title after abandonment, under Oregon donation act.
Oregon & California Railroad Company *v.* United States (U. S.), 25.
Selection of abandoned lands by railroad as lien lands, under Oregon donation act.
Oregon & California Railroad Company *v.* United States (U. S.), 25.

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RAILROAD AID.
After a railroad's right to receive public aid previously voted, and for which a tax had been levied, has been judicially determined, no issues are open on mandamus to compel collection of the tax, except as to the form of the proceedings which shall be directed.
State ex rel. Moore *v.* Board of Com'rs of Clinton County (Ind.), 938.
Authority of county to subscribe to capital stock.
Board of Commissioners of Wilkes County and John H. Johnson, Sheriff and Ex Officio Treasurer of Wilkes County, Petitioners, *v.* W. N. Coler & Co. (U. S.), 122.
Enforcement of public aid as affected by scope of erroneous decision.
State ex rel. Moore *v.* Board of Com'rs of Clinton County (Ind.), 938.
Judgment reversing decision of board of county commis-

RAILROAD AID—*Continued.*

sioners, which was adverse to railroad right to receive aid previously voted, was conclusive of such issue.
State ex rel. Moore *v.* Board of Com'rs of Clinton County (Ind.), 938.

Mandamus would lie to compel the entry of a new order directing the collection of the tax, and relator was not reduced to the alternative of either appealing from a second order, or else ignoring it and relying on the first as still in force.
State ex rel. Moore *v.* Board of Com'rs of Clinton County (Ind.), 938.

On appeal from the board of county commissioners, a taxpayer seeking to prevent collection may institute mandamus proceedings without again petitioning and appealing.
State ex rel. Moore *v.* Board of Com'rs of Clinton County (Ind.), 938.

Right of taxpayer to maintain action to prevent collection of railroad aid.
State ex rel. Moore *v.* Board of Com'rs of Clinton County (Ind.), 938.

The fact that the people voted on the question settled the form of the aid to be extended; and it was properly pleaded as a donation.
State ex rel. Moore *v.* Board of Com'rs of Clinton County (Ind.), 938.

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Witnesses.

Courts cannot dictate as to choice of methods of operation of railroads.
Norfolk & W. Ry. Co. *v.* Cromer (Va.), 371.

Power to purchase lines already constructed, construction of charter.
Central Trust Co. of New York *v.* Washington County R. Co. (Me.), 883.

RAILROADS IN STREETS.
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Abutters could not enjoin operation of road on viaduct.
Dolan *v.* New York & H. R. Co. (N. Y.), 130.

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Railroad not estopped by its evidence from denying a dedication, so as to prevent or mitigate a recovery of damages by an abutter.
Hast *v.* Piedmont & C. R. Co. (W. Va.), 108.

Right of abutting owners to recover where station house occupied more of street than viaduct.
Dolan *v.* New York & H. R. Co. (N. Y.), 130.

Right of public to use whole street.
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Bedford-Bowling Green Stone Co. *v.* Oman (Ky.), 249.

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RIGHT OF WAY.
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Presumptions as to width rebutted by evidence of adverse use of a portion claimed for twenty-five years.
Cedar Rapids Canning Co. *v.* Burlington, C. R. & N. Ry. Co. (Iowa), 855.

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SPECULATIVE DAMAGES.
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SPUR TRACKS.
Landowner had no right to maintenance of extension of tracks over private lands.
Schneider *v.* Knickerbocker Ice Co. (Wis.), 880.

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Abutters injured by reason of obstruction of street by erection of freight depot entitled to compensation under constitutional provisions relating to eminent domain.
Dennis *v.* Mobile & M. Ry. Co. (Ala.), 831.
Mobile & M. Ry. Co. *v.* Dennis (Ala.), 831.
Company not entitled to have private alley kept open for use of the public in going to and from passenger station, because of its use for such purpose for several years.
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Mobile & M. Ry. Co. *v.* Dennis (Ala.), 831.

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Could not be assumed, as matter of common knowledge, that street car could have been stopped within certain distance.
Kotila *v.* Houghton County St. Ry. Co. (Mich.), 808.

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Ensley *v.* Detroit United Ry. (Mich.), 452.

Presumption of negligence from accident rebutted by testimony of trainmen.
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Presumption of negligence from accident.
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Abutter entitled to compensation for injuries from construction of elevated railway.

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Aldis *v.* Union Elevated R. Co. (Ill.), 875.

Abutter entitled to compensation for injury to his private crossing over highway from construction of street railway.
Georgetown & Lexington Traction Co. *v.* Mulholland (Ky.), 871.

Abutter not entitled to compensation because of change of grade of highway for use of street railway, where the change of grade is with the consent of the plank road company owning the street, and of the township.
Austin *v.* Detroit, Y. & A. A. Ry. (Mich.), 862.

Abutter not entitled to compensation for change of highway grade for use of street railway company merely on the ground that the railroad is constructed on his side of the highway.
Austin *v.* Detroit, Y. & A. A. Ry. (Mich.), 862.

Abutter not entitled to compensation for injuries from removal of fences in order to construct street railway.
Georgetown & Lexington Traction Co. *v.* Mulholland (Ky.), 871.

Abutter's right to recover for injuries from construction and maintenance of elevated railway not affected by fact that it did not constitute an additional servitude.
Aldis *v.* Union Elevated R. Co. (Ill.), 875.

Abutter, whose half of the road was not touched by tracks, could not enjoin construction of railroad beyond the center, on the other side.
North Pennsylvania R. Co. *v.* Inland Trac Co. (Pa.), 823.

Allegation that street car collided with rear end of wagon is supported by evidence that the car collided with its rear wheel.
Schafstette *v.* St. Louis & M. R. R. Co. (Mo.), 715.

Appeal from order of court appointing viewers, etc., where petitioner seeks to complete its circuit by acquiring right to use tracks of another company.
Petition of Philadelphia, M. & S. St. Ry. Co. (Pa.), 677.

STREET RAILWAYS—*Cont'd.*

As railroads, application of Pennsylvania statutes.
City of Philadelphia *v.* Philadelphia Traction Co. (Pa.), 951.

Care due pedestrians with respect to appliances for stopping cars.
Mock *v.* Los Angeles Traction Co. (Cal.), 815.

Company organized under statute not estopped to deny its constitutionality in attempting to confer right on another company to use its tracks.
Petition of Philadelphia, M. & S. St. Ry. Co. (Pa.), 677.

Company, under its charter, could not be required to pay for repaving with new kind of material.
City of Williamsport *v.* Williamsport Pass. Ry. Co. (Pa.), 841.

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Care required of cyclist.
North Chicago St. R. Co. *v.* Cossar (Ill.), 796.

Cyclist's failure to turn out sufficiently from street car proximate cause of collision with conductor, who had alighted.
North Chicago St. R. Co. *v.* Cossar (Ill.), 796.

Driving on street car track is not, as matter of law.
Schafstette *v.* St. Louis & M. R. R. Co. (Mo.), 715.

Duty of cyclist to turn out when approaching street car conductor who had alighted in the discharge of his duties.
North Chicago St. R. Co. *v.* Cossar (Ill.), 796.

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Schafstette *v.* St. Louis & M. R. R. Co. (Mo.), 715.

Negligence in allowing cow to be at large, and great speed of car down grade, where it was not shown that car could have been checked in time.
Kotila *v.* Houghton County St. Ry. Co. (Mich.), 808.

No defense where negligence after discovery of plaintiff's peril.
Floyd *v.* Paducah Ry. & Light Co. (Ky.), 713.

Duty of motorman to avoid collision with vehicle on track.
Schafstette *v.* St. Louis & M. R. R. Co. (Mo.), 715.

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Floyd *v.* Paducah Ry. & Light Co. (Ky.), 713.

Electric railway not additional servitude on highway.
Georgetown & Lexington Traction Co. *v.* Mulholland (Ky.), 871.

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Error in asking motorman within what distance "he" could have stopped the car cured by his answer.
Schafstette *v.* St. Louis & M. R. R. Co. (Mo.), 715.

Harmless error in refusing instruction relating to cause of, and liability for, collision, requested by defendant, embracing only converse of proposition in instruction given.
Schafstette *v.* St. Louis & M. R. R. Co. (Mo.), 715.

Instruction making it a question whether motorman should have seen vehicle on track, where view was unobstructed for a great distance, properly refused.
Schafstette *v.* St. Louis & M. R. R. Co. (Mo.), 715.

Insufficiency of evidence to show impossibility of carrying out contract to build street railway.
Borough of Montooth *v.* Brownsville Ave. St. Ry. Co. (Pa.), 889.

Laws 1889, p. 161, c. 178, § 2, granting special charter, and requiring route to be laid out by selectmen, not repealed by Laws 1895, p. 367, c. 27.
Lenoix *v.* Dover, S. & R. St. Ry. (N. H.), 105.

Location of route by selectmen, not recorded, conferred no authority to occupy streets, under N. H. Pub. St. 1901, c. 45.
Lenoix *v.* Dover, S. & R. St. Ry. (N. H.), 105.

Narrowness of street no defense to action for breach of contract to build street railway.
Borough of Montooth *v.* Brownsville Ave. St. Ry. Co. (Pa.), 889.

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Not additional servitude.
Austin *v.* Detroit, Y. & A. A. Ry. (Mich.), 862.

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Schafstette *v.* St. Louis & M. R. R. Co. (Mo.), 715.

Presumptions of township's consent where highway grade is changed for use of street railway without objection.
Austin *v.* Detroit, Y. & A. A. Ry. (Mich.), 862.

Right of landowner to protect his land, by injunction, to center of road, from burden of street railway tracks, where neighbors on opposite side have consented to use of land by company.
North Pennsylvania R. Co. *v.* Inland Traction Co. (Pa.), 823.

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Schafstette *v.* St. Louis & M. R. R. Co. (Mo.), 715.

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Schafstette *v.* St. Louis & M. R. R. Co. (Mo.), 715.

Traction motor company a street railway when exercising street railway franchises.
City of Philadelphia *v.* Philadelphia Traction Co. (Pa.), 951.

Unconstitutional statute purporting to confer right to use tracks of another company.
Petition of Philadelphia, M. & S. St. Ry. Co. (Pa.), 677.

Valid defense in action for injuries from removal of abutter's fences in order to construct street railway.
Georgetown & Lexington Traction Co. *v.* Mulholland (Ky.), 871.

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Hast *v.* Piedmont & C. R. Co. (W. Va.), 108.

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City of Philadelphia *v.* Philadelphia Traction Co. (Pa.), 951.

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Myers *v.* Boston & Maine R. R. (N. H.), 737.
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Harris *v.* Southern Ry. Co. (Ky.), 753.
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